Save the Date: German-speaking young scholars' conference on "Politics and Private International Law" in April 2017

The following announcement has been kindly provided by Dr. Susanne L. Gössl, LL.M., University of Bonn:

"As a group of doctoral and post-doctoral students with a keen interest in private international law (PIL), we are trying to improve the exchange between young scholars in this field. To further this aim, we have undertaken to organize a conference for all German-speaking young scholars (i.e. doctoral and post-doctoral students) with an interest in private international law.

PIL is understood broadly, including international jurisdiction and procedure, ADR, uniform and comparative law, as long as there is a connection to cross-border relationships.

The conference – which we hope to develop into a recurring event – will take place at the University of Bonn on 6 and 7 April 2017. It will be dedicated to the topic

Politics and Private International Law

– German title: Politik und Internationales Privatrecht –

Choice-of-law rules established in continental Europe have since Savigny traditionally been regarded as 'neutral' as they only coordinate the law applicable in substance. However, the second half of the last century was marked by a realisation that choice-of-law rules may themselves promote or prevent certain substantial results. In the US, this has led to a partial abolishment of the classic understanding of the conflict of laws, and to its replacement by an analysis of the particular governmental interests concerned. Other legal systems have also seen traditional choice-of-law rules changed or limited by governmental or other political interests. The conference is dedicated to discussing the different aspects

of this interplay between private international law and politics as well as their merits and demerits.

We welcome contributions which focus on classic political elements of private international law, such as *lois de police*, *ordre public* or substantial provisions within choice-of-law systems, but also comparisons to methodical alternatives to PIL or contributions discussing more subtle political influences on seemingly neutral choice-of-law rules. Examples range from the ever increasing influence of the European Union over national or international political agendas to questions of 'regulatory competition' (which may be relevant in establishing a national forum for litigation or arbitration) or other regulatory issues (such as the regulation of the allegedly international internet). By the same token, international family law and questions of succession are constantly increasing in relevance, the current growth of international migration making it a particularly important field for governmental regulation.

We are glad to announce that Professor Dagmar Coester-Waltjen (University of Göttingen) has accepted our invitation to inaugurate our conference on 6 April 2017. The afternoon will be dedicated to academic discourse and discussion and conclude with a dinner. The conference will continue on 7 April. We plan to publish all papers presented in a conference volume.

We intend to accommodate 6 to 10 papers in the conference programme, each of which will be presented for half an hour, with some additional room for discussion. We will publish a Call for Papers in early 2016 but invite everyone interested to note down the conference date already and consider their potential contributions to the conference topic (in German language).

For further information please visit https://www.jura.uni-bonn.de/institut-fuer-deutsches-europaeisches-und-internationales-familienrecht/ipr-tagung/.

Questions may be directed at Dr. Susanne L. Gössl, LL.M. (sgoessl(at)uni-bonn.de)."

TDM Call for Papers: Special Issue on Africa

TDM is pleased to announce a forthcoming special issue on international arbitration involving commercial and investment disputes in Africa.

Africa's accelerating economic development is attracting a substantial increase in cross-border commerce, trade, and investment on the continent, and disputes arising from this increased economic activity are inevitably bound to follow. International arbitration will be the preferred method for resolving many of these disputes. Indeed, the growing focus on international arbitration to resolve commercial and investment disputes relating to Africa is reflected, among other ways, in the fact that the International Council on Commercial Arbitration (ICCA) will be holding its 22nd Congress for the first time in Africa in May 2016 in Mauritius.

To a great extent, the issues that arise in international arbitration in or relating to Africa will be no different than those that arise in arbitrations around the globe. Converging international arbitration procedures and the predictability and stability afforded by the New York Convention and Washington Convention help to ensure that this is the case. Yet party autonomy remains a core value of the international arbitral system, and, as such, regional approaches and local culture will continue to shape African-related arbitrations to a degree, just as they do elsewhere. Africa's rapid development is also likely to play a role in shaping international arbitration in this region.

This special issue will explore topics of particular interest and relevance to international arbitration in light of Africa's unique and evolving situation. The issue will focus on sub-Saharan Africa and will address issues pertaining to both commercial and investment arbitration. It will also likely explore alternative methods for resolving disputes, including litigation, mediation, and local dispute-resolution mechanisms.

Possible topics for submission to the special issue might include:

* The proliferation of international arbitral institutions in Africa and what the future holds for institutional arbitration on the African continent;

* The attitudes of African states and state-owned enterprises towards international commercial arbitration;

* Salient issues in the OHADA international arbitration framework;

* The influence of China and other Asian countries on international arbitration in Africa;

* Issues in enforcing arbitral awards in African states;

* Evolving attitudes in Africa towards bilateral investment treaties (BITs) and the extent to which BITs are (or are not) helping African states attract foreign direct investment;

* South Africa's draft investment law and other notable country-specific developments in Africa;

* Cultural issues impacting international arbitration in Africa;

* Empirical studies relating to international arbitration in Africa;

* Capacity building for arbitrators, judges, and practitioners in the region; and

* Alternative methods of resolving cross-border commercial and investment disputes in Africa.

We invite all those with an interest in the subject to contribute articles or notes on one of the above topics or any other relevant issue.

This special issue will be edited by Thomas R. Snider (Greenberg Traurig LLP), Professor Won Kidane (Seattle University Law School and the Addis Transnational Law Group), and Perry S. Bechky (International Trade & Investment Law PLLC).

Please address all questions and proposals to the editors at SniderT@gtlaw.com, kidanew@seattleu.edu, and pbechky@iti-law.com, copied to info@transnational-dispute-management.com.

Coming soon: Yearbook of Private International Law Vol. XVI (2014/2015)

This year's volume of the Yearbook of Private International Law is just about to be released. The Yearbook is edited by Professors Andrea Bonomi (Lausanne) and Gian Paolo Romano (Geneva) and published in association with the Swiss Institute of Comparative Law. This year's edition is the first volume to be published by Otto Schmidt (Cologne), ISBN 978-3-504-08004-4. It is 588 pages strong and costs 189,00 €. For further information, please click here.

