Choice of Law in the American Courts in 2014: Twenty-Eighth Annual Survey

Prof. Symeonides latest survey on choice of law in the American Courts is available on SSRN (to be published later in the American Journal of Comparative Law, vol. 63, 2015-2). The abstract reads as follows:

"This is the Twenty-Eighth Annual Survey of American choice-of-law cases. It was written at the request of the Association of American Law Schools Section on Conflict of Laws and it is intended as a service to fellow teachers of conflicts law, both in and outside the United States.This Survey covers cases decided by American state and federal appellate courts from January 1 to December 31, 2014, and posted on Westlaw by midnight, December 31, 2014. Of the 1,204 cases that meet these parameters, the Survey focuses on those cases that may contribute something new to the development or understanding of conflicts law — and, particularly, choice of law. The following are some of the highlights of the year:
One U.S. Supreme Court decision dealing with general jurisdiction, the second in three years, after a thirty-year silence; Seven cases deciding whether the Alien Tort Statute applies to actions filed by foreign plaintiffs against American defendants alleged to have aided and abetted the commission of international law violations outside the United States; a case involving a cross-border shooting of a Mexican boy by a U.S. Border Patrol agent; and a case arising from the imprisonment of U.S. contractor Alan Gross in Cuba;

Fifty-six court rulings striking down as unconstitutional the prohibition of same-sex marriages in 26 states, one ruling upholding the prohibition in four states, and a Texas case recognizing a California judgment that declared both male partners in a same-sex marriage to be the parents of a child conceived through artificial insemination and carried to term by a surrogate mother;

One more xenophobic statute, the eighth in four years, banning the use of certain foreign laws;

Several tort cases involving conduct-regulation conflicts and applying the law of the state of the tort, rather than the parties' common domicile;

One state supreme court case joining the minority of courts that have rejected the doctrine of severability of choice-of-forum clauses, and several cases involving the interplay of those clauses and choice-of-law clauses;

A California Supreme Court case holding that the Federal Arbitration Act (FAA) did not preempt a California statute that prohibited waivers of "representative actions" filed by employees against employers for violating the state's labor laws, and two cases disagreeing on whether contracting parties may avoid FAA preemption by choosing the "non-federal" part of a state's law;

A New York case recognizing a foreign judgment, even though New York had no jurisdiction over the debtor or his assets; a Pennsylvania case giving full faith and credit to the New York judgment; and a D.C. case refusing to do so — and not only because New York did not have jurisdiction; and

Many other interesting conflicts cases involving products liability, other torts, contracts with and without choice-of-law clauses, insurance contracts, statutes of limitation, marriages by proxy, divorce, marital property, and successions."

Latest Issue of RabelsZ: Vol. 78 No 4 (2014)

The latest issue of "Rabels Zeitschrift für ausländisches und internationales Privatrecht – The Rabel Journal of Comparative and International Private Law" (RabelsZ) has recently been released. It contains the following articles:

McGrath, Colm Peter, and Helmut Koziol: *Is Style of Reasoning a Fundamental Difference Between the Common Law and the Civil Law?*

Renner, Moritz: *Transnationale Wirtschaftsverfassung* (Transnational Economic Constitutionalism)

Since the 1920ies, the concept of the Economic Constitution ("Wirtschaftsverfassung") has been highly influential in German and European legal thinking. The Economic Constitution refers to the mandatory legal rules which shape the relationship of economy and politics within a democratic society. In Europe, these norms have come to be defined on a supranational level. Here, the Four Freedoms and the competition rules of the EU Treaty are the cornerstones of a European Economic Constitution. On the international level, there is no equivalent to such norms. World trade and investment law enshrine free trade, whereas there is an apparent lack of even basic rules of market regulation. The practice of cross-border economic exchange can be described as "private ordering in the shadow of law". Rules from different legal sources are recombined – or even replaced – by private mechanisms of dispute-resolution and standard-setting. The article analyzes this development with a view to the rise of international commercial arbitration and the growing importance of international accounting standards. Both examples show the limited reach of domestic and supranational Economic Constitutions, as they can be employed for "opting out" of mandatory regulation in cross-border contexts. At the same time, however, the institutions of private ordering described here increasingly develop their own standards of mandatory law, both by referring to existing national, supranational and international norms and by generating new rules of a genuinely transnational character. The article argues that these rules may form the nucleus of an emerging Transnational Economic Constitution ordering the relationship between economy, politics and law on a global level.

