# Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (5/2013)

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

- ***Robert Magnus*:** "Choice of court agreements in succession law"

*The EU Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (Succession Regulation), most recently adopted by the European Parliament and the Council of the European Union introduces the possibility for parties of a probate dispute to conclude a jurisdiction agreement. This article compares the new rules on jurisdiction agreements with the current legal situation in Germany, where such agreements in succession matters have not been much in use. As the Succession Regulation is for several reasons rather unsatisfactory the article further discusses more convincing alternatives (e.g. prorogation by the deceased in testamentary dispositions, arbitration agreements).*

- ***Maximilian Eßer***: "The adoption of more far-reaching formal requirements by the EU Member States under the Hague Protocol on the Law applicable to Maintenance Obligations"

*Art. 15 of Regulation (EC) No 4/2009 refers to the Hague Protocol of 2007 for the determination of the law applicable to maintenance obligations. The Protocol was ratified by the EU as a "Regional Economic Integration Organisation". The formal requirements in Art. 7 (2) and Art. 8 (2) of the Protocol have to be considered as minimum standards. In order to protect the weaker party from a hasty and heedless choice of applicable law on maintenance obligations, the choice-of-law agreement should from this perspective be recorded in an authentic instrument. In his essay, Eßer illustrates that neither public international law nor European Union law prevent the EU Member States from adopting more farreaching formal requirements.*

- ***Herbert Roth:*** "Der Einwand der Nichtzustellung des verfahrenseinleitenden Schriftstücks (Art. 34 Nr. 2, 54 EuGVVO) und die Anforderungen an Versäumnisurteile im Lichte des Art. 34 Nr. 1 EuGVVO" – the English abstract reads as follows:

*The European Court of Justice has correctly decided, that the Court of the Member State in which enforcement is sought may lawfully review the effective delivery of the initial trial document even if the exact date of service is specified in the certificate referred in Article 54 of the COUNCIL REGULATION (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. The Court also held convincingly, that the recognition and therefore enforcement of a default judgement is normally not manifestly contrary to public policy in the sense of Article 34 No 1 of the Council Regulation 44/2001 despite the fact that the default judgement itself does not provide any legal reasoning. Exceptions are necessary if the defendant had no effective remedy against the decision in the Member State of origin.*

- ***Jörg Pirrung:*** "Procedural conditions for compulsory placement of a child at risk of suicide in a secure care institution in another EU Member State"

*Judgment and View in case S.C. clarify important questions of judicial cooperation within the EU in child protection matters. According to the ECJ, a judgment ordering compulsory placement of a 17 year old child in a secure care institution in another Member State according to Article 56 of the Brussels IIa regulation N 2201/2003 must, before its enforcement there against the will of the child, be declared to be enforceable/registered in that State. Appeals brought against such a registration do not have suspensive effect. Further activity of the EU and/or national legislators should ensure, by developing concrete rules, that the decision of the court of the requested State on the application for such a declaration of enforceability shall be made with particular expedition. Though there may be differences of opinion as to certain aspects regarding the answer given by the ECJ in point 3 of the operative part of its decision, – one might have preferred the way via enforcement of a provisional protective measure taken, on the basis of the recognition of the decision of the State of origin, by the State requested, such as the English*

*decision of 24 February 2012 – the outcome of the procedure confirms the general impression that the ECJ has developed an effective way of interpretation and application of the regulation. After the entry into force for 25 EU States of the Hague Convention of 19 October 1996 on the Protection of Children, courts in EU States should, as far as possible, try to apply the EU regulation in conformity with the principles of this international treaty.*

- ***Urs Peter Gruber:*** "Die perpetuatio fori im Spannungsfeld von EuEheVO und den Haager Kinderschutzabkommen" – the English abstract reads as follows:

*In a case on the visiting rights of one parent to see the children in the custody of the other parent, the OLG Stuttgart was confronted with an intricate question of jurisdiction. Right after the commencement of the trial in Germany, the child had moved from Germany to Turkey and had acquired a new habitual residence there. The court had to decide whether this change of habitual residence was of relevance for its jurisdiction.*