The new volume contains the following contributions:

Doctrine
Linda J. SILBERMAN
Daimler AG v. Bauman: A New Era for Judicial Jurisdiction in the United States
Rui Manuel MOURA RAMOS
The New Portuguese Arbitration Act (Law No. 63/2011 of 14 December on Voluntary Arbitration)
Francisco GARCIMARTÍN
Provisional and Protective Measures in the Brussels I Regulation Recast
Martin ILLMER
The Revised Brussels I Regulation and Arbitration – A Missed Opportunity?
Ornella FERACI
Party Autonomy and Conflict of Jurisdictions in the EU Private International Law on Family and Succession Matters
Gian Paolo ROMANO
Conflicts between Parents and between Legal Orders in Respect of Parental Responsibility

Special Jurisdiction under the Brussels I-*bis* Regulation
Thomas KADNER GRAZIANO
Jurisdiction under Article 7 no. 1 of the Recast Brussels I Regulation: Disconnecting the Procedural Place of Performance from its Counterpart in Substantive Law. An Analysis of the Case Law of the ECJ and Proposals *de lege*

"Judicial Education and the Art of Judging"–2014 University of Missouri Symposium Publication

Last fall, the University of Missouri Center for the Study of Dispute Resolution convened an international symposium entitled "Judicial Education and the Art of Judging: From Myth to Methodology." Panelists included judges, academics and judicial education experts from the United States, Canada and Australia.

The symposium arose out of the recognition that although there is a large and ever-increasing body of literature on matters relating to judicial appointments, judicial independence, judicial policy making and the like, there is an extremely limited amount of information on how someone learns to be a judge. The conventional wisdom in the common law world holds that judges arrive on the bench already equipped with all the skills necessary to manage a courtroom and dispense justice fully, fairly and rapidly. However, many judges have written about the difficulties they have had adjusting to the demands of the bench, and

social scientists have identified a demonstrable link between judicial education and judicial performance. As a result, it is vitally important to identify and improve on best practices in judicial education.

The symposium sought to improve the understanding of judicial education by considering three related issue: (1) what it means to be a judge and what it is about judging that is different than other sorts of decision-making; (2) what the goal of judicial education is or should be; and (3) how judges can and should be educated. While most of the discussion took place within the context of common law legal systems, much of the material is of equal relevance to civil law systems.

Articles from this symposium are freely available here. The table of contents shows below.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2015: Abstracts

The latest issue of the *"Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)"* features the following articles:

Christoph Benicke, **Die Anknüpfung der Adoption durch Lebenspartner in Art. 22 Abs. 1 S. 3 EGBGB**

In Germany, step child adoption by the partner of a same sex civil union (registered partnership) has been legal since 2004, but was restricted to the other partner's biological child. 2014, following a landmark ruling by the German Constitutional Court the German Parliament has enacted legislation that rescinded this restriction and allowed thereby partners of registered same-sex couples to legally adopt the other partner's adoptive child. Not mandated by the Constitutional Court's ruling the legislator stopped short of totally putting same sex registered partnerships on equal footing with traditional marriages. The joint adoption by both partners is still reserved to the spouses of a heterosexual marriage.

On the occasion of this new legislation, a special choice of law rule for the adoption by same sex partners has been enacted. The general choice of law rule (Art. 22 par. 1 s. 2 EGBGB) calls for the national law of the adoptive parent. In the case of the adoption by one or both spouses of a heterosexual marriage the law applicable to the general effects of the marriage (Art. 14 EGBGB) is to be applied. This holds true for the joint adoption by both spouses or for the single (step parent) adoption by only one spouse. The new rule for same sex partners (Art. 22 par. 1 s. 3 EGBGB) follows the example of the rule for married couples, in that it calls for the application of the law that governs the general effects of the registered partnership, i.e. the law of the registering state (Art. 17b par. 1 EGBGB). However, the new rule for same sex partners limits itself to the case of the adoption by only one partner, leaving unregulated the choice of law question of a joint adoption by both partners. The single and only reason for this limitation is the ban on joint adoption by same sex partners in German internal adoption law, not taking into account, that the laws of other countries allow the joint adoption by same sex partners. As there is no valid reason for this limitation in

regard to the choice of law question this same rule must be extended to cover the joint application for the adoption by both partners. The general choice of law rule would lead to a quite preposterous result as it would call for the joint application of the national laws of both partners, whereas in the case of the adoption by only one partner the law that governs the effects the same sex partnership would apply.
The new legislation also casts new light on the discussion of the ramifications of Art. 17b par. 4 EGBGB. This rule limits the effects of a same sex partnership that was registered in another country and therefore is governed by this other country's laws. The legal effects cannot exceed the effects of a registered same sex partnership under German internal law. Under the previous law the majority opinion was that Art. 17b par. 4 EGBGB bans same sex partners from adopting jointly in Germany even if the joint adoption was legal under the applicable foreign adoption law. In granting the unrestricted step child adoption German law effectively allows partners to adopt a child jointly, just in two immediately consecutive proceedings. Therefore, there are no real differences left in regard to the legal effects of a registered partnership under a foreign law that allows the simultaneous joint adoption by same sex partners in one and only proceeding.

Christoph Thole, **The differentiation between Brussels I and EIR in annex proceedings and the relation to art. 31 CMR**
On the occasion of the ECJ ruling (4.9.2014 – C-157/13), the author discusses the precedence of special conventions (CMR) according to art. 71 (1) Brussels I-reg. and the question of the criteria necessary for the application of art. 3 EIR. With respect to art. 3 EIR, the ECJ rightly concludes that an action for the payment of a debt based on the provision of carriage services taken by the insolvency administrator of an insolvent undertaking in the course of insolvency proceedings is covered not by the EIR, but is a civil matter within the Brussels I-reg. However, once again, the Court has failed to further elaborate on the criteria necessary for the classification of an action as an insolvency-related action within the meaning of art. 3 EIR and art. 1 para. 2 lit. b Brussels I-reg.
With respect to art. 71 Brussels I-reg., it is a step forward that, in contrast to earlier verdicts, the ECJ itself decided upon the compatibility of the convention with the principles of EU law, instead of referring the matter to state courts. It would have been even more conclusive to rely on the wording of Art. 71 (1) Brussels I-reg. and omit the unwritten necessity of compatibility with EU Law entirely.