Donini, Valentina M.: *Protection of Weaker Parties and Economic Challenges – An Overview of Arab Countries' Consumer Protection Laws*

Lieder, Jan: *Die Aufrechnung im Internationalen Privat- und Verfahrensrecht* (Set-off in International Private and Procedural Law)

This paper analyses the functions of set-off, illustrates the differences between individual national regimes, introduces and explains Art. 17 of the Rome I Regulation (Rome I) and discusses disputes regarding further topics relating to the private international and procedural law of set-off. The primary function of set-off is the simplification of payment transactions. It facilitates the settlement of mutual claims of two parties against one another in a fast and simple way and reduces transaction

costs by rendering unnecessary the execution of two separate payment transactions and by disburdening lawsuits from multiple claims. Given these – and other – functional advantages, no developed legal system can afford to abstain from providing the legal institute of set-off. Nevertheless, there are profound differences between individual legal systems, e. g. in the classification of set-off as a matter of substantive or procedural law, in whether there is a pre-condition of an offsetting statement, and whether the set-off has a retroactive effect back to the moment in which the two claims faced each other for the first time (ex tunc) or whether it just takes effect ex nunc after the issuance of an offsetting statement. European and international academic model rules (DCFR, UNIDROIT) basically follow the German-coined continental approach, with the exception of instead giving a set-off an ex nunc effect to a large extent. The regulation of the conflicts of law by the newly established Art. 17 Rome I is of fundamental importance given the differences between the legal systems. It declares as applicable the law governing the claim against which the right to set-off is asserted and abolishes former disputes about the applicable law. It aims at protecting the set-off opponent, which is justified since he is confronted with the extinction of his claim and the party who has pleaded the set-off, judicially or extra-judicially, had the choice to file a suit instead. The author argues that all known kinds of unilateral set-offs should be governed by Art. 17 Rome I, and that – irrespective of the scope of Rome I – all kinds of claims, contractual and non-contractual, should be subjected to its Art. 17 (analogously). Since Art. 17 Rome I does not regulate the law applicable to set-off by contract, the general rules of the law of conflicts apply, especially Arts. 3 and 4 Rome I. Furthermore, Art. 17 Rome I does not apply to genuinely procedural aspects of a set-off, so that the lex fori is to be applied. Heavily disputed is the question of the international jurisdiction of a court in respect to procedural set-offs against disputed, non-connected claims. Here, the author argues against international jurisdiction as a prerequisite since the set-off opponent is not deserving of any protection.

Corneloup, Sabine: *Rechtsermittlung im internationalen Privatrecht der EU: Überlegungen aus Frankreich* (The Application of Foreign Law in European Private International Law: Reflections from a French Perspective)

On 16 January 2014, a symposium of the German Council of Private International

Law took place in honour of the 80th birthday of Hans Jürgen Sonnenberger. This article is based on a presentation given at that symposium. Its purpose is to formulate, as far as the scope of application of the Private International Law of the EU is concerned, proposals for harmonizing the application of foreign law by the national courts of the Member States. First, it provides an overview of the position in France and comes to the conclusion that the French case law is not completely satisfactory. Secondly, regarding the mandatory or facultative nature of conflict-of-law rules, it proposes that a clear distinction should be made between the judge and the parties. Conflict-of-law rules should always be applied ex officio by the judge, whereas the parties should have the possibility in the course of the proceedings to choose the lex fori. The limits of party autonomy are defined according to two different models which both might be appropriate. Regarding the ascertainment of foreign law, the article advocates for better judicial cooperation especially within the European Judicial Network.

WIPO-ILA Seminar on IP and Private International Law

A one day Seminar (starting 1 pm, ending 6pm) on Intellectual Property and Private International Law organized by the World Intellectual Property Organization (WIPO) and the International Law Association (ILA), will be held at the WIPO Headquarters, Geneva, Switzerland, on January 16, 2015. Consecutive panels will address WIPO and Private International Law, the Work of the Hague Conference on Private International Law, preceding Projects (ALI, CLIP, Transparency Project, Japan-Korea Principles Project), the Mission of the ILA Committee on Intellectual Property and Private International Law, and Selected Issues from the ILA Committee Guidelines (jurisdiction, applicable law, recognition of foreign judgments and arbitration). Discussion will follow.

The Seminar is open to the public, and there is no registration fee. Attendees are requested to register online and bring a photo ID. The language of the Seminar will be English.

Click here to see the program.

Opinion of Advocate General Jääskinen in Case C-352/13 (CDC) on jurisdiction in cartel damage claims under the Brussels I Regulation

by Jonas Steinle

Jonas Steinle, LL.M., is fellow at the Research Center for Transnational Commercial Dispute Resolution (www.ebs.edu/tcdr) at EBS Law School in Wiesbaden.

On 11 December 2014, Advocate General Jääskinen delivered its Opinion in Case C-352/13 (*CDC*). The case deals with the application of different heads of jurisdiction of the Brussels I Regulation to cartel damage claims.

The facts

The claim arises out of a complex cartel in the sector of the sale of hydrogen peroxide that covered the entire European Economic Area and had been going on for years before it was disclosed and fined by the European Commission. The Commission established that there was a single and continuous infringement of Art. 101 TFEU. The claimant, a Belgian company that is the buyer and assignee of potential damage claims resulting from this cartel, brought proceedings against the members of the cartel at the regional court (*Landgericht*) in Dortmund. The defendants in the case have their seats in different Member States including one defendant who has its seat in Germany.

