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.)
- *Andreas Spickhoff,* Vorsorgeverfügungen im Internationalen Privatrecht (pp. 825 ff.)
- *Michael Stürner :* Die Rolle des Kollisionsrechts bei der Durchsetzung von Menschenrechten (pp. 843 ff.)
- *Rolf Stürner.* Prozessökonomie als gemeineuropäischer Verfahrensgrundsatz? (pp. 855 ff.)
- *Luboš Tichý:* Die Anerkennung des Trusts als ein spezifisches Problem des IPR (pp. 865 ff.)
- *Satoshi Watanabe:* The Ratification of the Hague Child Abduction Convention and its Implementation in Japan (pp. 883 ff.)
- *Marc-Philippe Weller:* Die lex personalis im 21. Jahrhundert: Paradigmenwechsel von der lex patriae zur lex fori (pp. 897 ff.)
- *Pelayia Yessiou-Faltsi:* Deutsche Urteile über die Vaterschaftsfeststellung

von nichtehelichen Kindern aus der Sicht der griechischen öffentlichen Ordnung (pp. 913 ff.)
- *Reinhard Zimmermann:* Assessment of Damages: Three Specific Problems (pp. 921 ff.)

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.

OGEL and TDM Special Issue: Focus on Renewable Energy Disputes

With renewable energy disputes seemingly everywhere these days, OGEL and TDM have published a special joint issue focusing on these disputes at the level of international, European and national law. Below is the table of contents:

> *Introduction – Renewable Energy Disputes in the Europe and beyond: An Overview of Current Cases*, by K. Talus, University of Eastern Finland
>
> *Renewable Energy Disputes in the World Trade Organizatio*n, by R. Leal-Arcas, Queen Mary University of London, and A. Filis
>
> *Aggressive Legalism: China's Proactive Role in Renewable Energy Trade Disputes?*, by C. Wu, Academia Sinica, and K. Yang, Soochow University (Taipei)
>
> *Mapping Emerging Countries' Role in Renewable Energy Trade Disputes*, by B. Olmos Giupponi, University of Stirling

Green Energy Programs and the WTO Agreement on Subsidies and Countervailing Measures: A Good FIT?, by D.P. Steger, University of Ottawa, Faculty of Law

EU's Renewable Energy Directive saved by GATT Art. XX?, by J. Grigorova, Paris 1 Pantheon Sorbonne University

Retroactive Reduction of Support for Renewable Energy and Investment Treaty Protection from the Perspective of Shareholders and Lenders, by A. Reuter, GÖRG Partnerschaft von Rechtsanwälten

Renewable Energy Disputes Before International Economic Tribunals: A Case for Institutional 'Greening'?, by A. Kent, University of East Anglia

Renewable Energy Claims under the Energy Charter Treaty: An Overview, by J.M. Tirado, Winston & Strawn LLP

Non-Pecuniary Remedies Under the Energy Charter Treaty, by A. De Luca, Università Commerciale Luigi Bocconi

Joined Cases C-204/12 to C-208/12, Essent Belgium, by H. Bjørnebye, University of Oslo, Faculty of Law

Ålands Vindkraft AB v Energimyndigheten – The Free Movement Law Perspective, by S.L. Penttinen, UEF Law School, University of Eastern Finland

Recent Renewables Litigation in the UK: Some Interesting Cases, by A. Johnston, Faculty of Law, University College (Oxford)

The Rise and Fall of the Italian Scheme of Support for Renewable Energy From Photovoltaic Plants, by Z. Brocka Balbi

The Italian Photovoltaic sector in two practical cases: how to create an unfavorable investment climate in Renewables, by S.F. Massari, Università degli Studi di Bologna

Renewable Energy and Arbitration in Brazil: Some Topics, by E. Silva da Silva, CCRD-CAM / Brazil-Canada Chamber of Commerce, and N. Sosa Rebelo, Norte Rebelo Law Firm

Renewable Energy in the EU, the Energy Charter Treaty, and Italy's Withdrawal Therefrom, by A. De Luca, Università Commerciale Luigi Bocconi

