

Latest Issue of “Praxis des Internationalen Privat- und Verfahrensrechts” (2/2010)

Recently, the March/April issue of the German law journal “Praxis des Internationalen Privat- und Verfahrensrechts” (**IPRax**) was published.

This issue contains some of the papers presented at the Brussels I Conference in Heidelberg last December. The remaining papers will be published in the next issue.

Here is the contents:

- **Rolf Wagner:** “Die politischen Leitlinien zur justiziellen Zusammenarbeit in Zivilsachen im Stockholmer Programm” - the English abstract reads as follows:

Since the coming into force of the Amsterdam Treaty in 1999 the European Community is empowered to act in the area of civil cooperation in civil and commercial matters. The “Stockholm Programme - An open and secure Europe serving and protecting the citizens” is the third programme in this area. It covers the period 2010-2014 and defines strategic guidelines for legislative and operational planning within the area of freedom, security and justice. This article provides an overview of the Stockholm Programme.

- **Peter Schlosser:** “The Abolition of Exequatur Proceedings - Including Public Policy Review?”

The - alleged - basic paper to which reference is continuously made when exequatur proceedings and public policy are discussed is a so-called Tampere resolution. The European Council convened in a special meeting in the Finnish city in 1999 to discuss the creation of an area of security, freedom and justice in the European Union. The outcome of this meeting was not a binding text which would have been adopted by something like a plenary session of the heads of States and Governments. Instead, the document is titled “presidency’s conclusion” and is a summary drafted by the then Finish president. It is a

declaration of intention for the immediate future, pre-dominantly concerned with criminal and asylum matters and not binding on any European legislator. As far as “civil matters” are concerned, the “presidency’s conclusion” reads as follows: “In civil matters the European Council calls upon the Commission to make a proposal for further reduction of the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgment in the requested state. As a first step, these intermediate procedures should be abolished for titles in respect of small consumer or commercial claims and for certain judgments in the fields of family litigation (e.g. on maintenance claims and visiting rights). Such decisions would be automatically recognized throughout the Union without any intermediate proceedings or grounds for refusal of enforcement. This could be accompanied by the setting of minimum standards on specific aspects of civil procedural law. “The conclusion does not say whether it would be advisable to generally abolish intermediate procedures. It only states that intermediate procedures should be further “reduced”. If one takes the view that the “first step” of reduction should be followed by a second or third one, one could refer to the regulation on “Creating a European Enforcement Order for Uncontested Claims” and to the regulation on “Creating a European Order for Payment Procedure”. Not a single word mentions that at the end of all steps taken together the intermediate procedure or any control whatsoever in the requested state shall become obsolete and that even the most flagrant public policy concern shall become irrelevant. The need for a residuary review in the requested state is powerfully demonstrated by a recent ruling of the French Cour de Cassation: A woman resident in France had been ordered by the High Court of London to pay to the Lloyd’s Society no less than £ 142,037. The judgment did not give any reasons for the order except for stating that “the defendant had expressed its willingness not to accept the claim and that the judge accepted the claim pursuant to rule 14 par. 3 of the Civil Procedure Rules.” The relevant text of this provision is drafted as follows: “Where a party makes an admission under rule 14.1.2 (admission by notice in writing), any other party may apply for judgment on the admission. Judgment shall be such judgment as it appears to the court that the applicant is entitled for on the admission.” The judgment neither revealed at all the dates of the respective admissions made during the proceedings although the defendant had expressed its willingness to defend the case nor referred to any document produced in the course of the proceedings. One cannot but approve the ruling of the French Cour de Cassation confirming