*Pursuant to the Brussels IIa Regulation, which adheres to the principle of "perpetuatio fori", such a change does not affect jurisdiction of the court seised. However pursuant to the Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, in such a case, jurisdiction shifts automatically to the state in which the new habitual residence of the child is located.*

*Therefore, the OLG Stuttgart had to decide whether jurisdiction was governed by the Brussels IIa Regulation or rather by the above mentioned convention on the protection of minors which both Germany and Turkey are parties of. The OLG Stuttgart held that when defining the exact scope of application of the Brussels IIa Regulation, one should consider the rights and obligations of member states arising from agreements with non-member states. Therefore, in the case at hand, the court held that the jurisdictional issue was not governed by the Brussels IIa Regulation; in order to ensure that Germany complied with its contractual duties in relation to Turkey, it applied the convention on the protection of minors. Consequently, it declined jurisdiction in favour of the competent Turkish courts.*

- ***Fritz Sturm***: "Handschuhehe und Selbstbestimmung" – the English abstract reads as follows:

*For centuries, the aristocracy used proxy marriages to anticipate the ceremony before the bride and the groom had met. Today proxy marriages are utilized for immigration purposes.*

*In many countries, such as Germany, Austria, Switzerland and the UK, this form of marriage is not permitted. Nevertheless, those countries recognize proxy marriages performed in a state where such marriages are permitted, if the representative has been given precise instructions. The US also apply the lex loci celebrationis, whereas French conflict of laws always requires the physical presence of the French spouse (Art. 146-1 C.civ.).*

*It is interesting to note that in cases where the representative did not receive precise instructions, certain German judges refer to the ordre public. Indeed, the prevailing German doctrine refuses to view the question of the validity of a marriage solemnised by a representative with such unlimited power as a question of form, but sees it as a problem of substantive validity, and infers from the lack of the spouses' consent that such a marriage is null and void according to Art. 13 EGBGB.*

*However, as this paper shows, the prevailing doctrine has to be rejected in this respect. It goes astray as it does not reflect the fact that a marriage concluded through a representative authorized to independently choose the bride or groom himself may in fact later be approved by the spouse represented by him. This power of approval has to be qualified as a question of form and is therefore subject to the lex loci celebrationis.*

*An additional argument against this doctrine is that, if the representative has the aforementioned freedom of choice, Art. 13 EGBGB does not lead to a void marriage, but to a relationship which can only be dissolved by divorce.*

- ***Carl Friedrich Nordmeier***: "Estates without a Claimant in Private International Law – Hidden Renvoi, § 29 Austrian PILC and Art. 33 EU Succession Regulation"

*According to § 1936 German Civil Code, estates without a claimant are*

*inherited by the State, whereas § 760 Austrian Civil Code provides a right to escheat for assets located in Austria. In addition, § 29 Austrian Code of Private International Law (PILC) determines the lex rei sitae as applicable, including the question if there are heirs. The same is true for laws that do not have a rule corresponding to § 29 PILC but contain hidden renvois. Art. 33 of the new European Succession Regulation (ESR) solves the problem of how to treat estates without a claimant in transborder cases only partially. It is recommended to apply the lex rei sitae in conflict cases not covered by the rule. Art. 33 ESR is applicable if only a part of the estate remains without claimant or if assets are located in third countries. Sufficient protection for creditors of the estate is granted as long as they are entitled to seek satisfaction of the assets which a State appropriates. Overall, § 29 PILC provides a better solution for dealing with estates without a claimant than Art. 33 ESR.*

- ***Dieter Henrich:*** "Familienrechtliche Vorfragen für die Nebenklageberechtigung in einem Strafverfahren"
- ***Mathias Reimann***: "The End of Human Rights Litigation in US Courts? The Impact of Kiobel v. Royal Dutch Petroleum Co., 569 U.S. — (2013)"

*For three decades, the Alien Tort Claims Act provided non-US citizens with a jurisdictional basis to bring (private) tort actions in US federal courts for violations of international human rights norms against alleged perpetrators, both foreign and domestic. Especially suits against multinational corporations for aiding and abetting human rights violations committed by governments in developing countries against the local population had become numerous and turned into a major irritant in boardrooms and government offices.*

