

Radicati on Res Judicata of Arbitral Awards

Luca Radicati di Brozolo, who is a professor of law at the Catholic University of Milan and a partner at Bonelli Erede Pappalardo, has posted Res Judicata in International Arbitral Awards on SSRN. The abstract reads:

The paper analyses the sources of the res judicata effect of international arbitral awards. It discusses the problems inherent in the application of the rules of domestic law governing the res judicata effects of national judgments and the approach of international arbitrators and of national courts. It then proposes the development of ad hoc transnational principles to govern the subject matter, and focuses in particular on the Recommendations on Res Judicata in International Commercial Arbitration of the International Law Association.

Latest Issue of “Praxis des Internationalen Privat- und Verfahrensrechts” (3/2011)

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

Here is the contents:

- **Catrin Behnen:** “Die Haftung des falsus procurator im IPR - nach Geltung der Rom I- und Rom II-Verordnungen” - the English abstract reads as follows:

The extensive reform of the international law of obligations by the Rome I and

Rome II-Regulations raises the question of the future classification of the liability of the falsus procurator under international private law. Since the new regulations entered into force, the problem of classification has not only arisen at national law level, but also at the level of European Union Law. Most importantly, it must be questioned, whether the new Regulations contain overriding specifications regarding the classification of the liability of the falsus procurator that are binding for the Member States. This article discusses the applicable law on the liability of an unauthorised agent and thereby addresses the issue of whether normative requirements under European Union law are extant. Furthermore, the Article illustrates how the proposed introduction of a separate conflict of laws rule on the law of agency in the Draft Rome I-Regulation impinges on this question, even though this rule was eventually not adopted.

- **Ansgar Staudinger:** “Geschädigte im Sinne von Art. 11 Abs. 2 EuGVVO”
- the English abstract reads as follows:

The present essay discusses the decision of the European Court of Justice in the case of Voralberger Gebietskrankenkasse/WGV-Schwäbische Allgemeine – C-347/08. In this case, the court was concerned with the question whether, under Article 11 Paragraph 2 of the Council Regulation (EC) No. 44/2001 of 22 December 2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters a social insurance agency acting as the statutory assignee of the rights of the directly injured party has the right to bring an action directly against the insurer in the courts of its own Member State. The ECJ denies such a privilege, which is the correct decision in the author’s opinion, who, after having reviewed the ECJ’s judgement, also discusses the assignability of the decision to other conventions. Afterwards he raises the question to what extent legal entities, heirs or persons who claim compensation for immaterial damages, damages resulting of shock or alimony are allowed to sue the injuring party’s insurer at their own local forum.

- **Maximilian Seibl:** “Verbrauchergerichtsstände, vorprozessuale Dispositionen und Zuständigkeitsprobleme bei Ansprüchen aus c.i.c.” – the English abstract reads as follows:

The article firstly deals with the question as to whether and to what extent

international jurisdiction can be affected by pre-trial dispositions regarding the asserted claim by the parties to a lawsuit. Secondly, it examines the consequences resulting from the new EC Regulations Rome I and Rome II to the classification of claims out of culpa in contrahendo in terms of international jurisdiction. The background of the article consists of two decisions, one by the OLG (Higher Regional Court) Frankfurt/Main and one by the OLG München. The former concerned a case in which the defendant had pursued commercial resp. professional activities in the Member State of the consumer's domicile in accordance with Art. 15 sec. 1 lit. c) of the Brussels I Regulation at the time he concluded a contract with a consumer, but had ceased to do so before he was sued for damages in connection with the very contract. The latter - against which an appeal has meanwhile been dismissed by the BGH (German Federal High Court of Justice), cf. BGH, 10.2.2010, IV ZR 36/09 - concerned a case in which the party of a consumer contract had assigned his claim based on culpa in contrahendo to the plaintiff, so that the plaintiff could file a lawsuit against the other party of the contract. Here the question arose as to whether or not the jurisdiction norm of § 29a ZPO (German Code of Civil Procedure) - which provides a special forum for cases concerning consumer contracts negotiated away from business premises - was also applicable, if the plaintiff was not the person who had concluded the contract. The OLG München negated this question. Apart from that the court decided that jurisdiction in this case could not be based on § 29 ZPO which provides a special forum at the place of the performance of the contract, either. This part of the decision gives reason to the examination as to whether or not all claims based on culpa in contrahendo can still be subsumed under § 29 ZPO. Since these claims are now subject to Art. 12 of the Rome II Regulation, it appears to be doubtful whether the traditional German classification of culpa in contrahendo as a contractual claim in terms of jurisdiction can be upheld.