Excerpts of these articles are available here and here

New German Festschriften on private international law

A voluminous *Festschrift* in honour of Gerhard Wegen has recently been published: Christian Cascante, Andreas Spahlinger and Stephan Wilske (eds.), Global Wisdom on Business Transactions, International Law and Dispute Resolution, Festschrift für Gerhard Wegen zum 65. Geburtstag, Munich (CH Beck) 2015; XIII, 864 pp., 199 €. Gerhard Wegen is not only one of the leading German M & A lawyers and an internationally renowned expert on commercial arbitration, but also a honorary professor of international business law at the University of Tübingen (Germany) and a co-editor of a highly successful commentary on the German Civil Code (including private international law). This *liber amicorum* contains contributions both in English and in German on topics related to international business law, private international and comparative law as well as various aspects of international dispute resolution. For conflictoflaws.net readers, contributions on *Unamar* and mandatory rules (Gunther Kühne, p. 451), international labour law (Stefan Lingemann and Eva Maria Schweitzer, p. 463), problems of characterization in international insolvency law (Andreas Spahlinger, p. 527) and marital property law in German-French relations (Gerd Weinreich, p. 557) may be of particular interest. Moreover, a large number of articles is devoted to international commercial arbitration (pp. 569 et seqq.). For the full table of contents, see here.

Another recent *Festschrift* has been published in honour of Wulf-Henning Roth, professor emeritus at the University of Bonn: Thomas Ackermann/Johannes Köndgen (eds.), Privat- und Wirtschaftsrecht in Europa, Festschrift für Wulf-

Henning Roth zum 70. Geburtstag, Munich (CH Beck) 2015; XIV, 744 pp., 199 €. Although Roth is generally recognized as one of the leading German conflicts scholars of his generation, this *liber amicorum* is focused mainly on substantive private and economic law, both from a German and a European perspective. Nevertheless, readers interested in choice of law may discover some gems that deserve close attention: Wolfgang Ernst deals with English judge-made case-law as the applicable foreign law (p. 83), Johannes Fetsch analyses Article 83(4) of the EU Succession Regulation (p. 107), Peter Mankowski looks at choice-of-law agreements in consumer contracts (p. 361), Heinz-Peter Mansel publishes a pioneering study on mandatory rules in international property law (p. 375), and Oliver Remien presents a survey on the application of the law of other Member States in the EU (p. 431). For the full table of contents, see here.

The European Private International Law of Employment (book)

"The European Private International Law of Employment" that has just been published by Cambridge University Press.

Abstract:

The European Private International Law of Employment provides a descriptive and normative account of the European rules of jurisdiction and choice of law which frame international employment litigation in the courts of EU Member States. The author outlines the relevant rules of the Brussels I Regulation Recast, the Rome Regulations, the Posted Workers Directive and the draft of the Posting of Workers Enforcement Directive, and assesses those rules in light of the objective of protection of employees. By using the UK as a case study, he highlights the impact of the 'Europeanisation' of private international law on traditional perceptions and rules in this field of law in individual Member States.

The author shows how the goals and policies of the European Union, in particular the protection of employees, are fundamentally reshaping the regulation of transnational private relations. The book also provides for a separate examination of the choice-of-law treatment of claims based on breach of employment contract, statute and in tort, thus offering an accessible explanation of choice-of-law issues arising in connection with the three main types of employment claim. Finally, it presents new insights about the influence of EU private international law on the Member States' domestic private international law regimes, and offers recommendations for improving the existing rules of jurisdiction and choice of law.

About the author:

Uglješa Gruši is an assistant professor at the School of Law of the University of Nottingham, where he teaches commercial conflict of laws, arbitration and the law of torts.

Research Handbook on EU Private International Law

A new Research Handbook on EU Private International Law, within the Edward Elgar Research Handbooks in European Law series has just been published. It is edited by *Peter Stone*, Professor and *Youseph Farah*, Lecturer, School of Law, University of Essex, UK.

It contains the following contributions:

1. Internet Transactions and Activities
Peter Stone
2. A Step in the Right Direction! Critical Assessment of Forum Selection Agreements under the Revised Brussels I: A Comparative Analysis with US Law
Y*ouseph Farah and Anil Yilmaz-Vastardis*
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9. The Interaction between Rome I and Mandatory EU Private Rules – EPIL and EPL: Communicating Vessels?
Xandra E. Kramer

10. Choice of Law for Tort Claims"
Peter Stone

11. Defamation and Privacy and the Rome II Regulation
David Kenny and Liz Heffernan

12. Corporate Domicile and Residence
Marios Koutsias

More information is available on the publisher's website.