the decision of the Cour d'Appel of Rennes. The courts held that the mere abstract reference to rule 14 of the Civil Procedure Rules was tantamount to a total lack of reasons and that the recognition of such a judgment would be incompatible with international public policy. Further, that the production of documents such as a copy of the service of the action could not substitute the lacking reasoning of the judgment. The importance of the possibility to invoke public policy when necessary to hinder recognition of a judgment was evident also in the earlier Gambazzi case of the European Court of Justice (ECJ). In that case the defendant was penalized for contempt of court by an exclusion from further participation in the proceedings. The reason for the measure was the defendant's violation of a freezing and disclosure order. The ECJ ruled that in the light of the circumstances of the proceedings such a measure had to be regarded as grossly disproportionate and, hence, incompatible with the international public policy of the state where recognition was sought. In its final conclusions, general advocate Kokott emphasized that a foreign judgment cannot be recognized if the underlying proceedings failed to conform to the requirement of fairness such as enacted in Art. 6 of the European Convention on Human Rights. It is worth noting that also Switzerland refused to enforce the English judgment. The Swiss Federal Court so decided because after having changed its solicitor, Gambazzi's new solicitor was refused to study the files of the case. Even in the light of the pertinent case law regarding a very limited review in the requested state and the known promptness and efficiency of exequatur proceedings, the Commission still intends to abolish this "intermediate measure". In its Green Paper it literally states: "The existing exequatur procedure in the regulation simplified the procedure for recognition and enforcement of judgment compared to the previous systems under the 1968 Brussels Convention. Nevertheless, it is difficult to justify, in an internal market without frontiers that citizens and businesses have to undergo the expenses in terms of costs and time to assert their rights abroad." The context reveals that the term "the expenses" relates to the expenses of the exequatur procedure. However, the European Union is not the only internal market covering multiple jurisdictions. How is the comparable issue dealt with in other integrated internal markets? This is to be shown in the first part of this contribution. In the second part, I shall analyze in more detail and without any prejudice the ostensibly old-fashioned concept of exequatur.

- **Paul Beaumont/Emma Johnston:** “Abolition of the Exequatur in Brussels I: Is a Public Policy Defence Necessary for the Protection of Human Rights?”

The principle of mutual recognition of judicial decisions and the creation of a genuine judicial area throughout the European Union was endorsed in Tampere in October 1999. Thus, one of the primary objectives of the Brussels I is to enhance the proper functioning of the Internal Market by encouraging free movement of judgments. It is clear that in Tampere the European Council wanted to start the process of abolishing “intermediate measures” ie the declaration of enforceability (exequatur). It went further and said that in certain suggested areas, including maintenance claims, the “grounds for refusal of enforcement” should be removed. It did not specifically require the abolition of intermediate measures in relation to Brussels I and certainly did not require the abolition of the “grounds for refusal of enforcement” in Brussels I. The European Council in Brussels in December 2009, after the entry into force of the Lisbon Treaty and with the adoption of the Stockholm Programme, is still committed to the broad objective of removing “intermediate measures”. This is a process to be “continued” over the 5 years of the Stockholm Programme from 2010–2014 but not one that has to be “completed”. The European Council no longer says anything about abolishing the “grounds for refusal of enforcement”. Article 73 of the Brussels I Regulation obliged the European Commission to evaluate the operation of the Regulation throughout the Union and to produce a report to the European Parliament and the Council. In 2009 the Commission produced such a Report and a Green Paper on the application of the Regulation, which proposes a number of reforms. One of the main proposals concerns the abolition of exequatur proceedings for all judgments falling within the ambit of the Regulation. Brussels I is built upon the foundation of mutual trust and recognition and these principles are the driving force behind the proposed abolition of exequatur proceedings. Article 33 of Brussels I states that no special procedure is required to ensure recognition of a judgment in another Member State. At first glance this provision seems to imply that recognition of civil and commercial judgments within the EU is automatic. The reality is however, somewhat more complex than that. In order for a foreign judgment to be enforceable, a declaration of enforceability is required. At the first instance, it involves purely formal checks of the relevant documents with no opportunity for the parties or the court to raise any of the grounds for refusal of