- **Ivo Bach:** “Die Art und Weise der Zustellung in Art. 34 Nr. 2 EuGVVO: autonomer Maßstab versus nationales Zustellungsrecht” - the English abstract reads as follows:

Article 34 (2) Brussels I in principle allows courts to deny recognition and enforcement of a foreign (default) judgment when the defendant was not served with the document which instituted the proceedings “in a sufficient time and in such way as to enable him to arrange for his defence”. As an exception to this

principle, courts must not deny recognition and enforcement if the defendant failed to challenge the judgment in the country of origin. In its decision of 21 January 2010, the German Bundesgerichtshof (BGH) dealt with both aspects of Art. 34 (2) Brussels I. Regarding the defendant's obligation to challenge the judgment, the BGH - rightfully - clarified that the obligation exists even when the defendant does not gain knowledge of the judgment before the enforcement proceedings. In such a case the defendant may request a stay of the enforcement proceedings while challenging the judgment in the country of origin. Regarding the time and manner of the service, the BGH relied on the formal service requirements as provided in the German code of civil procedure (ZPO) - Germany being the country where service was effected. The latter part of the decision calls for criticism. In this author's opinion, in interpreting Art. 34 (2) Brussels I courts should not rely on national rules, but rather should look to autonomous criteria. As regards the manner of service, such autonomous criteria may be taken from the minimum standards-catalogue in Arts. 13 and 14 EEO.

- **Rolf A. Schütze:** "Der gewöhnliche Aufenthaltsort juristischer Personen und die Verpflichtung zur Stellung einer Prozesskostensicherheit nach § 110 ZPO" - the English abstract reads as follows:

Under § 110 ZPO (German Code of Civil Procedure) the court - on application of the defendant - has to make an order for security for costs if the claimant is resident abroad but not resident in an EU or EWR Member State. The ratio of this provision is that the defendant who successfully defends a baseless claim should be able to enforce a cost order against the claimant. Residence means the place where a person habitually and normally resides. The decision of the Oberlandesgericht Munich rules that a company (or other legal entity) is ordinarily resident in a place if its centre of management is at that place. Whilst the former Reichsgericht and the Bundesgerichtshof rule that the amount of the security must cover the possible claim of the defendant for recompensation of costs for all possible instances, the Oberlandesgericht Munich states that only the costs for the current instance and the appeal up to the time when the defendant can file a new application for security can be included in the calculation. The decision in both of its aspects is in accordance with the ratio of § 110 ZPO.

- **Peter Mankowski/Friederike Höffmann:** “Scheidung ausländischer gleichgeschlechtlicher Ehen in Deutschland?” – the English abstract reads as follows:

Same-sex marriages are on the rise if seen from a comparative perspective. In contrast, German constitutional law strictly reserves the notion of “marriage” to a marriage celebrated between man and woman. This must also have its impact in German PIL. Same-sex marriages are treated like registered partnerships and subjected to the special conflicts rule in Arts. 17b EGBGB, not to the conflicts rules governing proper marriage as contained in Art. 13-17 EGBGB. Hence, a proper divorce of a same-sex marriage can as such not be obtained in Germany but ought to be substituted with the dissolution of the registered partnership inherent in the so-called “marriage”. Although theoretically a principle of recognition might be an opportunity (if one succumbs to the notion of such principle at all), the limits of such recognition would be rather strict in Germany nonetheless.