Being seized in this complex case, the *Landgericht Dortmund* struggles with the

application of several heads of jurisdiction under the Brussels I Regulation in order to establish its own jurisdiction. Therefore, the *Landgericht Dortmund* referred to following three questions to the CJEU as an order for reference:

1. Must Art. 6 No. 1 of the Brussels I Regulation be interpreted in a way that under circumstances like in the case at hand the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments from separate proceedings? Is it relevant that the claim against the defendant who is domiciled in the Member State of the seized court was withdrawn after service of process to the defendants?

2. Must Art. 5 No. 3 of the Brussels I Regulation be interpreted in a way that under circumstances like in the case at hand the place where the harmful event occurred or may occur may be located with respect to every defendant in any Member State where the cartel agreement had been concluded or implemented?

3. Does the well-established principle of effectiveness with respect to the enforcement of the prohibition of restrictive agreements allow to take into account a jurisdiction or arbitration agreement, even if that would lead to the non-application of jurisdiction grounds such as Art. 5 No. 3 or Art. 6 No. 1 Brussels I Regulation?

The Opinion

As for the application of Art. 6 No. 1 of the Brussels I Regulation, the Advocate General referred first to the well-established principle of the CJEU that a risk of irreconcilable judgments must arise in the context of the same situation of fact and law. For the same situation of fact, the Advocate General simply referred to the binding decision of the European Commission that had established a single and continuous infringement of Art. 1010 TFEU. For the same situation of law the Advocate General pointed out that the members of a cartel are severally and jointly liable and that there was the risk that different Member State courts would interpret the joint and several debt differently which could lead to conflicting decisions in different Member States courts. Furthermore, the Advocate General pointed out that Art. 6 para. 3 Rome II Regulation implicitly refers to Art. 6 No. 1 Brussels I Regulation so that in sum the Advocate General held that Art. 6 No. 1 Brussels I Regulation might be applied to a case like the one at hand. As for the withdrawal of the claim against the German anchor-defendant, the Advocate

General did not consider this to be relevant for the jurisdiction of the referring court since he considered the service of process to be the relevant point in time to fulfil the criteria of Art. 6 No. 1 Brussels I Regulation.

With respect to Art. 5 No. 3 Brussels I Regulation, the Advocate General differentiated, again according to well-established case law of the CJEU, between the place giving rise to the damage and the place where the damage occurred. However, the Advocate General considered both alternatives of Art. 5 No 3 Brussels I Regulation to be inapplicable to the case at hand. The Advocate General observed that in a case of a long-standing and wide-spread cartel like the one at hand, it is essentially impossible to identify one single place where the event giving rise to the damage took place. Similarly, the place where the damage occurred would lead to the place of the claimant's seat as the relevant place of jurisdiction which is contrary to the purpose of the Brussels I Regulation. Hence, the Advocate General held that Art. 5 No. 3 Brussels I Regulation is in applicable in a case like to one at hand.

Finally, Advocate General Jääskinen considered the third question with respect to jurisdiction and arbitration agreements. He therefore drew the line between jurisdiction agreements under Art. 23 Brussels I Regulation on the one hand and jurisdiction agreements that designate Non-Member States courts or arbitration agreements on the other hand. As for agreements under Art. 23 Brussel I Regulation, the Advocate General referred to the principle of mutual trust and held that the principle of effectiveness could not hinder the application of Art. 23 Brussels and thereby the derogation of other grounds of jurisdiction in cartel damage claims. Contrarily, the Advocate General held that the principle of effectiveness with respect to the enforcement of the prohibition of restrictive agreements might render agreements of the second type inapplicable if an effective enforcement of EU competition law would not be assured.

Evaluation

The Opinion of the Advocate General is grist to the mill of the ongoing enhancement of private enforcement of competition law in the European Judicial Area. After the Directive on antitrust damage actions has been signed into law on 26 November 2014, jurisdiction in cartel damage claims is the last resort that has been left untouched so far. Jurisdiction is the first hurdle that potential claimants have to overcome in these types of cases. As one can see from the proceedings

pending before the *Landgericht Dortmund,* these proceedings can be extremely complex and time-consuming. Guidance on these issues by the CJEU is therefore much awaited.

As the Advocate General points out in his Opinion (para. 7), it is the first time that the CJEU will have to decide whether and to what extent the substantive EU law (e.g. Art. 101 TFEU) influences the jurisdictional rules of the Brussels I Regulation in their application. According to the Advocate General, the Brussels I Regulation is not very well suited to enhance private enforcement of competition law (para. 8). The consequences that the Advocate General draws from this finding are noteworthy: As considers Art. 5 No. 3 Brussels I Regulation, being the core jurisdictional rule for cartel damages claims, the Advocate General simply promotes to not apply this rule in complex cases such as the one at hand (para. 47). He even goes further and calls for the European legislator to introduce delict-specific jurisdictional rules into the Brussels I Regulation (para. 10).

This line of argumentation is a striking move. The non-application of a head of jurisdiction in a complex case is somewhat surprising. However, this would not solve the existing problems since it remains unclear in which cases Art. 5 No. 3 Brussels might be still applied then. The call for the introduction of delict-specific rules into the Brussels I Regulation is even more problematic since it breaks with the general scheme of the Brussels I Regulation as a general and cross-cutting legal instrument that might uniformly be applied to any case that is not excluded from its scope. Instead of creating more exceptions in this complex area of law, the CJEU should build on the existing system of the Brussels I Regulation and come forward with some guiding principles for the referring court which are drawn from the idea of procedural justice and not so much from substantive law influences from the specific area of law.