Upcoming international conference at the Academy of European Law: “How to handle international commercial cases – Hands-on experience and current trends”

The Academy of European Law (ERA) will host an international conference on recent experience and current trends in international commercial litigation, with a special focus on European private international law. The event will take place in Trier (Germany), on 8-9 October 2015. This conference will bring together top experts in international commercial litigation who will report on their experiences in this field including litigation strategy and tactics.

Key topics will be:

- Recent case law in the area of European civil procedure, private and business law, including Alternative Dispute Resolution (ADR) and arbitration,
- Best practice in applying commercial litigation and conflict of laws rules,
- Forthcoming changes after the entry into force of the new Hague Choice of Court Convention in June 2015, the recast of the Insolvency Regulation in summer 2015, the revision of the Small Claims Procedure 2015, and the Regulation establishing a European Account Preservation Order,
- A round table discussion about “Coherence, consolidation and codification: the road ahead for European private international law”.

The conference language will be English. The event is organized by Dr Angelika

Fuchs, ERA, in cooperation with Professor Jan von Hein, University of Freiburg (Germany). The confirmed speakers are

- **Professor Camelia Toader**, Judge at the European Court of Justice of the EU (CJEU), Luxembourg
- **Professor Gilles Cuniberti**, University of Luxembourg
- **Raquel Ferreira Correia**, Counsellor, Lisbon
- **Sarah Garvey**, Counsel and Head of KnowHow in the Litigation Department, Allen & Overy LLP, London
- **Jens Haubold**, Partner, Thümmel, Schütze & Partner, Stuttgart
- **Professor Jan von Hein**, Director of the Institute for Foreign and International Private Law, Dept. III, University of Freiburg
- **Brian Hutchinson**, Arbitrator, Mediator, Barrister, GBH Dispute Resolution Consultancy; Senior Lecturer, University College Dublin
- **Marie Louise Kinsler**, Barrister, 2 Temple Gardens, London
- **Professor Xandra Kramer**, Erasmus University Rotterdam; Deputy Judge of the District Court of Rotterdam
- **Alexander Layton QC**, Barrister, Arbitrator, 20 Essex Street, London.

The full conference programme is available here. For further information and registration (including early bird rebates), please click here.

The new European Insolvency Regulation

Antonio Leandro, the author of this post, teaches International Law at the University of Bari.

On 20 May 2015 the European Parliament approved the new European Insolvency Regulation (EIR) in the text adopted by the Council at first reading on 12 March (publication on the Official Journal is expected to follow soon). This marks the end of a revision process which started with the Commission proposal of 12 December 2012 (COM/2012/744 final).

The primary aim of the revision was to improve the operation of the EIR with a view to ensuring a smooth functioning of the internal market and its resilience in economic crises, having regard to national insolvency laws and to the case law of the ECJ on the "old" Insolvency Regulation, *i.e.* Regulation No 1346/2000 (the relevant ECJ judgments include: *Susanne Staubitz-Schreiber* [2006]; *Eurofood IFSC* [2006]; *Deko Marty Belgium* [2009]; *SCT Industri* [2009]; *German Graphics* [2009]; *MG Probud* [2010]; *Interedil* [2011]; *Zaza Retail* [2011]; *Rastelli Davide* [2011]; *F-Tex SIA* [2012]; *ERSTE Bank Hungary* [2012]; *Ulf Kazimierz Radziejewski* [2012]; *Bank Handlowy* [2012]; *Grontimmo* [2013]; *Meliha Veli Mustafa* [2013]; *Ralph Schmid* [2014]; *Burgo Group* [2014]; *Nickel & Goeldner Spedition* [2014]; *H* [2014]).

In short, the revised text: (*a*) extends the EIR's scope to proceedings aimed at giving the debtor a "second chance"; (*b*) strengthens the current jurisdictional framework in terms of certainty and clarity; (*c*) improves the coordination among insolvency proceedings opened in respect of the same debtor and strikes a better balance between efficient insolvency administration and protection of local creditors; (*d*) reinforces the publicity of the proceedings by compelling Member States to provide for insolvency registers and by providing for the interconnection of national registers; (*e*) deals with the management of multiple insolvency proceedings relating to groups of companies.