- **Alexander R. Markus/Lucas Arnet:** “Gerichtsstandsvereinbarung in einem Konnossement” – the English abstract reads as follows:

In its decision 7 Ob 18/09m of 8 July 2009 the Austrian Supreme Court of Justice (Oberster Gerichtshof, OGH), judged as substance of the case, the validity of an agreement conferring jurisdiction incorporated in a bill of lading, its character as well as its applicability to a civil claim for damages resulting from a breach of the contract of carriage on which the bill of lading was based. Aside from that, questions concerning the relation between the Lugano-Convention (LC) and the Brussels I Regulation arise in this judgement. An agreement conferring jurisdiction included in a bill of lading issued unilaterally by the carrier fulfils the requirements established in art. 17 par. 1 lit. c LC since in the international maritime trade the incorporation of agreements conferring jurisdiction in bills of lading can clearly be considered to be a generally known and consolidated commercial practice. Concerning the (non-)exclusivity of the agreement conferring jurisdiction (art. 17 par. 1/par. 4 LC) the OGH makes a distinction from its earlier case law and bases the decision on the European Court of Justices judgement of 24 June 1986, case 22/85, Rudolf Anterist ./ Credit Lyonnais. According to the in casu applicable Swiss Law the prorogatio fori in the bill of lading covers the contract of carriage as well, although in

principle the contract does not depend on the bill of lading. Lastly, to identify the relation between the LC and the Brussels I Regulation, the analogous application of art. 54b par. 1 LC is decisive.

- **Götz Schulze:** “Vorlagebeschluss zur intertemporalen Anwendung der Rom II-VO” - the English abstract reads as follows:

The Engl. High Court in Homawoo v. GMF has referred the question concerning the interpretation of Art. 31 and 32 of the Rome II-Regulation to the European Court of Justice for a Preliminary Ruling according to Art. 267 TFEU. Judge Slade recommends to specify Art. 31 Rome II-Regulation (entry into force) by the date of application on 11 January 2009 set out in Art. 32 Rome II-Regulation. Judge Tomlinson in Bacon v. Nacional Suiza prefers a strict literal interpretation with an entry into force on 20 August 2007 and a procedural understanding of Art. 32 Rome II-Regulation.

- **Bettina Heiderhoff:** “Neues zum gleichen Streitgegenstand im Sinne des Art. 27 EuGVVO” - the English abstract reads as follows:

The Austrian High Court (OGH) found that two actions do not involve the same cause of action when an identical claim is based on two different rules from different national laws and these rules stipulate different requirements. The decision is in conformity with the Austrian dogma that identity of the actions and lis pendens do not apply where a party bases a second claim on new facts. In other words, the identity of the cause of action depends on the facts presented to the court, unlike in Germany where the identity depends on the objective factual situation, no matter whether the claimant has presented all facts to the court in the first action or not. This Austrian point of view threatens uniform jurisdiction in the EU. It allows repetitive actions in different member states and, consequently, may lead to contradicting judgements. It encourages forum shopping. Therefore, it is a pity that the OGH did not present the case to the ECJ under Art. 267 TFEU.

- **Carl Friedrich Nordmeier:** “Divergenz von Delikts- und Unterhaltsstatut bei tödlich verlaufenden Straßenverkehrsunfällen: österreichischer Trauerschadensersatz und brasilianisches pretium

doloris vor dem Hintergrund der Europäisierung des Kollisionsrechts” – the English abstract reads as follows:

Claims for compensation based on the loss of a maintenance debtor in transborder cases demand the coordination of the law applicable to tort and the law applicable to maintenance obligations. In the present case of the Austrian Supreme Court (Oberster Gerichtshof), concerning a fatal traffic accident in Austria, whose victims were Brazilian nationals, Austrian tort law and Brazilian maintenance law had to be applied. From the Austrian perspective, the Hague Convention on the Law Applicable to Traffic Accidents has priority over the national conflict of law rules and over the Rome II Regulation. This raises questions relating to the possibility of a choice of law in cases that fall within the scope of application of the Convention. Austrian law does not provide a pension for the compensation of grief suffered by relatives of a victim of a fatal traffic accident. A pretium doloris of the Brazilian law is to be qualified as a question of tort and was rightly not awarded.