Burkhard Hess/Katharina Raffelsieper, **Debtor protection within Regulation 1896/2006: Current gaps in European procedural law**

Regulation 1896/2006 does not provide for effective debtor protection in cases when a European Order for Payment was not properly served on the debtor. As a result of the unilateral nature of the procedure for issuing the order, the order will be declared enforceable if the defendant does not challenge it within a period of 30 days. However, the service of the payment order shall safeguard the right to a defense. When the defendant has never been informed about the ongoing procedure, he should be able to easily contest the Order for Payment even after it has been declared enforceable. Yet, the text of the Regulation does not provide for a remedy in this situation. In a reference for a preliminary ruling, the Local Court Berlin-Wedding asked the European Court of Justice which remedy should apply. The referring court suggested an application by analogy of the review proceedings provided for in Article 20 of Regulation 1896/2006 in order to ensure an effective right to a defense. Regrettably, the CJEU did not endorse this solution. It declared national procedural law applicable in accordance with Article 26 of the Regulation. As a consequence, parties are sent to the fragmented remedies of national procedural laws. As the efficiency and uniform application of Regulation 1896/2006 is no longer guaranteed, the European lawmaker is called to remedy the insufficient situation. This article addresses the final decision of the Local Court which implemented the CJEU's judgment.

Peter Huber, **Investor Protection: Lugano Convention and questions of international insolvency law**

The article discusses a recent decision of the German Bundesgerichtshof which primarily deals with matters of international jurisdiction in tort claims under Article 5 No. 3 of the Lugano Convention. In doing so, the author also analyses to what extent the decision is in line with the more recent judgment of the ECJ in Kolassa v Barclays Bank. A second issue of the decision is how provisions of foreign insolvency law which modify a creditor's claim against a (not insolvent) co-debtor of the insolvent party should be characterised under domestic German private international law.

Christoph Thole, **Porsche versus Hedgefonds: The requirements for lis pendens under Art. 32 reg. 1215/2012 (Art. 30 reg. 44/2001)**

Porsche SE, which is currently trying to fend off several actions for damages connected to the failed takeover of Volkswagen, has reached a partial success

before the OLG Stuttgart. The OLG has ruled that the negative declaratory action against an institutional investor in Germany takes precedence over the action for performance filed in London. The proceedings clearly demonstrate how fiercely disputes concerning the place of jurisdiction in capital market law are fought. Specifically, the court needed to judge upon the necessary requirements for lodging the claim with the court under Art. 30 of the Brussels I-reg. (Art. 32 Reg. No. 1215/2012). The decision as well as most of the reasoning is convincing.

Peter Mankowski, **Lack of reciprocity for the recognition and enforcement of judgments between Liechtenstein and Germany**
Liechtenstein fashions a system of recognition and enforcement of foreign judgments with a strict and formal requirement of reciprocity in the Austrian tradition. In particular, judgments from Germany are not recognised in Liechtenstein. The retaliative price Liechtenstein has to pay is that judgments from Liechtenstein are not recognised in Germany, either, for lack of reciprocity. Methodologically, German courts are idealiter required to research whether reciprocity is guaranteed in a foreign country in relation to Germany. The popular lists in the leading German commentaries should only serve as a starting point.

Lars Klöhn/Philip Schwarz, **The residual company's applicable law**
The "theory of the residual company (Restgesellschaft)" deals with legal problems that may arise in the context of winding-up companies doing business in at least two countries. In Germany, the theory applies in particular to English private companies limited by shares ("Limited") with assets in Germany. If a Limited is dissolved in its home country, the residual company will come into existence and be considered as the owner of the company's "German" assets. The discussion in the literature as well as recent case law by Higher Regional Courts (Oberlandesgerichte) has focused on the question which law applies to the residual company. This paper analyzes the newest judgement on this issue by the Higher Regional Court of Hamm, which states that German law applies. The authors agree with this result while pointing out that this conclusion will be reached regardless of whether one follows the theory of domicile (Sitztheorie) or the theory of establishment (Gründungstheorie). Furthermore, German law applies irrespective of whether the company is still doing business or has already entered into liquidation.

Piotr Machnikowski/Martin Margonski, **Anerkennung von punitive damages- und actual damages-Urteilen in Polen**

The case note concerns the judgment of the Polish Supreme Court of October 11, 2013 on the enforceability of US-American punitive damages and judgments on actual damages in Poland. The enforceability has been rejected in case of punitive damages which, as a rule, are contrary to Polish public policy as such. Polish civil law is governed by the principles of compensation and restitution of the damage. The damage should be repaired to the condition that would have existed had the wrong not occurred. The injured party may not be enriched as a result of the damages awarded. The compensation law in Poland does recognize some exceptions to that rule which allow to grant compensation not closely based on the value of the restored damage. Such exceptions are, however, justified under the constitutional proportionality principle. Punitive damages do not meet such requirements to the extend they peruse penal objectives. They are permissible only to the extent they perform a compensatory function and are linked to the damage suffered. In case of actual damages, such conflict with the Polish public order does not occur by nature of the legal instrument. Yet, the said proportionality principle may lead to only a partial enforceability of a US-American actual damages judgment. The crucial factor here is how closely the factual setting of the case is connected to Poland. The judgment in question addresses the general problem of partial enforceability of foreign judgments, which has been found possible in case of divisible obligations. Despite some critique on detailed aspects of the findings, the case note positively appraises the judgment.

