

# Conferences: Organized by ERA

## Spring/Summer 2008

The Academy of European Law (ERA) organizes a number of private international law related conferences, seminars and courses during the spring and summer of 2008:

### **3rd European Forum for In-house Counsel, Brussels, 24-25 Apr 2008**

- Description from the ERA website: For the third consecutive year, ERA and ECLA are organising the European Forum for In-House Counsel, combining the pragmatism of an in-house lawyer association with the expertise of a first-class European training institute. The European Forum for In-House Counsel provides a forum for the exchange of practical experience, knowledge and views between all in-house counsel and other lawyers involved in business affairs. The aim is to provide in-house counsel, through expert input, with a comprehensive overview of and a practical insight into issues of European Community law with which an in-house counsel is confronted. The latest developments and the recent relevant case law of the Community courts in areas such as European competition law, European company law, European private law, as well as the topic of legal privilege, will be analysed during the forum. Interaction among participants will be encouraged through periods of discussion and case studies.
- Target audience: In-house counsel and lawyers specialised in business affairs

### **Cross-Border Debt Recovery, Trier, 15-16 May 2008**

- Description from the ERA website: Dr Angelika Fuchs (ERA) and Professor Burkhard Hess (University of Heidelberg) are organizing a conference on Cross-Border Debt Recovery. Freezing or “attaching” a debtor’s bank account(s) is a very effective way for creditors to recover the amount owed to them. Most Member States have legislation, which provides for the attachment of bank accounts. Debtors can, however, transfer funds very quickly to other accounts that the creditor may not

know about. The creditor is often not able to block such movements of funds as quickly and therefore loses a powerful weapon against recalcitrant debtors. The European Commission feels that problems of cross-border debt recovery are an obstacle to the free movement of payment orders within the European Union and to the proper functioning of the internal market. Late payment and non-payment are a risk for businesses and consumers alike. The Commission therefore proposes the creation of a European system for the attachment of bank accounts. The consultation process initiated by the Green Paper on the attachment of bank accounts has inspired a vivid debate among practitioners, governments and academics. Furthermore, a second Green Paper on measures enhancing the transparency of the debtor's assets will be published soon.

- Target audience: Lawyers in private practice, in-house lawyers, stakeholders, representatives of national authorities and academics specialised in civil procedure and banking law

### **Recent Developments in Private International Law and Business Law,** *Trier, 5-6 Jun 2008*

- Description from the ERA website: Dr Angelika Fuchs, ERA, organizes a seminar on recent developments in private international law and business law. Private international law and business law continue to be characterised by growing Europeanisation. The purpose of this seminar will be to present the latest developments in both legislation and jurisprudence in the following areas: Brussels I Regulation and anti-suit injunctions; Intellectual property and conflict of laws; New Regulation (EC) No. 1393/2007 on the service of documents; New Directive on certain aspects of mediation in civil and commercial matters; New Regulation (EC) on the law applicable to contractual obligations ("Rome I"); New Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations ("Rome II"); Trends in European company law: from Daily Mail to Sevic and Cartesio; Major decisions on cross-border insolvency.
- Target audience: Lawyers in private practice, in-house counsel in companies, associations, ministries and other public authorities, judges,

notaries, academics

**Summer Course: European Company Law, Trier, 18-20 Jun 2008**

- Description from the ERA website: Tomasz Kramer, ERA, organizes a summer course on European company law. For the second time European company law will feature in ERA's series of summer courses in Trier. The impact of enlargement and globalisation on the internal market creates a special context for individuals and companies that operate across borders. The European Commission has launched a wide-ranging strategy to adapt and harmonise European company law to meet these new challenges. European law has considerably influenced the shape of modern company law in EU member states. Directives and the case law of the European Court of Justice have helped to harmonise national laws and regulations have introduced new legal forms for businesses. The 'Europeanisation' of company law continues apace. This course will offer an introduction to the principles and framework of European company law. It will provide a comprehensive overview of subjects including the formation of different types of companies, corporate governance and management options, capital requirements, shareholders' rights and insolvency. In addition, topics such as corporate restructuring and mobility as well as the characteristics of transnational financial vehicles will be addressed, albeit taking into consideration national particularities. The course will address current challenges and the latest legislative proposals. The analysis of ECJ case law will be an essential element of the course. Participants will have the opportunity to take a preparatory online e-learning module.
- Target audience: Young lawyers in private practice, public administration or in-house counsel, as well as advanced or postgraduate students, academics, economists or auditors seeking a detailed introduction to European company law

**Summer Course: European Private Law, Trier, 30 Jun-4 Jul 2008**

- Description from the ERA website: Nuno Epifânio, ERA, organizes a summer course on European private law. The purpose of this course is to introduce lawyers to European private law. Among the areas covered during the seminar will be: European Civil Procedure; Private International Law; Contract Law; Insolvency Law; Financial Services;

Consumer Protection. This course should prove of particular interest to lawyers who wish to specialise in or acquire an in-depth knowledge of European private law. A general knowledge of EU law is suitable but no previous knowledge or experience in European Private Law is required to attend this course. Participants will be able to deepen their knowledge through case-studies and workshops. The course includes a visit to the European Court of Justice in Luxembourg. Participants will have the opportunity to take a preparatory online-learning module.