- **Arkadiusz Wowerka:** “Polnisches internationales Gesellschaftsrecht im Wandel” – the English abstract reads as follows:

The Polish applicable international private law provides no specific regulations on the international private law of companies. Also the judicature has up till now delivered no decisions in this matter. The essential principles of the international private law of the companies were developed by the doctrine. Within the frame of the planned reform of the international private law the government has presented the draft of a new regulation on the international private law which, with its provisions on the legal entities and organised entities, should fill the current gap in the subject area. The present article gives an overview on the autonomous international private law of the companies and its current evolution, dealing with the issues of the definition of the company, rules for determination of the law governing the companies, scope of the law governing the companies and finally the question of recognition of companies, in each case with references to the proposals of the government draft regulation.

- **Christel Mindach:** “Anerkennung und Vollstreckung von Drittlandsschiedssprüchen in Handelssachen in den GUS-Mitgliedstaaten”

- the English abstract reads as follows:

After the collapse of the Soviet Union, the newly founded States, establishing the Commonwealth of Independent States (CIS), had to build a completely new legal system. Quite naturally the legislation of international commercial arbitration played a secondary role during the first years of transformation, apart from the CIS Members Russia, Ukraine and Belarus. In the course of legislation process the most CIS States couldn't base on own legal traditions or experiences in this field. This insufficient situation changed in principle only just, when these States decided about the accession to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. With the exemption of Tajikistan and Turkmenistan the New York Convention came in force for all CIS Members in the meantime. The following article describes in a concise manner some of the fundamental requirements for the recognition and enforcement of foreign arbitral awards in commercial matters rendered in the territory of a State other than a CIS State under the appropriate national laws of CIS States including the procedure of compulsory enforcement.

- **Erik Jayme** on the conference on the Proposal for a 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, which took place in Vienna on 21 October 2010: "Der Verordnungsvorschlag für ein Europäisches Erbkollisionsrecht (2009) auf dem Prüfstand - Tagung in Wien"
- **Stefan Arnold:** "Vollharmonisierung im europäischen Verbraucherrecht - Tagung der Zeitschrift für Gemeinschaftsprivatrecht (GPR)" - the English abstract reads as follows:

On the 4th and 5th of June 2010, the Zeitschrift für Gemeinschaftsprivatrecht (Journal for EU-Private Law, JETL) and the Frankfurter Institut für das Recht der Europäischen Union (Frankfurt Institute for the Law of the European Union, FIREU) hosted a conference on „Full Harmonisation in European Consumer Law“ at the Europa-Universität in Frankfurt (Oder). Prof. Dr. Michael Stürner (Frankfurt/Oder) had invited to the conference. The speakers addressed not only the concept of full harmonisation but also the European framework for the harmonisation of Private Law and the consumer protection achieved by the the rules on Conflict of Laws. Moreover, the Draft Common

Frame of Reference and the effect of full harmonisation on specific fields of law were discussed. The participants also debated the practical effects of possible full harmonisation measures.

- **Erik Jayme** on the congress in Palermo on the occasion of the bicentenary of Emerico Amari's birth: "Rechtsvergleichung und kulturelle Identität - Kongress zum 200. Geburtstag von Emerico Amari (1810-1870) in Palermo"

Before the High Court: Michael Wilson & Partners Ltd v Nicholls

An interesting case is to be heard by the High Court on 31 May. It is an appeal from the decision of the New South Wales Court of Appeal in *Nicholls v Michael Wilson & Partners Ltd* (2010) 243 FLR 177; [2010] NSWCA 222.

The case arose out of the employment of two Australian citizens by a law firm operating in Kazakhstan. The firm commenced proceedings against the employees in the Supreme Court of New South Wales alleging that they and a partner of the firm had stolen clients of the firm when they left the firm and set up a rival business. The firm alleged that the employees were liable for breach of contract, inducing breach of contract, conspiracy to injure, breach of fiduciary duty and knowing assistance. The partner was not a party. The firm separately commenced arbitration proceedings in London against him, to which proceedings the employees were not party. The Supreme Court of New South Wales held the employees liable to the firm and awarded compensation. Subsequently the London arbitrators held that the partner had breached his duties but that this did not cause the firm any compensable loss.