enforcement. An appeal against the declaration of enforceability by the judgment debtor will trigger the application of Articles 34 and 35 which provide barriers to the recognition and enforcement of judgments. According to the European Court of Justice (ECJ), any such obstacle must be interpreted narrowly, "inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of the [Regulation]" The overwhelming majority of cases are successful and if the application is complete, then the decision is likely to be made within a matter of weeks. The Commission is of the view that given the high success rate of applications, the exequatur proceedings merely hinder free movement of judgments at the expense of the enforcement creditor and provide for delays for the benefit of the male fides judgment debtor. It is with this in mind that the Commission asks whether, in an Internal Market without frontiers, European citizens and businesses should be expected to sacrifice time and money in order to enforce their rights abroad. It is argued that in the Internal Market, free movement of judgments is necessary in order to ensure access to justice. Exequatur proceedings can create tension between Member States, creating suspicion and ultimately destroying mutual trust. It will be seen however, that total abolition of exequatur proceedings would effectively mean judgments must be recognised in every case with no ground for refusal unless the grounds for refusal are moved to the actual enforcement stage. Total abolition of the grounds for refusing enforcement would result in an unfair bias in favour of the judgment creditor to the detriment of the judgment debtor. The Commission on the one hand proposes to abolish the exequatur procedure provided by Brussels I but on the other hand, suggests that some form of "safeguard" should be preserved. The Green Paper tentatively suggests that a special review a posteriori could be put in place which would in effect create automatic recognition of a judgment reviewable only after becoming enforceable. Such an approach would enhance judicial co-operation and aid progressive equivalence of judgments from other Member States. Yet it is questioned whether allowing an offending judgment to be enforced in the first place, only to review it a posteriori is the most effective way of dealing with the problem. It is instead argued that a provision similar to that of Article 20 of the Hague Child Abduction Convention could strike a fair balance between the interests of the judgment creditor and debtor. As Brussels I stand it is open to the judgment debtor to appeal the declaration of enforceability. The appellant may claim a breach of public policy or lack of due process in the service of the documents instituting proceedings which may amount to a breach of Article 6 of

the European Convention on Human Rights (ECHR). The grounds to refuse recognition of a foreign judgment are restrictive and under no circumstances may the “substance” of the judgment be reviewed. Such a review of the substance would seriously undermine the mutual trust between courts of the European Union. However, the public policy exception does allow States to uphold essential substantive rules of its own system by refusing to enforce judgments from other EU States that infringe the fundamental principles of its own law. The question is whether Member States will be prepared to abandon the “public policy” defence and thereby give up this right to protect the fundamental principles of their substantive law? Will they be content to have a defence that simply focuses on protecting the fundamental rights of the defendant?

- **Horatia Muir Watt:** “Brussels I and Aggregate Litigation or the Case for Redesigning the Common Judicial Area in Order to Respond to Changing Dynamics, Functions and Structures in Contemporary Adjudication and Litigation”

Recent litigation relating to the recognition and enforcement of US class action judgments or settlements under Member States’ common private international law (still applicable to relationships with third States), along with current trends in their domestic legislation towards the acceptance of representative, class or group actions, herald a whole set of new issues linked to the appearance of collective redress within the common area of justice. It is the thesis of this paper that the Brussels I Regulation in its present form is ill-equipped to deal with the onslaught of aggregate claims, both in its provisions on jurisdiction and as far as the free movement of judgments and settlements is concerned. It may well be that the same could be said for the conflict of laws rules in Regulations Rome I and Rome II, which were also designed to govern purely individual relationships. Indeed, one may wonder whether the difficulties which arise under this heading are not the sign of an at least partial obsolescence of the whole European private international law model, insofar as it rests upon increasingly outdated conceptions of the dynamics, function, structure and governance requirements of litigation and adjudication. Although this conclusion may seem radical, it is in fact hardly surprising. Indeed, as it has been rightly observed, within the civilian legal tradition which is the template for the conceptions of adjudication and jurisdiction underlying the

Brussels I Regulation (like the other private international law instruments applicable in the common area of justice), the recourse to group litigation, which is now beginning to appear in the European context as one of the most effective means of improving ex post accountability of providers of mass commodities freely entering the market, represents a “sea-change” in legal structures, away from exclusive reliance on public enforcement.