Bernhard König, **Austrian money judgments which do not finally determine the amount of payment**

Judgments given in a Member State which are enforceable in that State are enforceable in other Member States. Difficulties could arise if a money judgment was given in a Member State which does not require a final determination of the amount of the payment in the judgment itself and has to be enforced in a Member State which national law requires the final determination of the amount of payment already in the judgment. This paper offers a glimpse to the question if and to what extent other Member States will have to deal with Austrian judgments which have not finally determined the amount of the payment.

Miguel Gómez Jene/Chris Thomale, **Arbitrator liability in International Arbitration**

Recent decisions by Spanish courts raise questions upon the conditions as well as

the extent of arbitrator liability. Authors suggest a distinction between qualified adjucative and simple managerial tasks: It is only when acting as a quasi-adjudicative agent that arbitrators should be essentially exempt from personal liability. Conversely, as far as an arbitrator's conduct of an arbitration procedure is concerned, he should assume general tort liability for negligence.

Jürgen Samtleben, **The New Panamanian Code of Private International Law – A Kaleidoscope of Conflict of Laws**
Panama is known as an important banking center and as the registered office of many internationally active corporations. Therefore, international relations between private subjects need specific regulation. Up to now, the private international law of Panama found its basis in individual provisions of the Civil Code, the Family Code and some special laws. These provisions were replaced by Law 7 of 2014, which contains in 184 articles a comprehensive regulation of nearly all conflict-of-law topics. The following article gives an overview of the new Law. As a result, it must be stated that the Law contains many flaws, due to insufficient coordination between the different parts and a lack of careful editing of the individual articles. In Panama, as well, the law has been criticized and there is a call for its thorough reform.

First Application of ECJ's Ruling in C-352/13, CDC Hydrogen Peroxide, in Dutch Private Enforcement Proceedings

By Polina Pavlova, research fellow at the MPI Luxembourg.

July, 21st 2015 has marked another important step in the private enforcement of competition law in Europe. Only two months after the long awaited preliminary ruling in the case *CDC Hydrogen Peroxide* (C-352/13) was delivered on May, 21st,

the Amsterdam Court of Appeal seems to be the first one to apply the new ECJ case law on jurisdiction in cartel damage cases. Its judgment (accessible here in Dutch and German) dealt with compensation claims against members of the sodium chlorate cartel and applied the recently established ECJ principles even before the referring court itself (the Dortmund District Court) could render a judgment on its jurisdiction.

Background of the case is the bundled enforcement of the claims of damaged customers in the aftermath of the Decision of the EU Commission from June, 11th 2008 fining a number of undertakings for their participation in a sodium chlorate cartel operating EEA wide. Following this decision, Cartel Damage Claims, a special purpose vehicle based in Brussels, started buying off claims of the cartel victims and filed a suit against several cartel members before the District Court of Amsterdam. The latter accepted jurisdiction with a judgment from June, 4th 2014: a judgment which was subject to scrutiny and eventually confirmed by the Amsterdam Court of Appeal.

The application in the appeal proceedings questioned the jurisdiction of the Dutch courts over a cartel member seated in Finland. The Amsterdam judges confirmed the decision of the lower court according to which, since one of the co-defendants in the first instance proceedings was seated in the Netherlands, jurisdiction can be based on ex-Article 6 (1) of the Brussels I Regulation. Transposing the reasoning of the ECJ in *CDC Hydrogen Peroxide* – issued in a parallel scenario – to the proceedings at hand, the Court of Appeal considered the EU jurisdictional rule on joint defendants applicable. The close connection between the claims in the sense of ex-Article 6 (1) and in particular the same situation of fact and law – a requirement well established in ECJ case law – was deemed fulfilled: Following *CDC Hydrogen Peroxide*, the national appellate court decided that the commitment of a continuous competition law infringement sanctioned by the Commission's Decision was sufficient to create an identical factual and legal background of the cartel damage claims. In addition, the court clarified that a company which has been held responsible for the cartel by the Commission can serve as an anchor defendant for the purposes of ex-Article 6 (1) even where the latter is a parent company of a cartel member and has not directly participated in the infringement.

Finally, the Amsterdam Court of Appeal (upholding the first instance decision)

confirmed that the standard jurisdiction and arbitration clauses contained in the supply agreements between the cartel members and their customers do not apply to cartel damage claims. As far as the evoked jurisdiction agreements were concerned, the appellate court applied the reasoning of the ECJ in *CDC Hydrogen Peroxide* relating to the interpretation ex-Article 23 (para 70 f.). The disputes were qualified as deriving from a competition law infringement previously unknown to the customers and not from the multiple contractual relationships between suppliers and customers as such. They could thus not be covered by the standard wording of a jurisdiction clause regulating the contractual relation of the parties. Regarding the arbitration agreements, the court saw no reason to deviate from the aforementioned interpretation.

The appeal of the Finish cartel member was thus dismissed.

It is interesting to note that in this judgment the national Court of Appeal merely confirms what the Amsterdam District Court had already decided in 2014, long before the ECJ rendered its *CDC Hydrogen Peroxide* ruling. Even though the lower court did not await the judgment of the ECJ, its result seems to fall completely in line with the now EU-wide binding principles formulated by the Luxembourg judges. This demonstrates that the ECJ case law now simply prescribes what private enforcement friendly jurisdictions were doing anyway.

What is perhaps more intriguing, is to observe where the national court went even one step further than the ECJ in completely transposing the considerations on the material scope of the choice-of-court clauses to the other type of dispute resolution clauses at issue, i.e. the arbitration agreements. This was motivated by the sole consideration that there are no reasons to judge differently in this regard. While this might be a welcome interpretation, the issue of the applicability and interpretation of arbitration clauses was left untouched by the ECJ ruling (see para 58, particularly evident in comparison to the Advocate General's opinion in the *CDC Hydrogen Peroxide* proceedings which dealt extensively with the issue, see there at para 118 ff.). Nevertheless, the equal treatment of the two types of (standard) dispute resolution clauses as regarding their scope seems to be common before Member State courts. This feature might prove to broaden the actual effect of the *CDC Hydrogen Peroxide* case law beyond its explicit scope (see e.g. the judgment of the District Court of Helsinki from of the July, 4th 2013, also concerning the Hydrogen Peroxide cartel). It remains to be

seen how other jurisdictions will see the application of arbitration clauses in cartel damage cases.