*In a landmark decision announced in April of 2013, the US Supreme Court decided that the Alien Tort Claims Act does not apply extraterritorially. Since virtually all cases brought by aliens arose and arise from acts committed outside of the United States, at first glance it seems that the Court has rendered the lower courts' extensive 30-year jurisprudence under the statute all but moot. This is a major victory in particular for multinational corporate defendants as well as a major defeat for human rights protection in US courts.*

*Yet, it is far from clear whether the decision really amounts to a death sentence for tort-based human rights litigation in US courts. The split decision may leave*

*room for some claims under the statute, e.g., if the acts were planned or knowingly tolerated by an American defendant on US soil. It also does not affect claims under the (more narrowly drafted) Torture Victim Protection Act of 1991, nor does it bar actions brought in the state courts under domestic (instead of international) law. Last, but not least, the decision cannot destroy the lasting legacy of the case law under the Alien Tort Claims Act which not only generated important decisions in international law but also increased the awareness of the human rights implications of foreign investment.*

- ***Wolfgang Winter:*** "Einschränkung des extraterritorialen Anwendungsbereichs des Alien Tort Statute" – the English abstract reads as follows:

*On April 17, 2013 the U.S. Supreme Court issued its decision in Kiobel et al. v. Royal Dutch Petroleum et al. regarding the extraterritorial scope of the Alien Tort Statute, a provision dated 1789. The Court unanimously dismissed the complaint, filed by Nigerian citizens residing in the United States, alleging that the defendant non-U.S. companies aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria. The Court's majority applied the rule of presumption against extraterritoriality to claims under the Alien Tort Statute and found that this presumption was not rebutted by the text, history, or purpose of the Alien Tort Statute. The minority vote required a nexus to the United States which did not exist in the present case.*

*The decision has to be applauded. It continues a recent development of U.S. Supreme Court decisions, avoids friction with the sovereignty of other nations, provides legal certainty and is in line with the historical context of the Alien Tort Statute.*

- ***Ulrich Spellenberg***: "Consequences of incapacity to the validity of contract and set-off"

*The judgment of the Austrian Supreme Court could have been an opportunity for the Court to rule on two major questions of private international and procedural law which are much discussed in Germany and much less in Austria, namely what law to apply on the consequences of incapacity to contract and whether international jurisdiction is necessary to plead a set-off. Unfortunately*

*the Court left the first one open, as it could, and did not even mention the second. Nevertheless, the judgment suggests remarks on these problems as well in Austrian as in German law.*

- ***Leonid Shmatenko***: "Die Auslegung des anerkennungsrechtlichen ordre public in der Ukraine" – the English abstract reads as follows:

*The rather undefined legal term of „public policy" leads to a great legal uncertainty in the Ukrainian jurisprudence and jeopardizes the recognition and enforcement of arbitral awards. By taking a clear position upon what falls under the public order and what not, the newest decision of the Ukrainian High Specialized Court on Civil and Criminal Cases is somewhat revolutionary. Even though it does still not provide a clear definition of the former, it provides a first glimpse of hope that someday Ukrainian courts may find one and thus, guarantee legal certainty for the recognition and enforcement of foreign arbitral awards and lead to an arbitration friendly environment.*

- ***Sebastian Krebber***: "The application of the posting-directive: Conflict of Laws, Fundamental Freedoms and Assignment of the Tasks among the Competent Courts"

*The decision of the OGH deals with the application of the posting-directive in the country of reception and reveals how uncertain the handling of the directive still is, because it duplicates employment conditions: on the one hand, the employment conditions of the law applicable to the employment contract and, on the other hand, the employment conditions of the law of the country of reception. The article attempts to show that the relationship between the general legal theory of the law of fundamental freedoms and the posting directive developed in Laval, Rüffert and above all in Commission/Luxembourg makes it possible to view the posting directive as a legal instrument whose only task is to secure the application of the employment conditions of the country of reception as set out in Art. 3 of the directive. Thus, the subject of the proceedings of the court in the country of reception with jurisdiction under Art. 6 of the posting-directive is limited to the enforcement of Art. 3 of the directive. The issues of the law of fundamental freedoms, conflict of laws and substantial law raised by the duplication of employment conditions are to be dealt with by the courts of general jurisdiction of Art. 18 et seq. Brussel I regulation.*