The new EIR will enter into force following its publication in the Official Journal, but the bulk of its provisions will only apply in 2017.

A broader scope

Opening the EIR to collective rescue and restructuring proceedings, to proceedings which leave the debtor fully or partially in control of its assets and affairs and to proceedings providing for a debt discharge or a debt adjustment in relation to consumers and self-employed persons as well as to interim proceedings, means that the appointment of a "liquidator" and the debtor's divestment are no more grounds of the EIR's applicability.

The difference between "all-creditors-including" and "not-all-creditors-including" proceedings has been implicitly upheld. However, Recital 14 clarifies that proceedings not including all the creditors should be proceedings aimed at

rescuing the debtor, while those leading to a definitive cessation of the debtor's activities or to the liquidation of the debtor's assets should include all the creditors.

Annex A lists the proceedings at stake: national insolvency procedures not listed fall out of the scope of the Regulation. In doing so, Annex A provides – as the ECJ held in *Ulf Kazimierz Radziejewski* (§§ 23-24) and *Meliha Veli Mustafa* (§ 36) – a clear-cut confine of the EIR's scope.

Moreover, the extension to proceedings whose purpose is not liquidation has led to replacing the term "liquidator" with "insolvency practitioner", so as to include a broader range of tasks in connection with the administration of the debtor's affairs. Annex B lists the relevant insolvency practitioners based on national laws.

Hereinafter, we will refer to the insolvency practitioner appointed in the main proceedings as the "main insolvency practitioner" and to the one appointed in secondary proceedings as the "secondary insolvency practitioner".

The innovations regarding jurisdiction

Some Recitals inspired by *Eurofood* and *Interedil* have been inserted in the new EIR to clarify the concept of "centre of main interests" (COMI).

It is now stated that the COMI of individuals is to be found – presumptively – in their "principal place of business", if they are independent businessmen or professional providers, or in their habitual residence, in all other cases (Article 3(1)).

In order to avoid fraudulent or abusive forum shopping practices, these presumptions will only apply if the registered office/principal place of business/habitual residence have not been transferred to another Member State within a given period prior to the request for the opening of the insolvency proceedings.

The court requested to open the proceedings will rule on jurisdiction of its own motion, and specify in the judgment on which ground it retained jurisdiction (Article 4).

Vis attractiva over "ancillary" proceedings is now codified in Article 6. Moreover,

should the “ancillary” action be related with another action based on civil and commercial law, then the insolvency practitioner is entitled to bring both claims in the court of the defendant’s domicile or, in the case of several defendants, in the court of the Member State where any of them is domiciled, provided that such court has jurisdiction under the Brussels I Regulation (recast).

Coordination of proceedings

The new EIR improves the coordination among insolvency proceedings opened against the same debtor, and attempts to strike a better balance between efficient insolvency administration and protection of local creditors.

In particular, it makes the opening of secondary proceedings conditional upon both the interests of local creditors and the objectives of the main proceedings, and accordingly, strengthens the main insolvency practitioner’s role in this regard.

The court of the establishment will be enabled, on request of the main insolvency practitioner, to refuse or to postpone the opening of secondary proceedings whenever this is not necessary to protect the interest of local creditors.

When ruling on a request for opening brought by local creditors, the court of the establishment should give the main insolvency practitioner the opportunity to be heard before deciding (Article 38). The main insolvency practitioner will have the opportunity to apply for refusal or postponement of the opening of secondary proceedings, while the court of the establishment will be in a position to be aware of any rescue or reorganization options explored by the main insolvency practitioner, so as to properly assess the consequences of the opening.

Based on these and other elements, the court may refuse the opening or opt for proceedings not involving the winding-up of the debtor. This differs from the current regime, which allows for the alternative proceedings option only for territorial proceedings, *i.e.* prior to the opening of main proceedings.

In line with this new broadened role in evaluating the impact of secondary proceedings upon the centralized rescue or the estate administration, the main insolvency practitioner will be entitled to challenge the decision whereby secondary proceedings are opened.