▪ **Burkhard Hess:** “Cross-border Collective Litigation and the Regulation Brussels I”

The European law of civil procedure is guided by the “leitmotiv” of two-party-proceedings. Litigation is generally regarded as taking place between one specific plaintiff and one specific defendant. Especially Article 27 JR (JR = Brussels I Regulation) which concerns pendency and Articles 32 and 34 No. 3 JR which address res judicata and conflicting judgments, are based on this concept. However, the idea of collective redress is not entirely new to European cross border litigation. Article 6 No. 1 JR explicitly states that several connected lawsuits can be brought to the courts of a Member State where one of the defendants is domiciled. When related actions are pending in different Member States, the court which was seized later may stay its proceedings. By providing for a discretionary stay, Article 28 JR also includes situations of complex litigation. Several cases concerning the JR have dealt with collective redress. The most prominent case is VKI ./ Henkel. In this case, an Austrian consumer association sought an injunction against a German businessman. Another example is the Lechouritou case, where approximately 1000 Greek victims of war atrocities committed during WW II sued the German government for compensation. The famous Mines de Potasse d’Alsace case involved damages caused to dozens of Dutch farmers by the pollution of the river Rhine. It goes without saying that in addition to the case law presented, several cross-border collective lawsuits have been filed in the Member States. These lawsuits mainly deal with antitrust and (less often) product liability issues. Finally, the Injunctions Directive 98/27/EC permits consumer associations from another state to institute proceedings for the infringement of consumer laws in the Member State where the infringement was initiated. However, this directive has not been very successful. It has only been applied in a few cross-border cases.

▪ **Luca G. Radicati di Brozolo:** “Choice of Court and Arbitration Agreements and the Review of the Brussels I Regulation”

Similarities and differences between choice of court and arbitration agreements in the perspective of the review of Regulation (EC) 44/2001 Choice of court agreements and arbitration agreements have much in common. Both involve the exercise of party autonomy in the designation of the judicial or arbitral forum for the settlement of disputes and have the effect of ousting the default jurisdiction. Both aim to ensure predictability and to allow the parties to choose the forum they consider best suited to adjudicate their dispute. The importance of these goals is by now largely acknowledged especially in international commercial transactions. Although it has not always been a foregone conclusion that parties could exclude the jurisdiction of local courts in favor of foreign ones or of arbitration, today most systems recognize the role of procedural party autonomy in this context. Also the policy reasons for favoring party autonomy in the choice of forum are largely similar for both types of agreements. Because of the broad recognition of the crucial role of these agreements, there is a growing concern that their effects are not sufficiently guaranteed in the European Union. It is not uncommon that proceedings are brought before a court of one member State in alleged violation of a choice of the courts of another member State or of arbitration by litigants who appear to attempt to circumvent these agreements by exploiting the perceived inefficiencies of some courts, or their reluctance to enforce such agreements effectively. In a number of well known, the European Court of Justice has found itself unable – quite correctly, in light of the existing text of Regulation (EC) 44/2001 (the “Brussels Regulation”) – to accept interpretations aimed at preventing such situations, foremost amongst which anti-suit injunctions. Partly for these reasons forum selection and arbitration agreements (and more generally arbitration) are amongst the topics on which the Commission has invited comments in the Green Paper on the review of the Regulation.

▪ **Urs Peter Gruber:** “Die neue EG-Unterhaltsverordnung” – the English abstract reads as follows:

Actually, the relevant rules on jurisdiction, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations are

contained in the Brussels I Regulation. In the near future, a new Regulation, which specifically deals with maintenance obligations, will apply. This new Regulation will bring about several significant changes. It will considerably strengthen the position of the maintenance creditor, in particular in the field of recognition and enforcement of decisions. It will contain rules on issues, which up to now have been left to the national legislators. Therefore, it can be said that the new Regulation marks a new level of integration in the field of European civil procedure.