Out of these circumstances, the matters before the High Court are:

1. whether, in light of the arbitral award, it was an abuse of process for the

firm to seek to recover against the employees in the Supreme Court of New South Wales;

2. whether the judge ought to have recused himself on the ground of apprehended bias in light of findings he made at interlocutory stages of the proceeding; and
3. whether the employees waived their right to appeal the judge's judgment after trial on the ground that he wrongly dismissed their application, prior to trial, for him to recuse himself, where the judge invited the employees to appeal that decision and they did not do so.

The parties' written submissions may be found on the High Court's website. (It may be of interest to know that the High Court has, from this year, begun publishing parties' submissions on its website.)

One of the matters raised at trial, and before the Court of Appeal, but not the subject of the appeal to the High Court was the governing law of the firm's claims against the employees. The Court of Appeal upheld the judge's decision to apply the law of New South Wales to all of the claims. The Court of Appeal held that:

1. the trial judge did not err in holding that the onus was on the employees to prove the content of Kazakh law and that absent such proof the presumption of identity applied (at [320]-[335]);
2. equitable claims were ordinarily governed by the law of the forum and, in light of the judge's conclusion that the employment contracts were governed by the law of New South Wales, no occasion arose to depart from that ordinary position on the ground that the source of the equitable obligations was a contract governed by foreign law (at [339]-[346]); and
3. though the firm was incorporated in the British Virgin Islands, it was not necessary to consider whether under the law of that place the partner breached his obligations to the firm arising from company law (as required by the *Foreign Corporations (Application of Laws) Act 1989* (Cth)) because the obligations asserted arose in equity not from company law (at [347]-[363]).

While the Court of Appeal's conclusion on the first point is a helpful authority concerning the presumption of identity, the point in fact appears to have been a false one in light of the trial judge's reasoning ([2009] NSWSC 1033). The employees pleaded that all the claims were governed by Kazakh law as the law

governing their employment contracts and the conduct of business in Kazakhstan (at [324]). Based on the expert evidence, the trial judge concluded that, under Kazakh choice of law rules, the employment contracts were governed by New South Wales law (at [314]-[342]). He concluded that the same result followed under Australian choice of law rules (at [343]-[363]). It is not apparent why it was felt necessary to consider the position under Kazakh choice of law rules, given that the question of the governing law of the contract would be expected to be addressed by Australian choice of law rules and they directed attention only to New South Wales law. In those circumstances, no renvoi question could arise. The judge then concluded (at [364]):

The defendants have failed to prove as a matter of fact that Kazakhstan law applies to the contracts of employment. The plaintiff has overwhelmingly proved it does not. The presumption that Kazakhstan law is the same as local New South Wales law applies in that event.

The third sentence does not follow from the previous two. This was not a case involving the presumption of identity at all, ie one in which the court concludes that foreign law applies but there is no evidence as to its content. Rather, the employees' position was that Kazakh substantive law applied, the firm's position was that New South Wales substantive law applied and the judge accepted the latter view.

Finally, it is worth noting one — of a very large number — interesting earlier interlocutory disputes in this proceeding. In *Wilson & Partners Ltd v Nicholls* (2008) 74 NSWLR 218; [2008] NSWSC 1230, the Supreme Court made an order for production for inspection of client files, located in Kazakhstan, of Kazakh companies associated with the employees and the partner. The companies were defendants to the proceeding. The files had been discovered but were not made available for inspection on the ground that this would breach Kazakh law. The Court held that even if this were so, it would not be an absolute bar to an order for production for inspection, as that is a question of procedure governed by the law of the forum (at [5]-[11]) and, in any event, the competing expert evidence did not prove that it would be a breach of Kazakh criminal or administrative law (at [12]-[27]). In resolving this application, the Court was not greatly assisted by the experts (at [12]):

Neither of the experts was cross-examined, and no application for leave to - cross-examine was made. Neither descended to much detail in setting out the statutory or other authoritative basis for the opinions that they tendered. In many cases, I am left with competing ipse dixits of the two experts.