- ***Reinhold Geimer***: "The Registrability of a Real Estate Purchase Agreement Established by a German Notary with the Spanish Land Register – A Comment on Tribunal Supremo, 19/06/2012 – 489/2007"

*The Spanish Supreme Court confirmed that registrations of ownership with the Spanish land register may be based on authentic instruments drawn up by German civil law notaries. In spite of some (misleading) comments on European law, the judgment heavily relies on specific provisions of Spanish law on the access of foreign instruments to the Spanish land register. According to the Spanish Supreme Court, any authentic instrument of foreign origin producing the same evidentiary effects as a Spanish authentic instrument can be registered with the land register. This result reflects current Spanish practice and is due to the effects of registration: registration in the Spanish land register is not needed to establish ownership, but only entails bona-fide effects. This is why the Spanish Supreme Court decision has no effects on German practice where registration is needed to complete the transfer of ownership. As a result, German register law makes a distinction between evidentiary effects of authentic instruments and substantive law requirements they have to meet. This distinction does not contravene European law as solely the Member States are competent to determine the rules according to which ownership is transferred.*

- ***Burkhard Hess***: "Das Kiobel-Urteil des US Supreme Court und die Zukunft der Human Rights Litigation – Tagung am MPI Luxemburg"
- ***Erik Jayme/Carl Zimmer:*** "Die Kodifikation lusophoner Privatrechte – Zum 100. Geburtstag von António Ferrer Correia"
- ***Deniz Deren/Lena Krause/Tobias Lutzi:*** "Symposium anlässlich der 100. Wiederkehr des Geburtstags von Gerhard Kegel und der 80. Wiederkehr des Geburtstags von Alexander Lüderitz vom 1.12.2012 in Köln"
- ***Jens Heinig***: "Die Wahl ausländischen Rechts im Familien- und Erbrecht"

# TDM 4 (2013) – Ten years of Transnational Dispute Management

TDM has published its special anniversary issue. According to the Editorial by Mark Kantor, and especially relevant to readers of this site, "the TDM community has not limited itself to investment treaty disputes. Instead, we have promoted discussion of international commercial arbitration, litigation over international issues in national courts, mediation of cross-border disputes, administrative law in national and international tribunals, labor and environmental disputes, the overlap between human rights law and tribunals and investments, the overlap between WTO dispute resolution and investments, administrative law and international matters, treaty making and treaty unmaking, and so many other methods for transnational dispute management." With articles from leading authorities on timely topics of regional and substantive interest, the anniversary issue is no different.

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# Conference Announcement: What Law Governs International Commercial Contracts?

On October 18, 2013, Brooklyn Law School is hosting an important symposium on the question of what law governs international commercial contracts. A link to the event is here. Below is a short description of the symposium. This should be of great interest to private international lawyers and the international arbitration community.

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What Law Governs International Commercial Contracts? Divergent Doctrines and the New Hague Principles

Friday, October 18 9:15 am-3:15 pm

Brooklyn Law School Subotnick Center 250 Joralemon Street Brooklyn, New York

**Co-Sponsors** Dennis J. Block Center for the Study of International Business Law
*Brooklyn Journal of International Law*

**About the Symposium** With the continued dramatic growth of international commerce, a critical question has become even more important: What law governs the contracts behind the commerce? Key issues include:

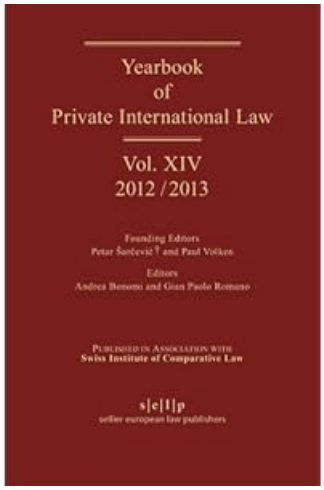
- In much of the world, courts accept the choice of the parties to a contract as to what law will govern it – but this principle is not accepted everywhere. Even in nations where it is accepted, differences abound.
- Should the ability of parties to select the law governing their contract be approached differently in the increasingly prevalent world of international commercial arbitration?
- In many arbitral systems, parties may select not only the law of a sovereign state, but also "rules of law" emanating from non-state sources, such as "principles" promulgated by international organizations. Should courts show the same deference to the parties' choice of non-state law?