The mentioned proceedings are only instances of a much broader landscape of private enforcement of cartel damage claims in the EU conducted to a great extent by special vehicles such as CDC. It seems that the Dutch jurisprudence might be, once again, setting an example on how international jurisdiction in competition law damage cases is to be dealt with by member state courts.

Festschrift for Dagmar Coester-Waltjen

The publishing house Gieseking has recently released the "Festschrift für Dagmar Coester-Waltjen" (for more information see the publisher's website). Edited by Katharina Hilbig-Lugani, Dominique Jakob, Gerald Mäsch, Phillipp Reuß and Christoph Schmid the volume contains, in part II, a large number of (mostly, but not only German language) contributions relating to private international law and international civil procedure:

- *Tu?rul Ansay,* State Courts in Commercial Arbitration and Confidentiality (pp. 843 ff.)
- *Jürgen Basedow,* Gegenseitigkeit im Kollisionsrecht (pp. 335 ff.)
- *Katharina Boele-Woelki,* Van het kastje naar de muur – Zur Eheschließung in Deutschland bei bestehender registrierter Partnerschaft nach niederländischem Recht (pp. 349 ff.)
- *Josef Drex,* The European Unitary Patent System: On the 'Unconstitutional' Misuse of Conflict-of-Law Rules (pp. 361 ff.)

- *Reinhold Geimer,* Grenzüberschreitender Gewaltschutz in der Europäischen Union: Eine Facette der Europäisierung des internationalen Verfahrensrechts (pp. 375 ff.)
- *Peter Gottwald,* Aktuelle Probleme des Internationalen Schiedsverfahrensrechts (pp. 389 ff.)
- *Beate Gsell,* Die Zulässigkeit von Gerichtsstandsvereinbarungen mit Verbraucherbeteiligung und Drittstaatenbezug unter der neuen EuGVO (pp. 403 ff.)
- *Bettina Heiderhoff,* Der Erfolgsort bei der Persönlichkeitsrechtsverletzung im Internet (pp. 413 ff.)
- *Tobias Helms,* Neubewertung von Privatscheidungen nach ausländischem Recht vor dem Hintergrund der Entwicklungen im deutschen Sach-, Kollisions- und Verfahrensrecht (pp. 431 ff.)
- *Dieter Henrich,* Im Ausland begründete und im Inland fortgeführte heterosexuelle Lebenspartnerschaften (pp. 443 ff.)
- *Burkhard Hess,* Grenzüberschreitende Gewaltschutzanordnungen im Europäischen Justizraum (pp. 453 ff.)
- *Erik Jayme,* Zur Formunwirksamkeit von Testamenten im Internationalen Privatrecht (pp. 461 ff.)
- *Eva-Maria Kieninger,* Das internationale Sachenrecht als Gegenstand eines Rechtsakts der EU – eine Skizze (pp. 469 ff.)
- *Peter Kindler,* Gerichtsstandsvereinbarung und Rechtshängigkeitssperre: Zum Schutz vor Torpedo-Klagen nach der Brüssel Ia-Verordnung (pp. 485 ff.)
- *Helmut Köhler,* Wettbewerbsstatut oder Deliktsstatut? – Zur Auslegung des Art. 6 Rom-II-VO (pp. 501 ff.)
- *Herbert Kronke,* Internationales Beweisrecht in der Praxis des Iran-United States Claims Tribunal (pp. 511 ff.)
- *Volker Lipp,* Anerkennungsprinzip und Namensrecht (pp. 521 ff.)
- *Dirk Looschelders,* Die allgemeinen Lehren des Internationalen Privatrechts im Rahmen der Europäischen Erbrechtsverordnung (pp. 531 ff.)
- *Nigel Lowe,* Strasbourg in Harmony with The Hague and Luxembourg over Child Abduction? (pp. 543 ff.)
- *Ulrich Magnus,* Rom I und der EuGH – für die Auslegung der Rom I-VO bereits relevante EuGH-Rechtsprechung (pp. 555 ff.)
- *Peter Mankowski,* Primärrechtliche Anerkennungspflicht im

Internationalen Familienrecht? (pp. 571 ff.)

- *Heinz-Peter Mansel,* Gesamt- und Einzelstatut: Die Koordination von Erb- und Sachstatut nach der EuErbVO (pp. 587 ff.)
- *Dieter Martiny,* Internationale Kindesentführung und europäischer Menschenrechtsschutz – Kollision unterschiedlicher Ansätze (pp. 597 ff.)
- *Thomas Pfeiffer,* Der internationale Anwendungsbereich des Mindestlohngesetzes (pp. 611 ff.)
- *Peter Picht,* „Wo die Liebe Wohnsitz nimmt" – Schlaglichter auf deutsch-schweizerische Ehegattenerbfälle in Zeiten der EuErbVO (pp. 619 ff.)
- *Hanns Prütting,* Der Fall Weber des EuGH und der dingliche Gerichtsstand des Art. 22 Nr. 1 EuGVVO (pp. 631 ff.)
- *Thomas Rauscher,* Nur ein Not-Sitz des Rechtsverhältnisses Zum gewöhnlichen Aufenthalt im Personalstatut (pp. 637 ff.)
- *Walter Rechberger,* Zu den Bewilligungsvoraussetzungen einer vorläufigen Kontenpfändung nach der EuKoPfVO (pp. 651 ff.)
- *Oliver Remien,* Unsicherheiten bei astreinte, dwangsom und Zwangsgeld im Europäischen Rechtsraum – zu Art. 55 EuGVVO 1215/2012 / Art. 49 EuGVVO 44/2001 sowie der GMVO in der Rechtspraxis – (pp. 661 ff.)
- *Philipp M. Reuß,* Gestaltung des europäischen abstammungsrechtlichen Kaleidoskops – Einige Überlegungen zur Anerkennung der niederländischen Duo-Mutterschaft in Deutschland (pp. 681 ff.)
- *Giesela Rühl,* Grenzüberschreitender Verbraucherschutz: (Nichts) Neues aus Brüssel und Luxemburg? (pp. 697 ff.)
- *Klaus Sachs und Evgenia Peiffer,* Schadensersatz wegen Klage vor dem staatlichen Gericht anstatt dem vereinbarten Schiedsgericht: Scharfe Waffe oder stumpfes Schwert im Arsenal schiedstreuer Parteien? (pp. 713 ff.)
- *Haimo Schack,* Beweisregeln und Beweismaß im Internationalen Zivilprozessrecht (pp. 725 ff.)
- *Peter Schlosser,* „Interventionsklagen" in Deutschland? (pp. 733 ff.)
- *Klaus Schurig,* Der Anlauf zu einem Paradigmenwandel im internationalen Gesellschaftsrecht (pp. 745 ff.)
- *Rolf A. Schütze,* Das *chess clock* Verfahren und andere Probleme des Beweisrechts im internationalen Schiedsverfahren (pp. 757 ff.)
- *Kurt Siehr,* Zur Reform des deutschen Internationalen Abstammungsrechts (Art. 19 und 20 EGBGB) (pp. 769 ff.)
- *Hans Jürgen Sonnenberger,* Zur Reform der kollisionsrechtlichen