Ortolani’s View on the Wathelet

Opinion

The AG opinion on Gazprom has triggered quite a lot of reactions within the arbitral world. I asked Dr. Pietro Ortolani, senior research fellow at the MPI Luxembourg, to allow me to have his published in CoL as well. Here they are.

The Advocate General's Opinion on C-536/13 *Gazprom* raises several interesting points, but it is doubtful whether the same approach will be adopted by the CJEU. Interestingly enough, it relies heavily on the recast Regulation, although it is not applicable *ratione temporis*. The AG argues that the recital operates in the manner of a "retroactive interpretative law"; however, this seems quite far-fetched, as a recital is not a binding provision of the Regulation and, as such, it should not be interpreted as having drastic effects on the way the Brussels I system operates (especially as far as the pre-recast scenarios are concerned). Two points in the Opinion are likely to trigger further debate:

- The main argument is that, since judgments on the existence and the validity of the arbitration agreement only do not circulate under the Recast Regulation, then an anti-suit injunction is not incompatible with the Brussels I system. This argument implies that anti-suit injunctions are only incompatible with Brussels I inasmuch as they prevent MS Courts from issuing a judgment which could circulate under the Regulation: hence, if the judgment does not circulate, there would be no incompatibility. However, Brussels I regulates not only the circulation of judgments, but also the allocation of jurisdiction: therefore, in order to determine whether a problem of compatibility arises, it is necessary to analyse the issue in this broader context. Inasmuch as the main subject matter falls within the scope of application of the Regulation, each Member State Court is put on an equal footing and cannot be deprived of the power to assess its own jurisdiction under the Regulation. Whenever one of the parties raises an *exceptio compromissi*, the court also has to decide on that point, in order to determine whether it has jurisdiction. An anti-suit injunction, therefore, affects not only the possibility for a Member State Court to determine whether the arbitration agreement exists and is valid or not, but also the possibility to subsequently assess the jurisdiction under the Regulation. These two aspects cannot be drastically divided, as they form part of the same assessment on

jurisdiction. Therefore, consistently with the subject-matter criterion, it does not seem possible to simply rely on recital 12(2) (which by the way refers to the application of the recognition and enforcement part of the Regulation, rather than jurisdiction) in order to argue that under the Recast Regulation anti-suit injunctions, ordered either by a court or an arbitral tribunal, do not create any problem of compatibility.

- In my opinion, the principle of mutual trust forms part of EU public policy. It is the backbone of the Brussels I system, and hence the foundation for a uniform system of jurisdiction and circulation of judgments in civil and commercial matters in the Union. Although according to the AG these provisions "do not compare with respect for fundamental rights", they serve the fundamental purpose of setting forth a European mechanism of justice in civil and commercial matters, in accordance with the goal of enhancing access to justice. Furthermore, the public policy status of mutual trust is evinced by the Regulation itself, according to which the public policy test at the recognition and enforcement stage does not apply to jurisdiction. Hence, the requested Member State Court cannot re-assess the jurisdiction of the first Court, but it is bound to accept it. This entails that there can never be an assessment of jurisdiction by a Member State Court which runs contrary to public policy, because of mutual trust. The Regulation, in other terms, sets forth an absolute presumption of compatibility of the first Court's assessment with public policy. But then, if that is the case, we must conclude that mutual trust must form part of public policy itself, in order to justify such absolute presumption and to impose a limit to the public policy ground for denial of recognition and enforcement under the Regulation. In this sense, the AG did not take into account several arguments arising out of the Recast, such as the fact that the abolition of *exequatur* clearly militates in favour of a reinforcement of the principle of mutual trust, rather than its marginalization.

In any case, the Opinion offers many extremely interesting insights on the complex interplay between arbitration and court litigation in the EU. It remains to be seen whether the Court will consider the questions admissible – in the case at hand, that is quite debatable. As a follow-up to this debate, I take the chance to refer you to the forthcoming EU Parliament Study on the legal instruments and practice of arbitration in the EU, to which I have contributed with Tony Cole from Brunel University.

A Note from Professor S.I. Strong on the Results of Her Recent Survey on International Commercial Mediation and Conciliation

With the permission of the publishers, I wanted to let you know that the preliminary results from a recent empirical study on international commercial mediation and conciliation are now available. The study, which is entitled "*Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation*," collected detailed data on 34 different questions from 221 respondents from all over the world. Survey participants included private practitioners, neutrals, in-house counsel, government lawyers, academics and judges with expertise in both domestic and international proceedings.

This information was gathered to assist UNCITRAL and UNCITRAL Working Group II (Arbitration and Conciliation) as they consider a proposal from the Government of the United States regarding a possible convention in this area of law. The U.S. proposal will be considered in depth at the Working Group II meeting in February 2015.