The Hague Principles on Choice of Law in International Contracts, prepared by the Hague Conference on Private International Law and now nearing completion, are expected to be quite influential, both in establishing the principle of party autonomy to select the law governing commercial contracts and in developing the principle and its limits.

This symposium addresses the important issues described above – from the perspectives of both current law and the "best practices" represented by the draft Hague Principles.

# Yearbook of Private International Law, Vol. XIV (2012-2013)

The latest volume of the Yearbook of Private International Law was just released.




**Doctrine**

- Marc Fallon & Thalia Kruger, The Spatial Scope of the EU's Rules on Jurisdiction and Enforcement of Judgments: From Bilateral Modus to Unilateral Universality?
- Pierre Mayer, Conflicting Decisions in International Commercial Arbitration
- Horatia Muir Watt, A Semiotics of Private International Legal Argument
- Thomas Kadner Graziano, Solving the Riddle of Conflicting Choice of Law Clauses in Battle of Forms Situations: The Hague Solution
- Sirko Harder, Recognition of a Foreign Judgment Overturned by a Non-Recognisable Judgment
- Marta Requejo Isidro, The Use of Force, Human Rights Violations and the Scope of the Brussels I Regulation

**A General Part for European Private International Law?**

- Stefan Leible & Michael Müller, The Idea of a "Rome 0 Regulation"
- Luís de Lima Pinheiro, The Methodology and the General Part of the Portuguese Private International Law Codification: A Possible Source of

Inspiration for the European Legislator?

**Protection of Personality Rights**

- William Bennett, New Developments in the United Kingdom: The Defamation Act 2013
- Laura E. Little, Internet Defamation, Freedom of Expression, and the Lessons of Private International Law for the United States
- Michel Reymond, Jurisdiction in Case of Personality Torts Committed over the Internet: A Proposal for a Targeting Test
- Thomas Thiede, A Topless Duchess and Caricatures of the Prophet Mohammed: A Flexible Conflict of Laws Rule for Cross-Border Infringements of Privacy and Reputation

**The Chinese Private International Law Acts: Some Selected Issues**

- Jin HUANG Creation and Perfection of China's Law Applicable to Foreign-Related Civil Relations
- Yujun Guo, Legislation and Practice on Proof of Foreign Law in China
- Yong Gan, Mandatory Rules in Private International Law in the People's Republic of China
- Qisheng He, Changes to Habitual Residence in China's lex personalis
- Guangjian Tu, The Codification of Conflict of Laws in China: What Has/Hasn't Yet Been Done for Cross-Border Torts?
- Wenwen Liang, The Applicable Law to Rights in rem under the Act on the Law Applicable to Foreign-Related Civil Relations of the People's Republic of China
- Weidong Zhu, The New Conflicts Rules for Family and Inheritance Matters in China

## News from Brussels

- Susanne Knöfel / Robert Bray, The Proposal for a Common European Sales Law: A Snapshot of the Debate
- Maria Álvarez Torne, Key Points on the Determination of International Jurisdiction in the New EU Regulation on Succession and Wills

## National Reports

- Adi Chen, The Limitation and Scope of the Israeli Court's International

Jurisdiction in Succession Matters
- Sandrine Giroud, Do You Speak Mareva? How Worldwide Freezing Orders Are Enforced in Switzerland
- Anil & Ranjit Malhotra, All Aboard for the Fertility Express: Surrogacy and Human Rights in India
- Tuulikki Mikkola, Pleading and Proof of Foreign Law in Finland
- Zeynep Derya Tarman, The International Jurisdiction of Turkish Courts on Personal Status of Turkish Nationals

**Forum**

- Rui Pereira Dias, Suing Corporations in a Global World: A Role for Transnational Jurisdictional Cooperation?
- Johanna Guillaumé, The Weakening of the Nation-State and Private International Law: The "Right to International Mobility"
- Tamas Dezso Czigler / Izolda Takacs, Chaos Renewed: The Rome I Regulation vs Other Sources of EU Law: A Classification of Conflicting Provisions

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# US Court Enforces Award Nullified in Country of Origin

On August 27th, 2013, the U.S. District Court for the Southern District of New York held in Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. PEMEX–Exploración y Productión that an arbitral award made in Mexico could be enforced in the U.S. despite being nullified by a Mexican Court.