- Target audience: Lawyers in private practice, in-house counsel, representatives of national authorities and academics
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## Latest Issue of “Praxis des Internationalen Privat- und Verfahrensrechts”

Recently, the March issue of “Praxis des Internationalen Privat- und Verfahrensrechts” (**IPRax**) was released.

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

- **R. Wagner/B. Timm** on the German ministerial draft bill on the law applicable to companies, juristic persons and associations (“Der Referentenentwurf eines Gesetzes zum Internationalen Privatrecht der Gesellschaften, Vereine und juristischen Personen”). The English abstract reads as follows:

*Companies that operate across borders need clarity with regard to which respective national law applies to them. There are some decisions of the European Court of Justice on the right of settlement according to the Treaty which touch this matter. However, no uniform picture has yet emerged in the*

European Union. A uniform European regulation would be desirable, but the EU-Commission has not taken up this question yet. In order to promote legal certainty, the German Federal Ministry of Justice has therefore presented a ministerial draft bill on the law applicable to companies, juristic persons and associations. The bill might later on serve as the basis for work on a European regulation. As a general rule, the ministerial draft bill provides for the “law of establishment”, i.e. the law at the place of registration, as the law applicable to companies, legal persons and associations. For non-registered companies, legal persons and associations, the applicable law is to be that under which they are organised. Furthermore, the proposed bill clarifies the scope of “the law of establishment” and contains regulations regarding the law applicable to cross-border reorganisations, the change of applicable law and other aspects of cross-border cases.

- **J. Fingerhuth/J. Rumpf** on the consequences of the German MoMiG for cross-border relocations of German entities (“MoMiG und die grenzüberschreitende Sitzverlegung – Die Sitztheorie ein (lebendes) Fossil?”). Here is the English abstract:

The German government rendered a top-to-bottom reform of the German Law on Limited Liability Companies (‘GmbHG’) with the governmental draft of the MoMiG dated 23 May 2007. The reform also covers the German law on Stock Corporations (‘AktG’) and general corporate law matters. It is intended by the reform to abandon the required concurrence of statutory seat and seat of the head office of a company and, therefore, to allow German GmbHs and AGs to move their head office to another country (cross-border relocation). Both GmbH and AG will have the same opportunities as entities from countries, where the incorporation theory is applicable. The article discusses the consequences of the MoMiG for cross-border relocations of German entities. In particular, by using the example of the GmbH & Co KG, the authors illustrate problems arising from the intentions of the MoMiG and the ‘real seat’ theory as it is currently applied in Germany. Furthermore, the authors discuss the need for German entities to completely apply the incorporation theory in Germany. The article comes to the conclusion that the ‘real seat’ theory will be entirely abandoned by the MoMiG becoming effective. The authors finally encourage

*the legislator to express this consequence literally within the reasoning of the MoMiG.*

- **A.-K. Bitter** on the interpretative connection between the Brussels I Regulation and the (future) Rome I Regulation (“Auslegungszusammenhang zwischen der Brüssel I-Verordnung und der künftigen Rom I-Verordnung”)
- **A. Kampf** on the implications of the European directive on services on PIL (“EU-Dienstleistungsrichtlinie und Kollisionsrecht”). The abstract reads:

*On 28 December 2006, after a period of almost three years of debate and political manoeuvring, the European directive on services (2006/123/EC) came into force. It will have to be implemented by the Member States by 28 December 2009 at the latest. The directive applies to a wide range of service activities based upon the case law of the European Court of Justice relating to the freedom of establishment and the free movement of services. In order to make it easier for businesses to set up in other Member States or to provide services across-border on a temporary basis, each Member State shall set up Points of Single Contact. These shall ensure that providers have access to all necessary information and can complete the formalities necessary for doing business in other Member States. Moreover regulatory and authorization bodies across the EU are meant to cooperate more effectively. The directive is expected to engender consumer confidence in cross-border services through access to information. Restrictive legislation and practices shall be abolished after having been screened. A rather neglected aspect in public discussion are the directive's implications on private international law. Nevertheless they should be examined for both practical and systematic reasons.*

- **A. Fuchs** on the question of international jurisdiction for direct actions against the insurer in the courts of the Member State where the injured party is domiciled (“Internationale Zuständigkeit für Direktklagen”), (ECJ, 13.12.2007, C-463/06 (*FBTO Schadeverzekeringen N.V. v. Jack Odenbreit*); Higher Regional Court Karlsruhe, 7.9.2007 - 14 W 31/07; Local Court Bremen, 6.2.2007 - 4 C 251/06). This is the English abstract:

*The injured party may bring an action directly against the insurer in the courts of the place in a Member State where the injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State. This follows, according to the judgment of the ECJ, from the reference in Article 11 (2) of the Brussels I Regulation to Article 9 (1) (b). The previous judgment of the first instance court in Bremen was based on the same argument. However, according to a judgment of the court of appeal in Karlsruhe, courts at the place of domicile of the injured party lack international jurisdiction under the Lugano Convention. Fuchs argues that neither the wording nor the historic interpretation support the assumption of jurisdiction of the courts in the state where the injured party is domiciled. This situation has not been altered in the course of the transfer of the Brussels Convention into a regulation. The main argument in favour of admitting direct claims before the courts of the injured party's domicile can be drawn from the systematic interpretation. However, this additional place of jurisdiction will have undesirable consequences such as forum shopping and race to the court. In case of Article 11 (3), it will lead to unforeseeable results for the policyholder or the insured. Furthermore, it may have a negative economic impact for drivers in relatively poor Member States. The author criticizes the European legislator for not having discussed these issues openly in the context of the Brussels I Regulation.*

- **A. Staudinger** on a decision of the German Federal Supreme Court on the scope of the head of jurisdiction of Art. 15 (2) Brussels I Regulation ("Reichweite des Verbrauchergerichtsstandes nach Art. 15 Abs. 2 EuGVVO"), (Federal Supreme Court, 12.6.2007 – XI ZR 290/06)
- **E. Eichenhofer** on a decision of the Higher Labour Court Frankfurt (Main) dealing with the question of international jurisdiction regarding contribution claims of German social security benefits offices against employers having their seat in another EU Member State ("Internationale Zuständigkeit für Beitragsforderungen deutscher tariflicher Sozialkassen gegen Arbeitgeber mit Sitz in anderen EU-Staaten"), (Higher Labour Court Frankfurt (Main), 12.2.2007 – 16 Sa 1366/06)
- **J. von Hein** on the concentration of jurisdiction regarding appeals in cross-border cases according to § 119 (1) No. 1 lit. b GVG ("Die

Zuständigkeitskonzentration für die Berufung in Auslandssachen nach § 119 Abs. 1 Nr. 1 lit. b GVG – ein gescheitertes Experiment?“), (Federal Supreme Court, 19.6.2007 – VI ZB 3/07 and 27.6.2007 – XII ZB 114/06)

- **D. Henrich** on the question of renvoi in PIL of names occurring due to a different qualification by foreign law (“Rückverweisung aufgrund abweichender Qualifikation im internationalen Namensrecht”), (Federal Supreme Court, 20.6.2007 – XII ZB 17/04)
- **B. König** on the requirements of due information as well as the scope of application of the Regulation creating a European Enforcement Order for uncontested claims (“EuVTVO: Belehrungserfordernisse und Anwendungsbereich”), (Regional Court Wels, 5.6.2006 – 1 Cg 159/06m, Higher Regional Court Linz, 4.7.2007 – 1 R 124/07x)
- **A. Laptew/S. Kopylov** on the requirement of reciprocity with regard to the enforcement of foreign judgments between the Russian Federation and Germany (Yukos Oil Company) (“Zum Erfordernis der Gegenseitigkeit bei der Vollstreckung ausländischer Urteile zwischen der Russischen Föderation und der Bundesrepublik Deutschland (Fall Yukos Oil Company)”), (Federal Commercial District Court Moscow, 2.3.2006 – KG-A40/698-06P)
- **H. Krüger** on the recognition and enforcement of foreign titles in Cameroon (“Zur Anerkennung und Vollstreckung ausländischer Titel in Kamerun”)
- **A. Jahn** on PIL questions in the context of withdrawals of wills due to marriage in anglo-american legal systems (“Kollisionsrechtliche Fragen des Widerrufs eines Testamentes durch Heirat in anglo-amerikanischen Rechtsordnungen”)
- **C. Jessel-Holst** on the Statute of Private International Law of the Republic of Macedonia (“Zum Gesetzbuch über internationales Privatrecht der Republik Mazedonien”)

Further, this issue contains the following **materials**:

- Statute of Private International Law of the Republic of Macedonia of 4 July 2007 (“Gesetz über internationales Privatrecht – Gesetz der Republik



Mazedonien vom 4.7.2007")

- Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock - signed in Luxembourg on 23 February 2007 ("Protokoll von Luxemburg zum Übereinkommen über internationale Sicherungsrechte an beweglicher Ausrüstung betreffend Besonderheiten des rollenden Eisenbahnmaterials - unterzeichnet in Luxemburg am 23.2.2007")

As well as the following **information**:

- **H.-G. Bollweg/K. Kreuzer** on the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock ("Das Luxemburger Eisenbahnprotokoll - „Protokoll zum Übereinkommen über internationale Sicherungsrechte an beweglicher Ausrüstung betreffend Besonderheiten des rollenden Eisenbahnmaterials“ vom 23. 2. 2007")
- **E. Jayme** on the (critical) debate in France about the Community's competence in PIL which was made public by French PIL professors by means of open letters on this issue ("Frankreich: Professorenstreit zum Europäischen IPR - einige Betrachtungen")
- **E. Jayme** on the convention of the Ludwig-Boltzmann-Institutes in Vienna ("Kodifikation des IPR, des grenzüberschreitenden Zivilrechts und Zivilverfahrensrechts in der Europäischen Union - Tagung der Ludwig-Boltzmann-Institute in Wien")
- **C. Gross**: report on the 40th UNCITRAL session ("Bericht über die 40. Sitzung der Kommission der Vereinten Nationen zum internationalen Handelsrecht (UNCITRAL)")