Behandlung der Eingehung einer Ehe und anderer personaler Lebens- und Risikogemeinschaften – ein zweiter Zwischenruf (pp. 787 ff.)

- *Ulrich Spellenberg,* Die zwei Arten einstweiliger Maßnahmen der EheGVO (pp. 813 ff.)
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Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2015: Abstracts

The latest issue of the *"Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)"* features the following articles:

Holger Jacobs, **The necessity of choosing the law applicable to non-contractual claims in international commercial contracts**

International commercial contracts usually include choice-of-law clauses. These clauses are often drafted narrowly, such that they do not cover non-contractual obligations. This article illustrates that, as a result, contractual and non-contractual claims closely linked to the contract risk being governed by different laws. This fragmentation might lead to lengthy and expensive disputes and considerable legal uncertainty. It is therefore advisable to expressly include non-contractual claims within the scope of choice-of-law clauses in international commercial contracts.

Leonard Hübner, **Section 64 sentence 1 German Law on Limited Liability Companies in Conflict of Laws and European Union Law**
The article treats the application of the liability pursuant to § 64 sentence 1 GmbHG to European foreign companies having its centre of main interest in Germany. At the outset, it demonstrates that the rule belongs to the lex concursus in terms of Art. 4 EuInsVO. For the purposes of this examination, the article considers the case law of the ECJ as well as the legal consequences of the qualification. At the second stage, it illustrates that the application of the rule to foreign companies does not infringe the freedom of establishment according to Art. 49, 54 TFEU.

Felix Koechel, **Submission by appearance under the Brussels I Regulation and representation in absentia**
In response to two questions referred by the Austrian Supreme Court, the ECJ ruled that a court-appointed representative for the absent defendant (Abwesenheitskurator) cannot enter an appearance on behalf of the defendant for the purposes of Article 24 of the Brussels I Regulation. This solution seems convincing because the entering of an appearance by the representative would circumvent the court's obligation to examine its jurisdiction on its own motion under Article 26 para 1 of the Brussels I Regulation. Considering also the ECJ's decisions in cases C-78/95 (Hendrikman) and C-327/10 (Hypote?ní banka) it seems that the entering of an appearance within the meaning of the Brussels I Regulation is generally excluded in case of a representation in absentia. It is, however, doubtful whether the very specific solution adopted by the ECJ in the present case should be applied in other cases of representation in proceedings.

Peter Mankowski, **Tacit choice of law, more preferential law principle, and protection against unfair dismissal in the conflict of laws of employment agreements**

Labour contracts with a cross border element are a particular challenge. They call for a particularly sound administration of justice. Especially, the discharge of employees gives rise to manifold questions. The final decision of the Bundesarbeitsgericht in the case Mahamdia provides a fine example. It tempts to spend further and deepening thoughts on tacit choice of law (with a special focus on jurisdiction agreements rendered invalid by virtue of Art. 23 Brussels Ibis Regulation, Art. 21 Brussels I Regulation/revised Lugano Convention), the most favourable law principle under Art. 8 (2) Rome I Regulation, and whether the general rules on discharge of employee might possibly fall under Art. 9 Rome I Regulation.

Christoph A. Kern, **Judicial protection against torpedo actions**
In the recent case Weber v. Weber, the ECJ had ruled that, contrary to the principle of priority provided for in the Brussels I Regulation, the court second seized must not stay the proceedings if it has exclusive jurisdiction. The German Federal Supreme Court (BGH) applies this ratio decidendi in a similar case. In its reasons, the BGH criticizes – and rightly so – the court of appeal which, in the face of a manifestly abusive action in Italy, had denied an identity of the claims and the parties by applying an "evaluative approach". Nevertheless, the repeated opposition of lower courts to apply the principle of priority is remarkable. The Brussels I recast, which corrects the ECJ's jurisprudence in the case Gasser v. Misat, would, however, allow for an approach based on forum selection: Whenever the parties have had no chance to protect themselves against torpedo actions by agreeing on the exclusive jurisdiction of a court or the courts of a Member State, the court second seized should be allowed to deviate from a strict application of the principle of priority.

Jörn Griebel, **The Need for Legal Relief Regarding Decisions of Jurisdiction Subject to Setting Aside Proceedings according to § 1040 of the German Code of Civil Procedure**
§ 1040 section 3 of the German Code of Civil Procedure prescribes that a so called "Zwischenentscheid", an arbitration tribunal's interim decision on its jurisdiction, can be challenged in national court proceedings. The decision of the German Federal Court of Justice (BGH) concerned the procedural question whether a need for legal relief exists in such setting aside proceedings concerning an investment award on jurisdiction, especially in situations where an award on the merits has in the meantime been rendered by the arbitration tribunal.