Those who would like to see a copy of the preliminary report can download a free copy here. The data will be further analyzed in the coming months and published sometime next year as an article.

Many thanks to those from conflictsoflaw.net who participated in the survey and who helped distribute it among their networks. If you have any questions about the preliminary report, please feel free to let me know.

Kind regards,

S.I. Strong, FCIArb
Associate Professor of Law
Senior Fellow, Center for the Study of Dispute Resolution University of Missouri

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Papers ELI/UNIDROIT Project on Civil Procedure published

As we reported earlier, in October 2013, the first exploratory workshop of the ELI/UNIDROIT project on European Rules of Civil Procedure took place. This was followed by the launch of three pilot studies this spring, the first results of which will be discussed in Rome next week.

Most of the papers presented at the first exploratory workshop have meanwhile been published in the *Uniform Law Review* 2014, issues 2 and 3.

Uniform Law Review 2014/2

- Diana Wallis – **Introductory remarks on the ELI-Unidroit project**
- Geoffrey C. Hazard, Jr. – **Some preliminary observations on the proposed ELI/Unidroit civil procedure project in the light of the experience of the ALI/Unidroit project**
- Sacha Prechal and Kees Cath – **The European acquis of civil procedure: constitutional aspects**
- Thomas Pfeiffer – **The contribution of arbitration to the harmonization of procedural laws in Europe**
- Xandra E. Kramer – **The structure of civil proceedings and why it matters: exploratory observations on future ELI-Unidroit European rules of civil procedure**
- Nicolò Trocker – **From ALI–Unidroit Principles to common European rules on access to information and evidence? A preliminary outlook and some suggestions**

- Loïc Cadiet – **The ALI–Unidroit project: from transnational principles to European rules of civil procedure: Public Conference, opening session, 18 October 2013**
- Neil Andrews – **Fundamentals of costs law: loser responsibility, access to justice, and procedural discipline**
- Miklós Kengyel – **Transparency of assets and enforcement**
- Rolf Stürner – **Principles of European civil procedure or a European model code? Some considerations on the joint ELI–Unidroit project**

Uniform Law Review 2014/3

- Eva Storskrubb – **Due notice of proceedings: present and future**
- Ianika N. Tzankova – **Case management: the stepchild of mass claim dispute resolution**

Commemorating Bernd von Hoffmann (1941-2011)

The University of Trier will hold an academic ceremony commemorating the late Professor Dr. Bernd von Hoffmann (1941-2011), on November 28, 2014. Bernd von Hoffmann held a Chair in Private Law, Comparative Law and Private International Law at the University of Trier from 1979 to 2007 and is recognized as one of the leading scholars of his generation, particularly in the fields of private international law and arbitration. The ceremony will be followed by a symposium (in German) dealing with „Structural asymmetries in international dispute resolution“ on November 29, 2014. The ceremony and the symposium are organized by von Hoffmann’s academic pupils, Professor Dr. Herbert Kronke, LL.M., University of Heidelberg, who is currently serving as a judge with the Iran-United States Claims Tribunal in The Hague, and Professor Dr. Karsten Thorn, LL.M., Bucerius Law School, Hamburg, in close collaboration with the Institute for Legal Policy at the University of Trier and the University’s law faculty.

The program is as follows:

Friday, November 28, 2014 – 17.30

Welcome Addresses
Professor Dr. Mark A. Zöller, Dean, Faculty of Law, University of Trier
Professor Dr. Michael Jäckel, President, University of Trier

Zur Person Bernd von Hoffmann
Professor Dr. Herbert Kronke, LL.M., University of Heidelberg; Judge, Iran-United States Claims Tribunal, The Hague

Privatautonomie und Parteiautonomie: (familienrechtliche) Zukunftsperspektiven
Professor Dr. Dr. h.c. mult. Dieter Henrich, University of Regensburg

Saturday, November 29, 2014 – 9.00 – 14.00

Welcome Address
Professor Dr. Gerhard Robbers, Minister of Justice, Rhineland-Palatinate

Der Schutz des Geschädigten bei grenzüberschreitenden Delikten im europäischen Zivilprozessrecht
Professor Dr. Jan von Hein, University of Freiburg/Germany

Grenzüberschreitende Rechtsdurchsetzung und Gemeinsames Europäisches Kaufrecht
Professor Dr. Jens Kleinschmidt, LL.M., University of Trier

Schiedsvereinbarungen in Fällen struktureller Unterlegenheit – hinreichende Schutzmechanismen oder Regelungslücken?
Professor Dr. Karsten Thorn, LL.M., Bucerius Law School, Hamburg

Kollektiver Rechtsschutz im Schiedsverfahren
Professor Dr. Thomas Rüfner, University of Trier

Justice is open to all – like the Ritz Hotel: Schiedsvereinbarungen im Sport
Dr. Francesca Mazza, Deutsche Institution für Schiedsgerichtsbarkeit

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (6/2014)

The latest issue (November/December) of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (IPRax) contains the following articles:

- ***Rolf Wagner:*** "The new programme in the judicial cooperation in civil matters – a turning point?"