*For recent information on PIL see also the website of the Institute for Private International Law, Cologne.*

*(Many thanks to Prof. Dr. Heinz-Peter Mansel, editor of the journal (University of Cologne) for providing the English abstracts.)*

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# The Cost of Transnational Accidents: Evolving Conflict Rules on Torts

*Antonio Nicita* (Professor of Economic Policy at University of Siena) and *Matteo Winkler* (LLM, Yale Law School; Ph.D., Bocconi University) have written an interesting paper on the economic analysis of the conflict of laws rules concerning transnational accidents, in particular domestic and supranational rules on tort liability. A preliminary version of the paper ("**The Cost of Transnational Accidents: Evolving Conflict Rules on Torts**") was presented on September 13th at the annual conference of the European Association of Law & Economics (EALE), held in Copenhagen.

An abstract has been kindly provided by the authors:

*The paper is divided into two parts. In the first part, the authors show the main conflict rules concerning torts at the domestic level: loci commissi delicti (place of accident), lex loci laesionis (place of injury), forum shopping and forum non conveniens, parties' freedom of choice (before and after the accident), victim's freedom of choice. Then, the authors describe the problems pertaining to each of these rules. In the second part, they analyse two cases, Bhopal and Amoco Cadiz, and conclude that when State courts are called to settle disputes concerning transnational accidents, they tend to protect their own community from the accident's consequences, if negative, or alternatively, to discharge the accident's negative externalities to other States' community. Both approaches raise problems from the standpoint of externalities regulation: they lead either to underregulation or overregulation.*

*In particular, Nicita and Winkler maintain that when, like in Bhopal, State courts strictly enforce the lex loci rule, they might both favor the flux of investment towards developing countries – although the damages in favor of these countries' victims are likely to be undercompensated, or protect the*

*delocalized activities of multinational enterprises, while when courts refer to the lex loci laesionis rule, they are likely to regulate the transnational activity and therefore to increase the costs of compliance borne by multinational enterprises.*

*As a third case study, finally, the authors examine the EC Regulation on the law applicable to torts, Rome II. According to this Regulation, they point out that there are some underlying policies, that attempt to supersede the policies enforcement by State courts.*

The paper is available on the EALE Conference's website, and will be revised by the authors according to the observations coming from the conference's public.

*On the economic analysis of conflict of laws, see also some of our previous posts at the following links: 1, 2, 3, 4, 5, 6, 7.*

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## **Conference: The European Traffic Law Days**

From the conference website: The European Traffic Law Days have established themselves as a forum for professional training and the exchange of experience between traffic law experts. The congress will provide experts in liability and insurance law with an opportunity to obtain a comprehensive overview of current developments in European traffic law relevant to daily practice.

The main emphasis of this year's event will be on the development of case law in the European Union on punitive damages. A working group will be set up, initially to determine the status quo, on the basis of which the fundamental problems involved in punitive damages will be discussed. Further topics are: Experience of the implementation of the fifth Directive; Elements of a sixth Directive (discussion on the progress achieved with the suggestions made during Trier VII); Minor accidents (improved enforcement of low-value claims involving traffic accidents

abroad); The statute of limitations (European Parliament initiative); Rome II, the Regulation that governs the law applicable to traffic accidents abroad; The introduction of the recording of accident data Europe-wide; Simpler registration of motor vehicles abroad. Finally, current developments in European law and initiatives and developments in the harmonisation of European civil law will be discussed.

**Target audience:** All persons professionally involved in traffic law.

This conference to be held in Trier, 17-19 October 2007, is organised by ERA in cooperation with the Institute for European Traffic Law. This event will take place for the eighth time and will continue to be organised on an annual basis. The conference programme can be downloaded from the conference website.

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## Another article on Spider-in-the-Web doctrine after Roche ruling

Matthias Rößler's article "The Court of Jurisdiction for Joint Parties in International Patent Disputes" published in the *International Review of Industrial Property and Copyright Law (IIC)* Number 4, 2007, pp. 380-400, discusses a recently much debated issue related to the enforcement of international patent disputes against multiple defendants. The abstract of the article states:

The paper discusses the development – and decline? – of the so-called "Spider-in-the-Web" rulings relating to the simplified filing of lawsuits against several cooperating companies in proceedings for the infringement of respective national patents in Europe. It shows the efforts and arguments that have been used in order to be able to apply Art. 6(1) of Council Regulation No. 44/2001 in cross-border patent disputes, and explains how the much-awaited *Roche* decision of the European Court of Justice brought clarity to the issue, yet not a globally viable solution.

The article is accessible on-line via the Beck-Online site.