- **Ansgar Staudinger:** “Streitfragen zum Erfüllungsortsgerichtsstand im Luftverkehr” - the English abstract reads as follows:

In case of carriage of passengers by air the Bundesgerichtshof has to interpret article 5 (1) lit. b Brussels I-Regulation. In the author’s view the grounds as well as the conclusion deserve absolute consent. However there persist several questions: The location of the place of the arrival or departure in the state, where the defendant carrier is domiciled or in a Non Member State of the EU does not a priori exclude the application of article 5 (1) lit. b Brussels I-Regulation including its passenger’s voting right. The customer factual only stay an option for that place, which neither corresponds with the defendants domicile nor a EU-Non Member State. Are both connection factors located outside the Member State, remains a recourse to article 5 (1) lit. a Brussels I-Regulation. Waiving the courts jurisdiction for the place of performance of the obligation in question by a standard form contract through the carrier and stipulating an exclusive conduct of a case in the Member State of his domicile seems to be improper in terms of the Council Directive 93/13/EEC on unfair terms in consumer contracts respectively §§ 307 (1), 310 (3) no. 3 of the “Bürgerliches Gesetzbuch” opposite to consumers, which are domiciled in the EU-Member State of the arrival or departure. This applies particularly when claims according to the Regulation (EC) No. 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights are concerned.

- **Rolf Wagner:** “Die Entscheidungen des EuGH zum Gerichtsstand des Erfüllungsorts nach der EuGVVO - unter besonderer Berücksichtigung der Rechtssache Rehder” - the English abstract reads as follows:

The article deals with the place of performance as a base for jurisdiction. There has been a lot of case law by the ECJ concerning Art. 5 No. 1 Brussels Convention: According to this case law, in general the place of performance had to be determined for each obligation separately (de Bloos-rule) according to choice of law rules of the forum (Tessili-rule). This system, however, has been strongly criticised. Thus, after long discussions during the negotiations concerning the revision of the Brussels Convention, a new wording was found for Art. 5 No. 1 Brussels Regulation, even though it was a compromise: The Brussels Regulation now defines at least the place of performance for the majority of contracts in international trade, i. e. for contracts for the sale of goods and contracts for the provision of services. Therefore it does not come as a surprise that the ECJ has been asked to give guidance in the interpretation of this definition. The present article comments on three important judgments by the ECJ connected to this question. In particular the author analyses in depth the judgment given in Rehder: In this case, the ECJ determined the place of performance with regard to contracts for the transport of passengers. Thus the author concludes that the European legislator neither could nor will be able to find a perfect solution. Therefore, patience is required with regard to the interpretation of the new definition because there are still open questions which have to be answered by the ECJ.

▪ **Gilles Cuniberti:** “Debarment from Defending, Default Judgments and Public Policy”

The origin of the Gambazzi case is to be found in the collapse of a Canadian investment company, Castor Holding Ltd., at the beginning of the 1990s. Castor had been incorporated in Montreal in 1977. Its first president was a German-born Canadian businessman named Karsten von Wersebe. In the 1980s, however, its main manager became a German national named Otto Wolfgang Stolzenberg. Marco Gambazzi was a Swiss lawyer who had specialized in assets management. He first invested in Castor, and was then offered to become a member of the board of directors of the company. In 1992, however, Castor was declared insolvent. Dozens of suits followed. First, the trustee (syndic) sought to challenge payments made by Castor before 1992. He focused on a Can\$ 15 million distribution of dividends to shareholders at the end of 1990, which he was eventually able to claim back after establishing that the company was already insolvent in 1990. More importantly, many investors sued the auditors