Bettina Heiderhoff, **No retroactive effect of Article 16 sec. 3 Hague Convention on child protection**

Under Article 21 German EGBGB it was possible that a father who had parental responsibility for his child under the law of its former habitual residence lost this right when the child moved to Germany. This was caused by the fact that Article 21 EGBGB connected the law governing parental custody to the place of habitual residence of the child.

Article 16 sec. 1 Hague Convention on child protection (1996) also connects the parental custody to the habitual residence. However, in Article 16 sec. 3 it has a different rule for the above described cases, stating that parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State.

The author is critical towards the common understanding of Article 21 EGBGB. The courts should always have interpreted this rule in the manner that is now explicitly fixed in Article 16 sec. 3 Hague Convention. As the rule has been virtually out of force for many years due to the overriding applicability of the Hague Convention, a retroactive change in its interpretation would cause great insecurity.

The essay also deals with various transitional problems. It supports the view of the OLG Karlsruhe, that the Hague Convention cannot be applied retroactively when a child moved to Germany before January 2011.

Herbert Roth, **Rechtskrafterstreckung auf Vorfragen im internationalen Zuständigkeitsrecht**

The European procedure law (Brussels I Regulation) does not make any statement concerning the scope of substantive res judicata of national judgments. However, the European Court of Justice extends the effects of res judicata to prejudicial questions of the validity of a choice-of-forum clause, in this respect it approves a European conception of substantive res judicata (ECJ, 15.11.2012 – Case C 456/11 – Gothaer Allgemeine Versicherung AG ./. Samskip GmbH, IPRax 2014, p. 163 Nr. 10, with annotation H. Roth, p. 136). The verdict of the higher regional court of Bremen as appellate court had to consider the precedent of the ECJ. It is the final decision after the case was referred back from the ECJ. The international jurisdiction of German courts was rejected in favour of the Icelandic courts, in spite of the defendant's domicile in Bremen.

Martin Gebauer, **Partial subrogation of the insurer to the insured's rights**

and the incidental question of a non-contractual claim

The decision, rendered by the local court of Cologne, illustrates some of the problems that arise when the injured party of a car accident brings an action as a creditor of a non-contractual claim against the debtor's insurer, despite the injured party having already been partially satisfied by his insurer as a consequence of a comprehensive insurance policy. The partial subrogation leads to separate claims of the injured party, on the one hand, and its insurer on the other. According to Article 19 of the Rome II Regulation, the subrogation, and its scope, is governed by the same law that governs the insurance contract between the injured party and its insurer. The non-contractual claim, however, which is the object of the subrogation, is governed by a different law and presents an incidental question within the subrogation. The injured party, as claimant, can sue the debtor's insurer in the courts of the place where the injured party is domiciled. The injured party's insurer, however, may not sue the debtor's insurer in the courts of the place where the injured party is domiciled, but is rather forced to bring the action at the defendant's domicile. This may lead to parallel proceedings in different states and runs the risk of uncoordinated decisions being made by the different courts regarding the extent of the subrogation.

Apostolos Anthimos, **On the remaining value of the 1961 German-Greek Convention on recognition and enforcement**

Since the late 1950s, Greece has established strong commercial ties with Germany. At the same time, many Greek citizens from the North of the country immigrated to Germany in pursuit of a better future. The need to regulate the recognition and enforcement of judgments led to the 1961 bilateral convention, which predominated for nearly 30 years in the field. Following the 1968 Brussels Convention, and the ensuing pertinent EC Regulations, its importance has been reduced gradually. That being the case though, the bilateral convention is still applied in regards to cases not covered by EC law and/or multilateral conventions. What is more interesting, is that the convention still applies for the majority of German judgments seeking recognition in Greece, namely cases concerning divorce decrees rendered before 2001, as well as adoption, affiliation, guardianship, and other family and personal status matters. The purpose of this paper is to highlight the significance of the bilateral convention from the Greek point of view, and to report briefly on its field of application and its interpretation by Greek courts.

David B. Adler, **Step towards the accommodation of the German-American judicial dispute? – The planned restriction of Germany's blocking statute regarding US discovery requests.**

Until today, US and German jurisprudence argue whether US courts are allowed to base discovery orders on the Federal Rules of Civil Procedure instead of the Hague Evidence Convention, despite the fact that evidence (e.g. documents) is located outside the US but in one of the signatory states. While the one side argues that the Hague Convention trumps the Federal Rules and has to be primarily, if not exclusively, utilized in those circumstances, the other side, especially many US courts, constantly resisted interpreting the Hague Evidence Convention as providing an exclusive mechanism for obtaining evidence. Instead, they have viewed the Convention as offering discretionary procedures that a US court may disregard in favor of the information gathering mechanisms laid out in the federal discovery rules. The Hague Evidence Convention has therefore, at least for requests from US courts, become less important over time.

The German Federal Ministry of Justice and Consumer Protection intends to put this debate to an end and to reconcile the differing legal philosophies of Civil Law and Common Law with regard to the collecting of evidence. It plans to alter the wording of the German blocking statute which, up to this date, does not allow US litigants to obtain pretrial discovery in the form of documents which are located in Germany at all. Instead of the overall prohibition of such requests, the altered statute is intended to allow the gathering of information located in Germany if the strict requirements of the statute, especially the substantiation requirements towards the description of the documents, are fulfilled. By changing the statute, Germany plans to revive the mechanisms of the Hague Evidence Convention with the goal of convincing the US courts to place future exterritorial evidence requests on those mechanisms rather than on the Federal Rules.

The article critically analyses the planned statutory changes, especially with regard to the strict specification and substantiation requirements concerning the documents requested. The author finally discusses whether the planned statutory changes will in all likelihood encourage US courts to make increased usage of the information gathering mechanisms under the Hague Evidence Convention with regards to documents located in Germany, notwithstanding the effective information gathering tools under the Federal Rules of Civil Procedure.