Here are some of the previous references to the related issues posted here previously: Court Limits Extraterritoriality of Federal Patent Law, U.S. Federal Courts and Foreign Patents: Recent Decisions Affecting the Global Harmonization of Patent Law, CLIP papers on Intellectual Property in Brussels I and Rome I Regulations, Last Issue of Revue Critique de Droit International Privé, Patent Litigation in the EU – German Case Note on “GAT” and “Roche”, Is Cross-Border Relief in European Patent Litigation at an End?, Jurisdiction over Defences and Connected Claims, Jurisdiction over European Patent Disputes, and the European Payment Procedure Order.

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## Maintenance Obligations: EP JURI Committee’s Draft Opinion on the Commission’s Proposal

On 11 April 2007 **Diana Wallis**, in her capacity of **draftswoman** appointed by the European Parliament’s Committee on Legal Affairs (JURI) **for the maintenance obligations regulation**, has released a Draft opinion to be discussed at the committee’s meeting of 2-3 May 2007.

Pursuant to Rule 47 of the European Parliament’s Rules of Procedure (provisional version – January 2007), the maintenance regulation is subject to the **enhanced cooperation between committees**, since its subject matter “falls almost equally within the competence of two committees” (as determined in Annex VI to the Rules of Procedure), and it is under the primary responsibility of the Committee on Civil Liberties, Justice and Home Affairs (LIBE).

The amendments proposed by Mrs Wallis in her Draft opinion are thus intended to be incorporated, after adoption in the JURI Committee, in the Draft Report to be prepared by the rapporteur in the LIBE Committee (Genowefa Grabowska): according to Rule 47,

*the committee responsible shall accept without a vote amendments from the*

*committee asked for an opinion where they concern matters which the chairman of the committee responsible considers, on the basis of Annex VI, after consulting the chairman of the committee asked for an opinion, to fall under the competence of the committee asked for an opinion, and which do not contradict other elements of the report.*

Mrs Wallis has presented 37 amendments to the original Commission's proposal. Some of them will be addressed in the following, and deal with the legal basis, jurisdiction and applicable law: as stated by the draftsman in the "short justification" that opens the Draft opinion,

*The solutions she proposes are pragmatic and intended to be acceptable to the broadest range of Member States. They may offend purists, but in her view the interests of litigants in having a speedy resolution of a problem which causes real hardship, also and in particular to children, must outweigh all other considerations, having due regard to the needs of maintenance debtors and the rights of the defence.*

Mrs Wallis made a similar statement commenting the EP Second Reading on Rome II (see our post on the debate in the Parliament, where she called on the other institutions to bring "the subject of private international law out of the dusty cupboards in justice ministries and expert committees into the glare of public, political, transparent debate"), and some of the proposed amendments to the maintenance regulation are likely to raise a controversial debate vis-à-vis the Council's and Commission's solutions, especially if the codecision procedure will be finally established for the adoption of the act, as envisaged by the Parliament itself and the Commission (see below).

## **Legal basis**

At present, the adoption of the maintenance regulation is subject to an unanimous vote in the Council, after the consultation of the European Parliament: the codecision procedure, ordinarily set out by the second indent of art. 67(5) of the Treaty for all measures provided for in art. 65, is in fact not applicable to measures involving "aspects relating to family law".

The situation is deemed unsatisfactory by the Commission itself, that in December

2005 presented a Communication to the Council calling on it to transfer maintenance obligations from the unanimity to the codecision procedure, using the “passerelle” provided for by art. 67(2) TEC. The Commission stressed

*the hybrid nature of the concept of maintenance obligation – a family matter in origin but a pecuniary issue in its implementation, like any other claim.*

The same view is obviously shared by the Parliament (see the letter from the JURI Committee to the LIBE Committee of 14 February 2007) and reflected in the amendments of the legal basis of the proposed regulation (see amendments 1, 2 and 3 of the JURI Draft opinion).

### **Jurisdiction (artt. 3-11 of the Commission’s Proposal)**

The draftswoman’s main concern is to ensure that any prorogation of jurisdiction has been freely and consciously agreed by the parties, being aware of its legal consequences, and that an *ex ante* choice of forum “is still relevant having regard to the situation of the parties at the time when the proceedings take place” (see amendment 6 to recital 11): it is thus proposed to confer to the court seised a discretionary power to assess the jurisdiction agreement, adding a new paragraph 2a to art. 4 (“Prorogation of jurisdiction”), according to which

*The court seised must be satisfied that any prorogation of jurisdiction has been freely agreed after obtaining independent legal advice and that it takes account of the situation of the parties at the time of the proceedings (amendment 22).*

As regards the form of the choice-of-forum agreement, communication by electronic means is not deemed equivalent to “writing”, and thus excluded from art. 4(2) (see amendment 21).

### **Applicable law (artt. 12-21 of the Commission’s Proposal)**

A number of important modifications are envisaged by the draftswoman in the provisions concerning the applicable law. The law of the country of the creditor’s habitual residence is maintained as basic rule, but an almost systematic application of the law of the forum is advocated by art. 13(2) and (3), as resulting from the amendments. Moreover, the exception clause set out in art. 13(3) (“General rules”) of the Commission’s Proposal is given a wider scope, since it is

possible to apply the law of another country with which the maintenance obligation is closely connected (such as the law of the country of the common nationality of the parties) also when “it would be inequitable or inappropriate” to apply the law of the country of the creditor’s habitual residence or the *lex fori*.