of Castor, Coopers & Lybrand, who had certified its accounts between 1978 and 1991. After more than ten years of litigation, there was still no judgment on the merits, which led the Montreal Court of appeal to conclude that "it is not exaggerated to say that the Castor Holding case has been an exceptional one in Canadian legal history, a genuine judicial derailment". In 1996, a remarkable decision was made by a handful of Canadian investors. DaimlerChrysler Canada and certain pension and other benefit funds that it had established for its employees decided to initiate proceedings in London against four individuals formerly involved in the management of Castor (Stolzenberg, Gambazzi, von Wersebe and Banziger) and more than thirty corporate entities allegedly related to them. The plaintiffs argued that they had been defrauded by the defendants in Canada, and thus sought restitution. The reason why the proceedings were brought to England is unclear. There was virtually no connection between the case and the United Kingdom. The only exception was that Stolzenberg once owned a house in London, as he owned others in Paris and, it seems, Germany, Canada and South America. But even that house, which was the sole connecting factor which was likely to give jurisdiction to the English court over the entire case and the thirty-six defendants, was sold before the defendants were served with the writ instituting the proceedings in March 1997. Unsurprisingly, therefore, the jurisdiction of the English court was challenged. The case went up to the House of Lords which eventually ruled that the date which mattered to appreciate whether one defendant was domiciled in England and could thus be the anchor allowing to drag an infinite number of co-defendants to London was the time when the writ was issued by the English court. In this case, that meant May 1996, because the English court had permitted the plaintiffs to postpone service of the writ in order to enable them, first, to conduct *ex parte* hearings of several days for the purpose of convincing the court that it should grant a world wide freezing order, and, second, to carefully prepare simultaneous service so that none of the defendants could escape the English trial by initiating parallel proceedings elsewhere. The only reasonable explanation for choosing to bring the case to England is the availability of powerful interim measures which have turned London into a magnet forum for international fraud cases. English world wide freezing orders and, even more importantly, English disclosure orders seem to be remarkably and uniquely efficient in the process of tracing stolen assets, so much so that an English court once called them one of the two nuclear weapons of English civil procedure. If other jurisdictions have not been able to tackle as efficiently the

issue of international frauds, alleged victims cannot be blamed for seeking justice where it can effectively be achieved. But the quest for justice, or for making England the jurisdiction of choice, cannot justify everything. In this case, available nuclear weapons were used to their full capacity. This certainly enabled plaintiffs to secure a decisive victory. But this was at the costs of the fairness that the English legal system ought to have afforded to the defendants.

- **Herbert Roth** on the ECJ's judgment in case C-167/08 (Draka NK Cables Ltd.): "Das Verfahren über die Zulassung der Zwangsvollstreckung nach Art. 38 ff. EuGVVO als geschlossenes System"
- **Christian Heinze**: "Fiktive Inlandszustellungen und der Vorrang des europäischen Zivilverfahrensrechts" - the English abstract reads as follows:

Some EU Member States' national procedural laws allow or used to allow service on defendants domiciled in another EU Member State by a form of "fictitious" service within the jurisdiction. Under these provisions and certain further requirements, service may be deemed to take effect at the moment when a copy of the document is lodged with a national authority or at the time when it is sent abroad for service, irrespective of the time when the recipient actually receives the copy. Even if the national law deems this form of service to take effect within the jurisdiction, the following article argues that the practice is incompatible with Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents, because it impairs the effectiveness of the European rules, in particular as concerns the date of service.

- **Yuanshi Bu**: "Danone vs. Wahaha - Anmerkungen zu Schiedsverfahren mit chinesischen Parteien" - the English abstract reads as follows:

The legal feud between Danone and Wahaha, both being leading beverage manufacturers in the Chinese market, had developed into one of the most significant investment disputes in the history of the People's Republic of China. A number of arbitration proceedings and civil actions were filed inside and outside China. In particular, several arbitration proceedings pending before the Swedish Chamber of Commerce since May 2007, the outcome of which was supposed to largely decide that of the disputes between the two parties, had

drawn considerable public attention. Despite the surprising settlement shortly before the arbitration tribunals rendered their decisions, the disputes between Danone and Wahaha offer a valuable opportunity to inquire into the law and practice of arbitration relating to foreign investments in China. This case note will first comment on the award of a Chinese domestic arbitration proceeding dealing with one of the major issues of the whole disputes - the ownership of the trademark "Wahaha" - and then discuss questions that were relevant to the proceeding in Stockholm.

- **Boris Kasolowsky/Magdalene Steup:** "Insolvenz in internationalen Schiedsverfahren - lex arbitri oder lex fori concursus" - the English abstract reads as follows:

The article deals with a recent English Court of Appeal decision which addresses the effects of the insolvency of a party to pending arbitration proceedings. The Court of Appeal concluded that the effects were to be determined by reference to English law and considered that the arbitration tribunal acted well within its jurisdiction when it ordered the proceedings to be continued. In reaching this Conclusion the Court of Appeal just as the arbitral tribunal and the High Court relied on the European Insolvency Regulation which forms part of English law. Being the first major court of an EU Member State to address the question of the insolvency of a party to pending arbitration proceedings by reference to the European Insolvency Regulation, the judgment is likely to serve as a signpost for what is to be expected in other Member States. The article further considers the likely impact of this particular decision on the future practice of choosing arbitration seats, and possibly also the timing for commencing arbitration proceedings. In doing so, the authors will consider in particular the decision of the Swiss Bundesgericht which, by contrast to the English Court of Appeal judgment, concludes that the relevant company law/the lex concursus (i.e. the provisions of law applicable to the party that happens to have become insolvent in the course of the proceedings) are decisive for the purposes of determining the effects of the insolvency of one of the parties on the continuation of the proceedings.