Since the entry into force of the Amsterdam Treaty in 1999 the European Union is empowered to act in the area of cooperation in civil and commercial matters. This article describes the fourth programme in this area. It covers the period 2015–2019. The author provides an overview of the history and content of the new programme in so far as the area of civil and commercial law is concerned. Furthermore, he explains how this programme differs in conceptual terms from its predecessors.

- ***Michael Stürner/Christoph Wendelstein:*** "The law governing arbitral agreements in contractual disputes"

The article deals with the law governing arbitral agreements in contractual disputes. As such agreements are excluded from the material scope of application of Regulation Rome I, a conflict of laws approach has to be found in national law. Under German law, none of the existing black-letter private international law rules apply. Various connecting factors are conceivable (e.g. law of the seat of the arbitration, law governing the arbitration). Given the close connection between the arbitral agreement and the main contract, the article suggests that the law applicable to the latter will also determine the former. That applies, of course, only if the parties did not (explicitly or implicitly) choose the law applicable to the arbitral agreement.

- ***Katharina Hilbig-Lugani***: "Das gemeinschaftliche Testament im deutsch-französischen Rechtsverkehr – Ein Stiefkind der

Erbrechtsverordnung" – The English abstract reads as follows:

Mutual wills have troubled German doctrine before a European instrument came along and they continue to do so under the Succession Regulation 650/2012. The Regulation lacks an explicit provision. The focus of the present contribution lies on the discussion whether a mutual will is subject to the conflict of law rule on agreements as to succession (article 25 of Regulation 650/2012) or subject to the general provision on dispositions upon death (article 24 of Regulation 650/2012). The concepts of "mutual will" and "agreement as to succession" on the European level are far from being clear. Though less favorable, the more convincing arguments – including wording, systematics and legislative history – argue in favor of the application of article 24 Regulation 650/2012.

- ***Peter Kindler***: "Corporate Group Liability between Contract and Tort under the Brussels I Regulation"

The judgment of the CJEU of 17 October 2013 (C-519/12 – OTP Bank vs. Hochtief) confirms the consolidated case law on art. 5(1)(a) Brussels I Regulation regarding the contractual nature of the matter. The liability has to derive from "obligations freely assumed" by one party towards another. According to the Court there is no such freely assumed obligation when the claim is based on a provision of national law imposing a liability on the controlling shareholder of a corporation for the debts of such corporation in case of its failure to disclose the acquisition of control to the commercial register. Astonishingly, the CJEU goes beyond the question referred for the preliminary ruling by the Hungarian Kúria and also gives its views on art. 5(3) Brussels I Regulation. Under this provision, in matters relating to tort, a person domiciled in a Member State may be sued in the courts of the place where the "harmful event" occurred. In this regard, the judgment is incomplete as far as causation is concerned. It remains unclear which could be the defendant's conduct that caused the "harmful event".

- ***Christian Koller:*** "Conflicting Goals in European Insolvency Law: Reorganization vs. Territorial Liquidation"

In the Christianapol-case the ECJ had to resolve the conflict between main

insolvency proceedings, aiming at the restructuring of the debtor, and secondary proceedings, which must be winding-up proceedings under the European Insolvency Regulation. The ECJ's solution is mainly based on the interpretation of the provisions of the Insolvency Regulation dealing with the coordination of proceedings. It does not, however, take sufficient account of the effects of restructuring measures approved by the court in the main insolvency proceedings. This contribution, therefore, discusses the effects the recognition of a restructuring plan approved by the court in the main insolvency proceedings might have on the opening of secondary proceedings.

- ***Wulf-Henning Roth***: "IZPR und IPR – terra incognita" – The English abstract reads as follows:

The judgment of the Oberlandesgericht Karlsruhe, in its substance, deals with the much debated issue whether and under what conditions agreements on costs and charges that go along with the conclusion of an insurance contract may be regarded as void. Issues of private international law are given short shrift. In this regard however, the judgment of the renowned Appellate Court reveals an astonishing ignorance of the fundamentals of European private international law: Instead of applying Regulation No. 44/2001 the Court turns to the German law of jurisdiction; and, with regard to substance (claim based on contract; voidness of the contract; claim based on precontractual misinformation), neither the Rom I- nor the Rom II-Regulation is even mentioned. Instead, the Court bases its judgment on the Rome Contracts Convention of 1980 whose direct applicability has been explicitly excluded by German legislation.

- ***Christoph A. Kern***: "Jurisdiction based on the place of performance according to Art. 5(1) Brussels I 2001/Art. 7(1) Brussels I 2012 when a contract combines the sale of real estate with the seller's obligation to construct business premises and find financially strong tenants"

The Düsseldorf Court of Appeal held that a contract combining the sale of real estate with the seller's obligation to construct business premises on the land

and to find financially strong tenants is a contract on the provision of services in the sense of Art. 5(1) lit. b 2nd indent Brussels I 2001 (Art. 7(1) lit. b 2nd indent Brussels I 2012). This holding might have been driven by the court's wish not to apply the traditional rule in Art. 5(1) lit. a Brussels I 2001 (Art. 7(1) lit. a Brussels I 2012), according to which the place of performance must be determined with reference to the primary obligation in question. In the eyes of the commentator, the obligations to construct certain premises and to find solvent tenants normally do not affect the qualification of the contract as a sale of real estate, even more so if these obligations cannot be enforced directly by the buyer but their only sanctions are a condition precedent and a right of withdrawal. The commentator sees a parallel to contracts on the supply of goods to be manufactured according to requirements specified by the buyer, which have been qualified as sales contracts by the ECJ in the case C-381/08 (Car Trim).