According to the revised text of art. 13 (amendment 25: French and Italian versions differ from the English one, the latter showing some mistakes in the translation),

*1. Maintenance obligations shall be governed by the law of the country in whose territory the creditor is habitually resident.*

*2. The law of the forum shall apply:*

*(a) where it is the law of the country of the creditor’s habitual residence, or*

*(b) where the creditor is unable to obtain maintenance from the debtor by virtue of the law of the country of the creditor’s habitual residence, or*

*(c) unless the creditor requests otherwise and the court is satisfied that he or she has obtained independent legal advice on the question, where it is the law of the country of the debtor’s habitual residence.*

*3. Notwithstanding paragraph 1, the law of the forum may be applied, even where it is not the law of the country of the creditor’s habitual residence, where it allows maintenance disputes to be equitably resolved in a simpler, faster and less expensive manner and there is no evidence of forum shopping.*

*4. Alternatively, where the law of the country of the creditor’s habitual residence or the law of the forum does not enable the creditor to obtain maintenance from the debtor or where it would be inequitable or inappropriate to apply that law, the maintenance obligations shall be governed by the law of another country with which the maintenance obligation is closely connected, in particular, but not exclusively, that of the country of the common nationality of the creditor and the debtor.*

The provision in art. 13(2)(a) seems not necessary; under the conditions set out in art. 13(2)(c) for the application of the law of the forum (as the law of the country of the debtor’s habitual residence) it is not clear whether the creditor has a



burden to expressly invoke the application of the law of the country of his habitual residence.

The preference expressed by the draftswoman for the *lex fori* is stressed by the conditions set out in art. 13(3) for this law to be discretionary applied by the court, and is clearly stated by Mrs Wallis in the justification accompanying amendment 7 to recital 14:

*The Regulation's aim of enabling maintenance creditors easily to obtain a decision which will be automatically enforceable in another Member State would be frustrated if a solution were to be adopted which obliged courts to apply foreign law where the dispute could be resolved simpler, faster and more economically by applying the law of the forum.*

*Application of foreign law tends to prolong proceedings and lead to additional costs being incurred in procedures which often involve an element of urgency and in which litigants do not necessarily have deep pockets. Moreover, in some cases application of the law of the creditor's country of habitual residence could give rise to an undesirable result, as in the case where the creditor seeks a maintenance order in the country of which she is a national having sought refuge there after leaving the country in which she had been habitually resident with her husband who is of the same nationality, who is still resident there.*

*On these grounds, this amendment provides for the discretionary application of the law of the forum, whilst safeguarding against forum shopping.*

As regards the choice of the applicable law by the parties, also in respect of a choice-of-law agreement a discretionary power is given to the court seised to assess whether it “has been freely agreed after obtaining independent legal advice” (see amendment 26, inserting a new para. 1a to art. 14).

Finally, the draftswoman proposes the deletion of art. 15, on the non-existence of a maintenance obligation that the debtor may oppose to the creditor's claim under a law different than the applicable one (see amendment 27: this provision is deemed “to conflict with the principle of mutual recognition and to be discriminatory”).

## **Public policy**

An important amendment is proposed as regards the *ordre public* clause provided in art. 20: in the original Commission's proposal, public policy could not operate vis-à-vis the law of a Member State. The draftswoman advocates the deletion of this intracommunity exemption, thus allowing the application of the law of a Member State to be refused on such a ground (see amendment 29).

### **Alternative means of enforcement**

Special attention is devoted by the draftswoman to issues relating to enforcement of maintenance decisions:

*The draftswoman's chief concern in preparing these amendments to the proposal for a regulation has been to ensure that decisions relating to maintenance obligations, in the broadest sense of the expression, in cross-border cases are recognised and enforced across the Union in the quickest and most effective way at the lowest possible cost. [...]*

*While suggesting improvements to the provisions of the proposed regulation, the rapporteur takes the opportunity of calling on the Member States to consider novel forms of enforcement of maintenance decisions which have been found to be highly effective in non-EU jurisdictions.*

An example of these “novel and effective means of enforcement” is given in the justification to amendment 11 (recital 19): confiscation of driving licences.

On the other hand, a new art. 35a is proposed (see amendment 34), which allows courts to “use the full panoply of measures available to them under their national law”, not being limited to the orders listed in the regulation:

#### *Article 35a – Other enforcement orders*

*The court seised may order all such other measures of enforcement as are provided for in its national law which it considers appropriate.*

The maintenance regulation is scheduled in the plenary session of the European Parliament on 3 September 2007 (see the OEIL page on the status of the procedure); the JHA Council agreed on some political guidelines on the matter in its recent session in Luxembourg on 19 and 20 April 2007 (see our posts here and

here).

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# Justice and Home Affairs Council Session in Luxembourg (19-20 April 2007)

On 19 and 20 April the JHA Council will hold its 2794th session in Luxembourg, under the German Presidency. On the agenda for the “Justice” issues, scheduled for Thursday 19th, there are a number of points dealing with cooperation in civil law matters, both under the “A” items (on which the Council decides without discussion, since an agreement has previously been found in the Committee of Permanent Representatives – COREPER) and under the “B” items (that are actively debated in the Council: see the agenda for the meeting).