The arbitration was conducted in Mexico City in accordance with the rules of the International Chamber of Commerce. The plaintiff was a subsidiary of a Texan company, the defendant an instrumentality of the Mexican state.

In September 2011, the Mexican Eleventh Collegiate Court on Civil Matters of the Federal District held that the award was invalid, because the arbitrators were not

competent to hear and decide cases brought against the sovereign, or an instrumentality of the sovereign, and that proper recourse of an aggrieved commercial party is in the Mexican district court for administrative matters. The court based its decision in part on a statute that was not in existence at the time the parties' entered their contract.

The U.S. Court held that the Mexican judgment violated basic notions of justice in that it applied a law that was not in existence at the time the parties' contract was formed and left the plaintiff without an apparent ability to litigate its claims. As a consequence, it declined to defer to the Mexican Court's ruling, and confirmed the Award.

French courts also enforce awards nullified in their country of origin. An important difference in the US doctrine is the focus on the foreign judgment nullifying the relevant award. U.S. court in principle defer to judgments nullifying arbitral awards and thus enforce them. In *Termo Rio*, it was held:

> *when a competent foreign court has nullified a foreign arbitration award, United States courts should not go behind that decision absent extraordinary circumstances not present in this case.*

The US Court distinguished this case from *Termo Rio* and *Baker Marine*, where US Courts had deferred to foreign judgments:

> *this is a very different case from Baker Marine and from TermoRio. In neither of those cases did the annulling court rely on a law that did not exist at the time of the parties' contract. In both Baker Marine and TermoRio, the nullification was based on the failure of arbitrators to follow proper procedure. The courts of Nigeria and Colombia did not hold that the cases could not be subject to arbitration, and therefore there was no contradiction between the government entities' agreements to arbitrate and the courts' rulings. Here, in contrast, the Eleventh Collegiate Court ruled that the entire case was not subject to arbitration based on public policy grounds, a ruling that was at odds with PEP's own agreement, the PEMEX enabling statute, and the law of Mexico at the time of contracting and the commencement of arbitration.*

*H/T: Sébastien Manciaux*

# Fellowship Announcements

With thanks to Professor S.I. Strong for bringing these openings to our attention, there are serveral fellowships currently accepting applications that might be of interest to our readers.

The first position is the Brandon Research Fellowship at the Lauterpacht Centre for International Law at the University of Cambridge in the United Kingdom. The Brandon Fellowship supports research on various topics of international public and private law, including international arbitration. Further details are available at http://www.lcil.cam.ac.uk/news/content/brandon-research-fellowships-international-law-2014 . The closing date for applications is September 23, 2013.

The second position is also based at the Lauterpacht Centre. This fellowship is sponsored by the British Red Cross and involves research relating to the International Committee of the Red Cross Study on Customary International Humanitarian Law. More information can be found at http://www.redcross.org.uk/About-us/Jobs or by contacting Elizabeth Knight on EKnight@redcross.org.uk or 020 7877 7452 quoting ref number UKO 46734. The closing date is September 22, 2013.

The final position is the U.S. Supreme Court Fellowship in Washington, D.C. Four fellowships are awarded each year, and several of the positions provide the opportunity to consider matters relating to international and comparative law. Although the fellowships are affiliated with the U.S. Supreme Court, there does not appear to be a requirement that candidates be U.S. nationals, although applicants from outside the United States should check. The program has been significantly revamped this year and is now open to both junior and mid-career candidates. Further information is available at http://www.supremecourt.gov/fellows/default.aspx. Applications are due by November 15, 2013.