- ***Angelika Fuchs****:* "Direct claim and assignment after cross-border traffic accident"

Following the respective judgment of the CJEU (C-347/08), a German court decided that a federal state in Germany, acting as the statutory assignee of the rights of the directly injured party in an international motor accident, may not bring an action directly in the courts of its Member State against the insurer of the person allegedly responsible for the accident, when that insurer is established in another Member State. The court argues that – other than the injured party itself – the federal state cannot be considered to be a weaker party and can therefore not rely on the combined provisions of Articles 9(1)(b) and 11(2) of the Brussels I Regulation. The following article explains what impact the assignment of rights has on the interpretation of different rules of jurisdiction.

- ***Martin Gebauer:*** "The Autocomplete Features of „Google" and the Infringement of Personality Right – Jurisdiction to Adjudicate and Choice of Law"

In its recent "Google"-decision, the German Federal Supreme Court (FSC) ruled that German courts have jurisdiction to adjudicate under Section 32 of the German Code of Civil Procedure in an action brought against Google Inc., a

company seated in California, USA, for the infringement of personality rights by means of the autocomplete feature offered by "Google.de". The FSC also held that German law applied. For the first time after the "eDate Advertising" ruling of the European Court of Justice (ECJ), the FSC had the opportunity to synchronize the approach of its own case law, in terms of the German autonomous rules of jurisdiction, with the approach developed by the ECJ. Without picking it out as a central theme, the FSC approach differs from the approach of the ECJ. Whereas the ECJ is looking for the place where the alleged victim has its centre of interests, the FSC requires that the forum state be the place where the diverging interests of both parties collide. This test is applied both to the question of jurisdiction to adjudicate and to the question of choice of law (under autonomous German conflict rules). Mainly for three reasons, the FSC in the long run should bring its case law more in line with the "eDate-doctrine" of the ECJ: First, the centre of interests of a person is more predictable as a ground of jurisdiction than the place of colliding interests. Second, jurisdiction to adjudicate and choice of law fit together in the sense that a court having jurisdiction under the Brussels Regulation for the alleged infringement of personality rights should preferably be empowered to apply the law of the forum. Third, the coordination of parallel proceedings within the EU is closely linked to the scope of the jurisdictional rules in the member states. Coordination works better when these rules resemble each other even in cases where the defendant is domiciled in a third state.

- ***Andreas Engel:*** "Conflict of Laws in Property Law: Statutory Limitation and Changes in the Applicable Law"

In a lawsuit for the recovery of a classic car which was originally sold in Germany and then went missing after the Second World War, only to later reappear in the U.S. where it was sold at an auction in California and then re-transferred to Germany for an exhibition, the Oberlandesgericht Hamburg had to grapple with diverging national laws. Under Californian law, but not under German law, the pertinent period of limitation is not deemed to accrue until the discovery of the whereabouts of the article, and there is no tacking of previous possessors.

According to German conflict-of-law rules regarding property, German law was applicable for the recovery claim and its limitation. However, even the special

provision of art. 43 para. 3 EGBGB does not allow for a retroactive modification of final legal determinations arrived at pursuant to a law formerly applicable. A final legal determination of facts in that sense can also be of a negative nature. In the given case, this meant that German property law had to respect and uphold the Californian decision as to when the period of limitation began to accrue.

- ***Bettina Heiderhoff:*** "Return of the child in case of child's objection under the Hague Child Abduction Convention"

The decisions mainly concern issues of Art. 13(2) Hague Child Abduction Convention. In both cases, the children were relatively old (between 11 and 16 years) and objected to the return.

In the ECHR case, the court order to return the children to their mother in England was not enforced by the French authorities following an unsuccessful mediation meeting between the mother and the children. The ECHR held that France should have tried harder to influence the position of the children (para. 94). The OGH found that even at the age of 15 it was necessary for the courts to assess the individual maturity of the child.

In fact, Art. 13(2) Child Abduction Convention must be interpreted in a narrow way. Only where a child possesses the necessary maturity, and is objecting in a determined and distinct manner, may the return be refused by the authorities. While it must be deplored that Art. 13(2) is so imprecise, courts should still try to establish a clear line. For children below a certain age (one might consider the age of 10, for instance) the necessary maturity should, generally, be denied. Correspondingly, there might also be an age above which maturity is assumed without further investigation (this might be appropriate for children of 13 years and older).

Only where a child has been unduly influenced by the abducting parent is there reason for an attempt to change the child's opinion.