As regards the “A” points, two important deliberations will take place on private international law issues (see the list of public deliberations released by the Press Office of the Council):

- Amended proposal for a Regulation of the European Parliament and of the Council on the **service** in the Member States **of judicial and extrajudicial documents** in civil or commercial matters, amending Council Regulation (EC) No 1348/2000: the amended proposal adapts the original Commission proposal to the general agreement of the Council and to the opinion of the European Parliament in a codified version;
- Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (**Rome II**): **Non-approval of the European Parliament’s amendment** (see the related section of our site).

As regards the “B” items, the first three points deal with cooperation in civil matters (Rome I, Rome III and the Regulation on maintenance obligations); in addition, as a last point the Council will discuss further proceedings of the works

on a Common Frame of Reference for European contract law.

Here's an excerpt of the Background Note prepared by the Press Service of the Council: for each draft instrument we have added the latest available Council public document.

**Rome III** (Jurisdiction and applicable law in matrimonial matters: see the related section of our site)

*At the informal meeting in January 2007 in Dresden, ministers underlined the importance of family law issues for the creation of a true area of justice, as there are more and more families where the spouses come from different countries.*

*Some progress has been achieved since then on this proposal in the sense that a common understanding on a number of important questions is emerging among a majority of Member States. Some delegations have doubts about the added value of this proposal, but the Presidency believes that it is important to continue the discussions in order to find a solution acceptable to all delegations.*

*The Council will discuss a number of issues with a view to clarifying certain elements of this file and to finding a solution acceptable to all delegations. In particular, the Council will discuss the question of the choice of court by the parties and the choice of applicable law.*

*Latest available document of the Council: doc. n. 5274/07 of 12 January 2007 (text of the Regulation as drafted by the Presidency on the basis of the meetings of the Committee on Civil Law Matters (Rome III) and the comments made by Member States delegations).*

**Jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations** (see our related posts [here](#) and [here](#))

*The Council is expected to agree on some political guidelines on issues of particular importance for the continuation of the work on this draft regulation.  
[...]*

*[T]he shared will to move forward in such an important area as maintenance obligations was highlighted at the informal meeting of Justice and Home Affairs Ministers in Dresden on 15 and 16 January 2007.*

*The Council should focus its discussion on:*

- *the abolition of the exequatur procedure for all maintenance obligation decisions covered by the Regulation, which would reduce the costs involved in enforcement of maintenance decisions and improve the position of creditors by speeding up enforcement of decisions and making them more easily portable within the European Union;*
- *the introduction of a system of cooperation between central authorities in order to facilitate application of the Regulation;*
- *making it clear in a recital that the Regulation applies only in situations having cross-border implications and hence an international aspect, and*
- *the conditions on which Member State may retain or conclude agreements with third countries in this particular area.*

**Latest available document of the Council:** doc. n. 16830/06 of 20 December 2006 (available in German: text of the Regulation as drafted by the Finnish and German Presidency on the basis of the meetings of the Committee on Civil Law Matters (Maintenance Obligations) and the comments made by Member States delegations).

**Rome I** (see the related section of our site)

*[...] Although most of the text is agreed by all delegations, there are some elements on which there is still not yet unanimity. With this aim, the Council is expected to examine a compromise package submitted by the Presidency.*

*The following questions will be particularly examined: the principle of choice of law by the parties to the contract, the law applicable in the absence of choice and individual employment contracts.*

**Latest available document of the Council:** doc. n. 6935/07 of 2 March 2007 (French or German text of the Regulation as drafted by the Presidency on the basis of the meetings of the Committee on Civil Law Matters (Rome I) and the comments made by Member States delegations).

## European Contract Law

The Council is invited to decide that a Council position on a common frame of reference for European contract law, in particular as regards its purpose, content and scope, is developed and defined. [...]

In 2006 the European Parliament expressed its views in two Resolutions. The Commission has announced that it will submit a second Progress Report on European Contract Law and the Acquis Review. The Research Network will produce a draft by the end of 2007. In view of the importance of the project the Presidency considers that it would be appropriate for the Council to develop and define its own position. In this context, the Presidency suggests that the Council identifies the issues that require careful examination and proposes a method of work within the Council preparatory bodies.