Not high praise!

Which Strategy for West Tankers?

As reported yesterday, West Tankers has now won its arbitration against the insurers of Erg Petroli and obtained a judgment in England in the terms of the award.

The purpose of this last move, it seems, was to create a defense against the enforcement in England of any forthcoming Italian judgment finding in favour of the insurers. This would create a conflict of judgments in England, and West Tankers hopes that pursuant to Article 34 of the Brussels I Regulation, the English judgment (in the terms of the award) would prevail.

If this strategy was to prevail, this would mean that the Italian judgment could not be enforced in England. But West Tankers may have assets in other European jurisdictions where the Italian judgment would be recognised almost automatically. In particular, it is likely that it owns vessels which could be attached in any European harbour where they stop. It might therefore be that the Italian judgment could be enforced in France, Greece, Spain, etc...

It seems, therefore, that West Tankers has two ways forward.

The most obvious one would be to seek recognition of the arbitral award in most jurisdictions of Europe, and hope that in each of these jurisdictions, a local judgment declaring the award enforceable would be considered as a judgment in the meaning of Article 34 of the Brussels I Regulation. The insurers would then be left with Italy, that West Tankers' vessels might find wise to avoid.

Alternatively, West Tankers might want to focus on the UK and try to rely on the English judgment to obtain restitution of any payment it would be forced to make abroad on the basis of the Italian judgment (for a similar example, see [here](#)). I have no idea whether this could work as a matter of UK law. But it might be a theoretical question, as the Italian insurers of Erg Petroli might not have assets there.

West Tankers: Will the Future Italian Judgment Ever be Recognised in the UK?

On April 6th, 2011, the English High Court delivered a new judgment in *West Tankers*.

Most readers will recall the basic facts of the case. A dispute arose after a collision between a ship, the *Front Comor*, and a pier at a refinery in Italy. The charterparty provided for arbitration in London. The charterer first initiated arbitral proceedings against the owner of ship. It then sued the defendant before Italian courts. After an English Court issued an antisuit injunction restraining the claimant from continuing the Italian proceedings, the case was referred to the European Court of Justice which held that the English court was not authorised to issue such injunction.

But on November 12th, 2008, the arbitral tribunal delivered its arbitral award and held that the defendant was under no liability to the claimant and its insurer.

The issue before the English court was essentially one of English arbitration law: whether such award could be declared enforceable in the UK. An interesting issue was whether the Brussels I regulation was relevant here, as an English judgment declaring the award enforceable in the UK might be considered as a bar to the recognition/enforcement of any inconsistent judgment rendered in another member state. And an Italian judgment ruling in favor of the claimant would be

hardly conciliable with an English judgment given in the terms of the arbitral award. But would such English judgment be a Regulation judgment in the first place?

In his judgment of April 6, Justice Field held that, as long as the Italian judgment had not been rendered, it was not necessary to decide the issue. In the meantime, however, he confirmed that judgment in the terms of the award could be entered into.

Tip-off: Sebastien Lootgieter

Born and Jorek on Dallah

A most interesting note over at the Kluwer Arbitration Blog.

Latest Issue of “Praxis des Internationalen Privat- und Verfahrensrechts” (2/2011)

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

Here is the contents:

- **Jürgen Basedow**: “Das Staatsangehörigkeitsprinzip in der Europäischen Union” - the English abstract reads as follows:

In continental countries, citizenship has traditionally played an important role as a connecting factor in the private international law relating to personal

status. The article outlines the gradual emergence of this connecting factor throughout the 150 years of rising nationalism up to World War II and explores its remaining significance in the framework of European integration, with a particular view to the prohibition of discrimination on grounds of nationality under article 18 TFEU. Against the background of the historical purpose of that provision, the author advocates an anti-protectionist reading of that article which does not categorically prohibit the use of citizenship as a connecting factor, but only a discrimination of foreigners on the sole ground of their foreign citizenship. This interpretation is underpinned by a detailed inquiry into the case law of the European Court of Justice on article 18 and into the secondary law of the European Union. This approach leads to detailed conclusions with regard to the use of nationality in the areas of jurisdiction, choice of law rules and recognition.