- **Erik Jayme** on the meeting of the European Group for Private International Law in Padua in September 2009: "Die Vereinheitlichung

des Internationalen Privat- und Verfahrensrechts in der Europäischen Union: Tendenzen und Widerstände Tagung der „Europäischen Gruppe für Internationales Privatrecht“ (GEDIP) an der Universität Padua”

- **Marc-Philippe Weller** on the Heidelberg symposium on the occasion of the 75th birthday of Prof. Dr. Dr. h.c. mult. Erik Jayme: “Symposium zu Ehren von Erik Jayme”
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October 2007 Round-Up: International Tort Claims, “Forum Non” Dismissals and Punitive Damages

This installment of significant developments will focus on salient issues that have been the subject of frequent, past posts on this website.

First, the United States Court of Appeals for the Second Circuit decided a compendium of Alien Tort Claim cases that raise an interesting question at the intersection of domestic and international law: that is, when determining whether a corporate defendant has “aided and abetted” a violation of international law, what law defines the test for “aiding and abetting.” *Khulumani v. Barclay National Bank* and *Ntsebeza v. DaimlerChrysler* (available [here](#)) concern the tort claims of a class of persons alive in South Africa between 1948 and 1993 who were affected by the apartheid regime. The defendants are 50 multinational corporations, and the claimed damages total over \$400 billion. The basic theory of the case is that defendants’ indirectly caused plaintiffs’ injuries by perpetuating the apartheid system (e.g. by providing loans to a “desperate South African government”), and that they indirectly profited from those acts which violated recognized human rights standards, but not necessarily the law of the place where those acts took place. The District Court dismissed the case as a non-justiciable political question, but also because “aiding and abetting” human rights violations – the gravamen of

the indirect causation and indirect harm claims – provided no basis for ATCA liability. A split panel of the Second circuit reversed. Amongst the other decisions intertwined in the 146 page opinion, the court determined that the appropriate test for aiding and abetting liability under the ATCA is set out in the Rome Statute of the International Criminal Court – that is, one is guilty if one renders aid “for the purpose of facilitating the commissions of a . . . crime.” This is a far more stringent test than the one argued by Plaintiffs, founded on the Restatement (Second) of Torts § 876(b), which pins liability if one “gives substantial assistance or encouragement” to another’s actions which he “knows” to “constitute a breach of duty.” While the case was kept alive and remanded for further consideration, commentators have begun to wonder whether Plaintiffs have won a pyrrhic victory: “[i]f the Rome Statute test for aiding and abetting is broadly adopted, few ATCA cases against corporations may clear summary judgment and go on trial.”

In a second notable case, the United States Court of Appeals for the Eleventh Circuit considered does a forum non conveniens dismissal of foreign plaintiffs in favor of Italian courts put the remaining American plaintiffs “effectively out of court” so as to justify appellate review of the dismissal? The panel held that it does. In *King v. Cessna Aircraft Co.*, the personal estates of 70 deceased individuals sued defendant for a tragic air accident in Milan, Italy. Sixty-nine of those plaintiffs were European, with one being American. The district court dismissed the claims of the European plaintiffs on forum non conveniens grounds, and stayed the action of the American plaintiff pending resolution by the Italian courts (because, in its view, the American plaintiff was entitled to “a presumption in favor of its chosen forum”). All plaintiffs appealed. Because one may not generally appeal a decision to stay proceedings, appellate jurisdiction turned on whether the American plaintiff was “effectively out of court” by the imposition of the stay. The Court held that that plaintiff:

“has for all practical effects been put out of court indefinitely while litigation whose nature, extent, and duration are unknown, is pending in Italy. The district court has held its hand while Italian courts assume or continue what amounts to jurisdiction over the merits of the lawsuit. Their decision of Italian law issues will be followed by the district court. The stay order does have the legal effect of preventing [the American plaintiff] from proceeding with his claims in federal court for an indefinite period of time, potentially for years. Because he has been effectively put out of court, we have jurisdiction to review

the order that did put him out. We do not mean that there are no differences between federalism and international comity for purposes of evaluating the merits of a stay order, as distinguished from deciding whether appellate jurisdiction exists to review the stay order . . . : “The relationship between the federal courts and the states (grounded in federalism and the Constitution) is different from the relationship between federal courts and foreign nations (grounded in the historical notion of comity).” . . . Those important differences do not, however, affect the extent to which a plaintiff is placed “effectively out of court,” which is the measure that defines our appellate jurisdiction over stay orders.”

On the merits, the court vacated the stay as improvident because “there is no indication when, if ever, the Italian litigation will resolve the claims raised in this case, and whether [the American plaintiff] will have a meaningful opportunity to participate in those proceedings.” The court did not consider the merits of the European plaintiff’s appeal of the forum non conveniens decision, preferring instead to remand the entire case for reconsideration in the event that the vacation of the stay, and the continuation of the lone American case here in the U.S., affects that decision.

Finally, in the latest salvo into the propriety and extent of punitive damage awards, the Supreme Court just granted certiorari in *Exxon Shipping Co., et al., v. Baker, et al.* (07-219). This case concerns a \$2.5 billion punitive damages award against Exxon Mobil Corp. and its shipping subsidiary for the massive oil spill in Alaska’s Prince William Sound in 1989. In agreeing to hear Exxon’s appeal, the Court will decide whether the company should be subject to punitive damages solely upon judge-made maritime law, which is in apparent contradiction of decades of legal history and subject to considerable discordance in the federal courts. The case also raises the question of whether, if maritime law does govern, this specific award is too high because it is said to be “larger than the total of all punitive damages awards affirmed by all federal appellate courts in our history.” The appeal also included the question of whether a verdict of that size was unconstitutional; separating this case from recent ones (see here), the Court did not agree to hear that last question. Nevertheless, this decision will have significant ramifications for international maritime concerns. Early reactions can be found here, here, and here. SCOTUSblog has a brief discussion and links to the briefs as well here.

Settled Expectations in a World of Unsettled Law: Choice of Law after the Class Action Fairness Act

Samuel Issacharoff (*New York University School of Law*) has made his forthcoming article in the *Columbia Law Review*, "**Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act**", available for download on SSRN. The abstract reads as follows:

*This Essay examines the pressure placed upon choice of law doctrine by the newly enacted Class Action Fairness Act ("CAFA"). The core argument is that current choice of law doctrine, which assumes fidelity to the forum state choice of law rules as its basic premise, corresponds poorly to the national scope of economic activity in cases brought into federal court under CAFA. The Essay argues that there needs to be some conformity between the national scale of contemporary economic activity and the state-by-state presumption of inherited conflict of laws doctrine in order to provide some sensible legal oversight of national market conduct. Because of the multiplicity of potential forums for litigation of national market activity, the inherited doctrines of *Klaxon Co. v. Stentor Electric Manufacturing Co.* and *Erie Railroad Co. v. Tompkins* do little to provide settled expectations about the substantive laws governing broad-scale economic conduct.*

The Essay offers an approach that should guide choice of law rules in the context of national market cases based on the need to facilitate common legal oversight of undifferentiated national market activity. The claim here is that conduct that arises from mass-produced goods entering the stream of commerce with no preset purchaser or destination should be treated as just that: goods in the national market. In the absence of national choice of law rules, this Essay suggests that courts should, as a default rule, apply the laws of the home state of the defendant to all standardized claims, regardless of the situs of the final injury. The upshot of this approach is to suggest a path for

future development of national market cases that have been brought into the federal courts as a result of CAFA.

The full article can be downloaded from [here](#).