# Hague Academy, Summer Programme for 2014

***Private International Law***

***Second Period: 28 July-15 August 2014***

**General Course**

4-15 August

*Arbitration and Private International Law:* George A. BERMANN, Columbia University School of Law

**Special Courses**

28 July-1 August

* Renvoi *in Private International Law – The Technique of Dialogue between Legal Cultures:* Walid KASSIR, Université Saint-Joseph

*Legal Certainty in International Civil Cases:* Thalia KRUGER, University of Antwerp

* *Circulation of Cultural Property, Choice of Law and Methods of Dispute Resolution:* Manlio FRIGO, University of Milan

4-8 August

*Maintenance in Private International Law, Recent Developments:* Christoph BENICKE, University of Giessen

* *The International Adoption of Minors and Rights of the Child:* María Susana

NAJURIETA, University of Buenos Aires

11-15 August

*Limitations on Party Autonomy in International Commercial Arbitration:* Giuditta CORDERO-MOSS, University of Oslo

* *International Air Passenger Transport:* Olivier CACHARD, University of Lorraine

*in French, with English translation.

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# Woodward on Legal Uncertainty and Aberrant Contracts

William J. Woodward Jr. (Santa Clara Law School) has posted Legal Uncertainty and Aberrant Contracts: The Choice of Law Clause on SSRN.

> *Legal uncertainty about the applicability of local consumer protection can destroy a consumer's claim or defense within the consumer arbitration environment. What is worse, because the consumer arbitration system cannot accommodate either legal complexity or legal uncertainty, the tendency will be to resolve cases in the way the consumer's form contract dictates, that is, in favor of the drafter. To demonstrate this effect and advocate statutory change, this article focuses on fee-shifting statutes in California and several other states. These statutes convert very common one-way fee-shifting terms (consumer pays business's attorneys fees if business wins but not the other way around) into two-way fee-shifting provisions (loser pays winner's fees in all cases). As written, these statutes level the lopsided playing field created by the drafter and, indeed, may give consumers access to lawyers in cases where their claims or defenses are strong. But choice of law provisions, found in the same*

*consumer forms, introduce near-impenetrable uncertainty into the applicability of those same statutes, thereby reducing or eliminating the intended statutory benefits. Statutory change is needed to restore the intended benefits of the otherwise applicable fee-shifting statutes (and of other local consumer protection similarly degraded by drafters' choice of law clauses); the article concludes by presenting a roadmap for state statutory reform.*

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# PhD Positions in Private International Law in Luxembourg

The Faculty of Law of the University of Luxembourg will be seeking to recruit several PhD candidates in Private International Law.

Candidates should be PhD students who will be expected to work on their doctorate, to teach a few hours per week (one to three) and to contribute to research projects in private international law, mostly under my supervision. They are 3-year contracts, which can be extended for one year.

Ideally, candidates would hold a Master's degree in private international law or in international dispute resolution (litigation or arbitration). Their language skills should be sufficient to work in a multilingual environment. Skills in another social science (economics, political science, etc…) would be an advantage.

Applications should include:

- A motivation letter.
- A detailed curriculum vitae with list of publications and copies thereof, if applicable.
- A transcript of concluded university studies.
- The name, current position and relationship to the applicant, of one referee.

They should be sent to me by email (gilles.cuniberti@uni.lu). I am also available to

answer any questions at the same address.

Deadline for applications: September 1st, 2013.

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# Brand on Implementing the 2005 Hague Convention

Ronald A. Brand (University of Pittsburgh School of Law) has posted Implementing the 2005 Hague Convention: The EU Magnet and the US Centrifuge on SSRN.

> *Competence for the development of rules of private international law has become more-and-more centralized in the European Union, while remaining diffused in the United States. Nowhere has this divergence of process in private international law development been clearer than in the approach each has so far taken to the ratification and implementation of the 2005 Hague Convention on Choice of Court Agreements. In Europe, ratification has been preceded by the 2012 Recast of the Brussels I Regulation, coordinating internal and external developments, and reaffirming Union competence for future developments, both internally and externally. In the United States, debate has arisen over whether the Convention should be implemented in a single federal statute – as was done for the New York Convention in the Federal Arbitration Act – or through state-by-state enactment of a Uniform Act promulgated by the National Conference of Commissioners on Uniform State Laws. These differences in approach are important to future negotiations in multilateral fora such as The Hague Conference on Private International law, UNCITRAL, and UNIDROIT. They demonstrate a coherence of approach within the EU which attracts not only its own Member States, but also external constituencies in international negotiations, and diffuse development of the law in the United States, which tends to make leadership in multilateral negotiations difficult.*

The paper is forthcoming in the *Liber Amicorum Alegrias Borras*.