- **Ivo Bach:** “Zurück in die Zukunft - die dogmatische Einordnung der Rechtsscheinvollmacht im gemeineuropäischen IPR” - the English abstract reads as follows:

Under most legal systems, a principal may be bound by a contract that his agent has concluded even if the agent lacked the actual authority to do so. As long as the principal's conduct creates the reasonable impression that he authorized his agent to conduct the transaction, the law protects the third party. Under German law, such a “reasonable impression” is presumed in particular when (a) the principal has knowledge of the agent's behavior yet does not intervene (“Duldungsvollmacht”), or when (b) the principal could (and should) have knowledge that would allow him to intervene (“Anscheinsvollmacht”).

European conflict-of-laws rules raise the question of whether the principal's liability under the agent's apparent authority should be classified as a contractual or a non-contractual obligation - i.e. whether Rome I or Rome II determines the applicable law. In light of the ECJ's criteria for distinguishing contractual from non-contractual obligations, this paper concludes that both of the above-mentioned apparent authority scenarios of German law must be classified as non-contractual obligations, thus placing them within the scope of Rome II.

This result generates a difficult follow-up question: is apparent authority a case of culpa in contrahendo (Art. 12 Rome II) or should it be governed by Rome II's general rule on torts/delicts (Art. 4)? This paper tends towards an application of Art. 12 Rome II.

- **Marianne Micha:** “Der Klägergerichtsstand des Geschädigten bei versicherungsrechtlichen Direktklagen in der Revision der EuGVVO” – the English abstract reads as follows:

The Commission of the EC presented a Report together with a Green Paper on the review of Regulation 44/2001 on jurisdiction in civil and commercial matters. The present article examines the needs for review with a view to a recent decision of the ECJ (FTBO ./ Jack Odenbreit), in which it granted the person injured in a car accident a forum in the Member State of his domicile, although the accident took place in another Member State where the insured tortfeasor was domiciled and had taken out motor liability insurance for his car. On the whole, the present legal situation is satisfying. Concerning third State situations, the injured person should be granted a forum at his domicile, if the accident took place within the EU although the insurer is not domiciled in a Member State. Choice of court agreements do not bind the injured person if they are to his detriment.

- **Burkhard Hess:** “Die Reform der EuGVVO und die Zukunft des Europäischen Zivilprozessrechts” – the English abstract reads as follows:

On December 14, 2010, the European Commission presented its highly anticipated proposal for the reform of the Brussels I Regulation. KOM (2010) 748 endg. vom 14.12.2010, der Text ist verfügbar unter: http://ec.europa.eu/justice/policies/civil/docs/com_2010_748_en.pdf. Im folgenden Beitrag werden die Vorschläge als EuGVVO-E bezeichnet. This proposal marks the beginning of the formal law-making process to recast the Regulation. Intense, legal and political debate concerning the function and the reform of this central legal instrument of the European Judicial Area can be expected in the next months. This debate should not be limited to the legal instrument itself, but it should address the future of European Procedural Law as a whole. In particular, procedural law academics should continue to engage actively in – and thereby influence – European judicial policy. The following

contribution deals with the cornerstones of the reform proposals and contrasts them to the current stage of European Civil Procedural Law. It also contains a first evaluation of the reform proposals.