- ***Hans Jürgen Sonnenberger:*** "Transkription einer von zwei Italienern in den USA – New York – geschlossenen gleichgeschlechtlichen Ehe in das italienische Personenstandsregister" – The English abstract reads as

follows:

For the first time in Italy the Tribunale of Grosseto ordered the transcription of an Italian same-sex couple's marriage, who was wedded abroad. This note analyzes the decision, demonstrates the development of Italian and European case law and evaluates it in the light of the reasoning of the Tribunale.

- ***Christa Jessel-Holst:*** "Recodification of the Private International Law of Montenegro"

The contribution analyses the new Montenegrin Act on Private International Law of 23 December, 2013, as the first comprehensive PIL-reform in a Yugoslav successor state. The Act regulates conflict of laws as well as procedural international law in 169 articles. EU-harmonization is a main objective of the reform. Habitual residence is introduced as a connecting factor, for which a legal definition is provided. The scope of party autonomy is considerably expanded. Novelties include inter alia a general escape clause and a provision on overriding mandatory rules. Issues like maintenance, personal name, agency or intellectual property are regulated for the first time, others have been totally reformed. The reciprocity requirement for the recognition of foreign judgments has been abolished. For the recognition of foreign arbitral awards it is referred to the New York UN-Convention of 1958. For Montenegro, the new Act replaces the Yugoslav codification of 1982.

Revista de Arbitraje Comercial y de Inversiones, 2014 (3)

The last issue of *Arbitraje. Revista de Arbitraje Comercial y de Inversiones*, 2014 (3), has just been released. Although contributions are in Spanish, most provide for an abstract in English; I reproduce them below. The Journal also offers a section on recently published texts concerning arbitration, case law (Spanish and foreign), as well as news of interest for the arbitration world.

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orders in the competent jurisdiction as well as in the arbitration, and it will be analyzed the interaction between normative blocks and the derivative malfunctions of a complex assembly between the conventional sources (particularly CMR) and the derivative of the Europe institutions normative. From the operators sector's point of view, it will tackle that when the aim of the legal security is achieving or on the contrary the absence of the compatibility of the rules between those deserve rules finishes producing doubts that harm all the interests of the present cast

Hernando DÍAZ CANDIA , *Viabilidad y operatividad práctica contemporánea del arbitraje tributario en Venezuela (The practical feasibility of tax arbitration in Venezuela)*

The article refers to arbitration of tax disputes in Venezuela. While it is focused on domestic Venezuelan law, it is useful as a source of comparative tax and arbitration laws to study the differences and similarities of various legal systems. The article explains that the arbitrability of tax disputes is provided in the Venezuelan Tax Code at least since 2001, but that there have been no actual tax arbitrations reported in Venezuela, except in investment arbitrations. The lack of actual cases may be due to complicated legal provisions, which, if taken isolated and literally, could imply that tax arbitration is just a burdensome step within judicial tax matters, which makes the resolution of disputes lengthier and more expensive for the taxpayer. The article proposes that tax arbitration must be approached as arbitration is generally conceived by the Venezuelan Constitution of 1999: as a truly alternative and efficient dispute resolution mechanism. That implies that the Tax Code must be construed to permit the annulment of tax assessment by arbitrators and that the intervention of judicial courts must be limited. Tax arbitration can further the perception of fairness of the tax system, which can ultimately reduce tax evasion

Horacio ANDALUZ VEGACENTENO, *Retando el concepto de validez?. La naturaleza jurídica del reconocimiento de laudos anulados (Challenging the Concept of Validity? The Legal Nature of the Recognition of Annulled Awards)*

The recognition in 2013 in the United States of a Mexican arbitral award annulled by Mexicans courts seems to bring the implicit affirmation that it is legally possible to grant recognition to an annulled award. Such affirmation itself challenges the concept of legal validity, since it means that what have been

declared void can, at the same time, be valid as to produce legal effects. The point of this article is to find the legal nature behind the so called recognition of annulled awards. In order to do so, the article reviews nine judicial decisions, from 1984 to 2013, and concludes that behind the recognition of annulled awards there are three different hypotheses, each one with a distinctive legal nature and none of them being a challenge to the concept of legal validity.

Brian HADERSPOCK, *Revisión de laudos arbitrales en Bolivia: una propuesta plausible (Review of arbitration awards in Bolivia: a plausible proposal)*

The contribution focuses on the question whether or not an extraordinary review of judgments in respect of arbitral awards would be positive in the Bolivian legal system. Through this note, the author tries to discuss the feasibility of this extraordinary appeal in Bolivia's arbitration process. To do this, the author presents certain criteria that, in his opinion, are positive, therefore concluding, that considering implementing this resource in the Bolivian arbitration legislation would be a feasible decision. In this sense, the author proposes changes to the current arbitration legislation, allowing the value of justice prevail over any judicial or extrajudicial decision

Seguimundo NAVARRO*, Cuestiones relativas al* third party funding *en arbitraje*

Francisco RUIZ RISUEÑO, *Árbitros e instituciones arbitrales: la ética como exigencia irrenunciable de la actuación arbitral*