Steffen Leithold/Stuyvesant Wainwright, **Joint Tenancy in the U.S.**

Joint tenancy is a special form of ownership with widespread usage in the USA,

which involves the ownership by two or more persons of the same property. These individuals, known as joint tenants, share an equal, undivided ownership interest in the property. A chief characteristic of joint tenancy is the creation of a “Right of Survivorship”. This right provides that upon the death of a joint tenant, his or her ownership interest in the property transfers automatically to the surviving joint tenant(s) by operation of law, regardless of any testamentary intent to the contrary; and joint tenants are prohibited from excluding this right by will. Joint tenancies can be created either through inter vivos transactions or testamentary bequests, and for the most part any asset can be owned in joint tenancy. A frequent reason for owning property in joint tenancy is to facilitate the transfer of a decedent’s ownership interest in an asset by minimizing the expense and time-constraints involved with the administration of a probate proceeding. Additional advantages of owning property in joint tenancy include potential protections against a creditor’s claims or against assertions by a spouse or minor children of homestead rights. Lastly, owning property in joint tenancy can result in inheritance, gift, property and income tax consequences.

Tobias Lutzi, **France’s New Conflict-of-Laws Rule Regarding Same-Sex Marriage and the French ordre public international**
On 28 January, the French Cour de cassation confirmed a highly debated decision of the Cour d’appel de Chambéry, according to which the equal access to marriage for homosexual couples is part of France’s ordre public international, allowing the court to disregard the Moroccan prohibition of same-sex marriage in spite of the Franco-Moroccan Agreement of 10 August 1981 and to apply Art. 202-1(2) of the French Code civil to the wedding of a homosexual Franco-Moroccan couple. The court expressly upheld the decision but indicated some possible limitations of its judgment in a concurrent press release.

ILA French Branch/Swiss Ministry

of Foreign Affairs/ERA Conference: "INTERNATIONAL LAW AND EUROPEAN UNION LAW – Harmony and Dissonance in International and European Business Law Practice"

Professor *Catherine Kessedjian*, President of the French Branch of the International Law Association (ILA), is organising an international conference on "INTERNATIONAL LAW AND EUROPEAN UNION LAW – Harmony and Dissonance in International and European Business Law Practice" in conjunction with the Swiss Ministry of Foreign Affairs and the Academy of European Law (ERA) which will take place on 24 and 25 September 2015 in Trier (Germany).

The *aim of this conference* is to provide legal practitioners with a comprehensive overview and high-level discussions on key topics and recent developments affecting their daily practice at the crossroads of international law and EU law.

Key topics include:

– EU/Member States and international law: who does what? Issues relating to international negotiations, international responsibility, representation in international litigation, international law as a standard of review in CJEU case-law;

– The international dispute resolution mechanism jigsaw: Litigation before European courts: private parties' access to the ECtHR and the CJEU, equivalent protection system;

– Brussels I and the arbitration exception, primacy of the New York Convention, parallel proceedings and conflicting court and arbitral decisions, recent EU case-law (C-536/13, Gazprom and C-352/13, CDC), 2015 entry into force of the Hague Convention on Choice of Court Agreements: changes and coordination;

– Relationship between ISDS and national judicial systems, protection of the State's right to regulate and legitimate public policy objectives, establishment and functioning of arbitral tribunals, review of ISDS decisions by bilateral or multilateral appellate mechanisms;

– UN, EU and State sanctions: role and effectiveness, (extra-)territorial scope, impact on fundamental rights and judicial review by the ECtHR (Nada and Al Dulimi) and by the CJEU (Kadi and recent cases), impact on international sales contracts.

It should be noted that the conference fee for members of the ILA is reduced to **100 €**.

Further information is available here and here.

Two New Papers on Business and Human Rights

A short piece on two recently released papers, both accessible in pdf format (first one in Spanish, second in English). Just click on the title.

I reproduce the abstracts by the authors.

F. J. ZAMORA CABOT, Chair Professor of Private International Law, UJI of Castellon, Spain

Sustainable Development and Multinational Enterprises: A Study of Land Grabbings from a Responsibility Viewpoint

> The international community has adopted sustainable development as one of its priority issues. Multinational corporations can however interfere or render it impossible through land grabbings, a complex phenomenon because on many occasions they reach a prominent role that can be seen, among their different appearances, as a real pathology of the above mentioned development.
>
> After having been previously scrutinized with relation to a comment on the case Mubende-Neuman I entertain no doubt at all that such grabbings more often than not turn out to be diametrically opposed to the various targets that

outline sustainable development, as have already been revealed, for instance, by Secretary General of the United Nations Ban Ki- Moon, along his consolidated report over the agenda in this regard after 2015.

I propose in here, then, after an **Introductory Section,** a presentation of the problem following recent cases, showing different conflict situations in selected sectors, **Section 2,** and others under which collective efforts have achieved or are in the process of attaining remedies in terms of justice, **Section 3.** I will put an end to my survey with some final reflections, **Section 4,** within which **I** will raise the relevant activity carried out by the human rights defenders, in this particular case deeply rooted in the communities and the land where they live and the great credit that deserves to us their continued and brave fight all around the world.

N. ZAMBRANA TÉVAR LLM (LSE), PhD (Navarra) Assistant Professor, KIMEP University (Almaty, Kazakhstan)

Can arbitration become the preferred grievance mechanism in conflicts related to business and human rights?

International law demands that States provide victims of human rights violations with a right to remedy, also in the case of violations of human rights by legal entities. International law also provides some indications as to how State and non-State based dispute resolution mechanisms should be like, in order to fulfil the human rights standards of the right to remedy. Dispute resolution mechanisms of an initially commercial nature, such as arbitration or mediation, could become very useful grievance mechanisms to provide redress for victims of human rights abuses committed by multinational corporations. Still, there are problems to be solved, such as obtaining consent from the parties involved in the arbitration process. Such consent may be obtained by imitating other dispute resolution mechanisms such as ICSID arbitration.