*(Many thanks to Martin George, for his collaboration in hunting down some of the documents referred to above)*

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# Vol. 3, Issue 1, Journal of Private International Law

✖ The new issue of the **Journal of Private International Law, Volume 3, Issue 1 (April 2007)**, will be published shortly. The contents are (*click on the links below to view the abstract*):

**Canada and the US Contemplate Changes to Foreign-Judgment Enforcement** by *Vaughan Black (Professor, Dalhousie Law School, Halifax)*

**The Rome I Proposal** by *Ole Lando & Peter Arnt Nielson (Copenhagen Business School)*

**Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu?** by *Andrew Dickinson (Consultant, Clifford Chance LLP; Visiting Fellow in Private*

*International Law, BIICL)*

**Choice-of-Law Rules for Electronic Consumer Contracts: Replacement of The Rome Convention by the Rome I Regulation** by *Lorna Gillies (Lecturer in Law, University of Leicester)*

**Parties' Choice of Law in E-Consumer Contracts** by *Zheng Tang (Lecturer in Law, University of Aberdeen)*

**Choice of Law in Maritime Torts** by *Martin P. George (PhD Candidate & Postgraduate Teaching Assistant, University of Birmingham)*

**The European Convention on Human Rights and English Private International Law** by *Ben Juratowitch (DPhil candidate, University of Oxford)*

**Child Abduction: Convention "Rights of Custody" - Who Decides? An Anglo-Spanish Perspective** by *Kisch Beevers (University of Sheffield) & Javier Pérez Milla (University of Zaragoza)*

**Book Review: J. Meeusen, M. Pertegàs and G. Straetmans (eds) Enforcement of International Contracts in the European Union: Convergence and Divergence between Brussels I and Rome I** by *Lorna Gillies (Lecturer in Law, University of Leicester)*

For those who haven't yet subscribed to the **Journal of Private International Law**, subscription information can be found **here**. In addition to the Journal itself, you will also receive online access to all of the articles (current subscribers will be able to download the articles linked to above straight away).

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## **GEDIP: Working Sessions of the Sixteenth Annual Meeting (2006)**

A very interesting **report of the working sessions of the 16th Annual meeting of the European Group for Private International Law (GEDIP-**

**EGPIL**), held in Coimbra on 22-24 September 2006, has been recently published on the new site of the Group. The summary (in French) has been compiled by *N. Ascensão Silva, R. Pereira Dias* and *G. Rocha Ribeiro* (University of Coimbra).

Here's a list of the matters discussed by the Group, as organized by the authors (in brackets the rapporteurs; *our translation and free adaptation from French*):

## **I. EC Private International Law and Third States:**

1. The external competence question (*C. Kessedjan*);
2. The revision of the Lugano Convention (*A. Borrás*).

## **II. The Commission's "Rome III" Proposal and the Green Paper on matrimonial property regimes:**

1. The Rome III Proposal (*A. Borrás*) [on the Green Paper on applicable law and jurisdiction in divorce matters, see also the report of *M. Struycken* presented at the 2005 meeting (Chania) of the Group and the draft articles on applicable law discussed at the 2003 meeting (Wien)];
2. The Green Paper on matrimonial property regimes (*K. Kreuzer*) (see also the Response of the EGPIL to the Green Paper, prepared after the meeting of Coimbra).

## **III. The "Rome I" Proposal** [on the revision of the Rome Convention, see also a number of previous proposals and comments on the Group's site]:

1. Article 3(5) of the Rome I Proposal (Choice of the law of a Third State and mandatory rules of Community law) (*E. Jayme*);
2. The Report of the Financial Market Law Committee on «Rome I» Proposal («Legal assessment of the conversion of the Rome Convention to Community instrument and the provisions of the proposed Rome I Regulation») (*T. C. Hartley*).

## **IV. The mutual recognition method** (*P. Lagarde*) (in particular, the ECJ cases *Standesamt Stadt Niebüll/Grunkin*, C-96/04 and C-353/06).

## **V. The codification of European Private International Law** (*M. Fallon*).

## **VI. Current events:**

1. Private international law and human rights – ECHR case *Eskinazi and*



- Chelouche v. Turkey* (application no. 14600/05) (*P. Kinsch*);
2. New developments in EC secondary legislation (*E. Jayme* and *C. Kohler*);
  3. New developments in the Hague Conference (*H. van Loon*);
  4. Current status of EC projects in Private International Law matters (*M. Francisco Fonseca*).

The report is available here, along with the minutes of all the previous meetings of the Group, since 1991, and a number of related documents and proposals. Highly recommended.

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## **Germany: New Central Authority For International Child Abduction and Adoption Cases**

Since 1 Januar 2007, Germany has a new authority dealing with questions of international legal relations and international legal assistance which had fallen before in the competence of the Federal Public Prosecutor (*Generalbundesanwalt*) – the *Bundesamt für Justiz*.

Thus, the *Bundesamt für Justiz* is now *inter alia* the competent authority according to:

- the 1980 Hague Convention on the Civil Aspects of International Child Abduction
- the 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption
- the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children
- the Brussels II *bis* Regulation

In addition, the *Bundesamt für Justiz*

- is the German contact point in the European Judicial Network (EJN)
- is competent to refer questions on the interpretation of the Brussels Convention and the Rome Convention on the Law Applicable to Contractual Obligations to the ECJ
- will be the central authority according to the Hague Convention on the International Protection of Adults as soon as it will enter into force (the German Parliament adopted the implementing law on 14 December 2006 - however, for the entry into force of this Convention it is necessary that, besides Germany, a third State ratifies the Convention. So far, only the UK has ratified the Convention (only for Scotland))

Cf. with regard to the competences of this new authority the article by *Rolf Wagner*, Das Bundesamt für Justiz, IPRax 2007, 87