As regards the protection of local creditors, in order to avoid the opening of secondary proceedings, the main insolvency practitioner may undertake within the main proceedings, in respect of assets located in the Member State of the establishment, 'that he will comply with the distribution and priority rights under national law that [they] would have if secondary proceedings were opened' (Article 36(1)). This undertaking should remove the local creditors' concern over seeing themselves deprived of interests and preferential rights based on the local *lex concursus* by the opening of the sole main proceedings and by the applicability of the COMI's *lex concursus*. At the same time, it will avoid the opening of secondary proceedings that may adversely affect the outcome of the main insolvency proceedings, in particular where the latter are aimed at rescue and restructuring.

In this respect, the new EIR draws inspiration from the "synthetic secondary proceedings".

If secondary proceedings are opened or the request of opening is still pending, the new EIR extends the duty to cooperate both to the courts involved and between courts and insolvency practitioners (Articles 41-43).

Courts and insolvency practitioners are also required to take account of principles and guidelines adopted by European and international organizations active in the area of insolvency law, including the UNCITRAL guidelines (Recital 48). For instance, the courts may coordinate with each other to appoint the insolvency practitioners, while courts and insolvency practitioners may enter into protocols and agreements to facilitate cross-border cooperation and to coordinate the administration and supervision of the debtor's assets and affairs.

Publishing insolvency information

Member States are required to establish publicly accessible electronic registers that contain information on cross-border cases (Article 24). All national registers will be interconnected with each other through the European e-Justice portal (Article 25).

This mandatory regime is meant to safeguard the foreign creditors' right to lodge claims and prevent the opening of parallel proceedings. As for the foreign creditors – *i.e.* those having their habitual residence, domicile or registered office

in a Member State other than the State of the proceedings, including the tax authorities and social security authorities of Member States: Article 2(12) –, their right to lodge claims will be facilitated by using a standard form to be established in an implementing act of the Commission.

Certain protective rules concerning the personal data have been inserted on account of the fact that, as noted above, the new Regulation will also apply to proceedings opened against persons who do not carry out an independent business or professional activity: see Articles 78-83. Having these cases in mind, Recital 80 strikes a balance with the creditors' right to lodge the claims by calling Member States to ensure both that the relevant information is given to creditors by individual notice and that claims of creditors who have not received the information are not affected by the proceedings.

Groups of companies

The revision also addresses the management of multiple insolvency proceedings relating to groups of companies, introducing a specific Chapter (V). This strives to ensure the efficiency of the insolvency administration, whilst respecting each group member's separate legal personality.

In this regard, the new EIR draws inspiration from the UNCITRAL Model Law and related Legislative and Practice Guides.

Firstly, should more proceedings be opened in different Member States, the new EIR requires all the actors involved (insolvency practitioners and courts) to comply with the duties of cooperation and communication applicable when main and secondary insolvency proceedings are opened against the same debtor (Chapter V, Section 1).

An important innovation is that an insolvency practitioner is now allowed to request the opening of a "group coordination proceeding", which should further facilitate, in particular, the restructuring of groups (Chapter V, Section 2). The participation of the other insolvency practitioners (hence, the other proceedings) rests on a voluntary basis.

A "coordinator" will be appointed to propose and implement the coordination plan (Articles 71-72).

All the advantages of the “coordination proceedings” should be worth the costs. In other words, the costs of the coordination should be sustainable and adequate having regard to the purpose of each proceedings involved.

The introduction of groups-of-companies oriented rules will not prevent a court from opening insolvency proceedings for several companies in a single State if the court finds a common COMI therein (Recital 53).

What about the applicable law?

The revision only marginally addresses the issue of applicable law.

However, Article 11(2) and Article 13(2) of the new texts are noteworthy in this respect, in that they manage, as regards contracts relating to immovable property and contracts of employment, the effects of the insolvency stemming from the (local) *lex contractus* when the insolvency being handled abroad in the main proceedings.

Article 18 extends to pending arbitration proceedings the existing rule whereby the effects of insolvency proceedings on a pending lawsuit concerning assets or rights included in the debtor’s insolvency estate must be governed by the law of the Member State where the lawsuit is pending (the law of the seat of the arbitration will apply).

Finally, all the rules whose functioning depends on the concept of “Member State in which assets are situated” will benefit from the broader and more detailed definition provided by Article 2(9), which refers, among other “assets”, to registered shares in companies, financial instruments, cash held in credit institutions accounts and copyrights.