- **Andreas Spickhoff** on the ECJ's decision in C-278/09 (Olivier Martinez, Robert Martinez ./ MGN Ltd) as well as decisions of the German Federal Supreme Court (2.3.2010 - VI ZR 23/09); Regional Court Cologne (26.8.2009 - 28 O 478/08) and the Austrian Supreme Court (8.9.2009 - 4 Ob 138/09m) dealing with the questions of jurisdiction and applicable law with regard to the infringement of personal rights on the internet: "Persönlichkeitsverletzungen im Internet: Internationale Zuständigkeit und Kollisionsrecht"
- **Anatol Dutta.** "Ein besonderer Gerichtsstand für die Geschäftsführung ohne Auftrag in Europa?(Higher Regional Court Cologne - 13.5.2009 - 6 U 217/08, Regional Court Aachen, 31.10.2008 - 12 O 40/089" - the English abstract reads as follows:

Localising negotiorum gestio on the map of the law of obligations is a difficult task, especially when applying autonomous criteria such as those developed by the European Court of Justice for the terms "contract" and "tort" in Article 5 (1) and (3) of the Brussels I Regulation. In a recent decision, the Regional Court of Appeal in Cologne held that obligations flowing from negotiorum gestio are, for purposes of the European jurisdictional rules, neither contractual nor tortious. That view appears to be sound not only in theory but also in practice (infra III.): Article 5 (1) and (3) of the Brussels I Regulation - if applied to negotiorum gestio - would not lead to the proper forum for disputes on negotiorum gestio, namely the courts at the place where the negotiorum gestio was performed (infra II). Hence, the article suggests that a new special head of jurisdiction for negotiorum gestio should be introduced (infra IV.).

- **Hannes Wais:** "Internationale Zuständigkeit bei gesellschaftsrechtlichen Ansprüchen aus Geschäftsführerhaftung gemäß § 64 Abs. 2 Satz 1 GmbHG a.F./§ 64 Satz 1 GmbHG n.F.(Higher Regional Court Düsseldorf, 18.12.2009 - I-17 U 152/08, Higher Regional Court Karlsruhe, 22.12.2009 - 13 U 102/09)" - the English abstract reads as follows:

Must international jurisdiction for liability claims based on § 64 GmbHG against

a foreign director of a German company with restricted liability (Gesellschaft mit beschränkter Haftung) be determined according to the European Insolvency Regulation or according to the Brussels I Regulation? Furthermore, if one applies the Brussels I Regulation, has the claim to be qualified as a matter relating to a contract pursuant to Art. 5 (1), or to a tort pursuant to Art. 5 (3) Brussels I Regulation? Both the OLG Düsseldorf (Higher Regional Court) and the OLG Karlsruhe had to consider these questions in recent cases. In accordance with earlier decisions of German courts the OLG Düsseldorf regarded Art. 5 (1) Brussels I Regulation applicable.

- **Moritz Brinkmann:** “Die Auswirkungen der Eröffnung eines Verfahrens nach Chapter 11 U.S. Bankruptcy Code auf im Inland anhängige Prozesse(Federal Supreme Court, 13.10.2009 - X ZR 79/06)” - the English abstract reads as follows:

The article discusses the effects of the commencement of insolvency proceedings on a lawsuit pending between the debtor and another party. When the lawsuit is taking place in another jurisdiction than the insolvency proceedings, three questions have to be answered: 1.) Does the lex fori processus recognize the foreign insolvency proceedings? 2.) If yes, does the commencement of the foreign insolvency proceedings lead to a stay of the litigation? 3.) If yes, who, or rather which side has the right to resume the lawsuit? Against the backdrop of a decision by the Bundesgerichtshof dealing with the effects of a U.S.-chapter 11 filing on a lawsuit before German courts, Brinkmann shows the differences between the solutions under the European Insolvency Regulation (EC) No 1346/2000 and under § 352 German Insolvency Code (InsO) which is applicable when the insolvency proceedings are in a non-EU member state: While Art. 15 of the European Insolvency Regulation is a conflict rule under which the lex fori processus is applicable to answer questions 2.) and 3.), § 352 I 1 German Insolvency Code is a substantive rule that directly stays the domestic lawsuit. On the question, who has the right to resume the litigation, the Bundesgerichtshof applies the lex fori concursus. Brinkmann argues that this issue should be decided by the lex fori processus notwithstanding § 352 I 2 InsO.

- **Jörg Pirrung:** “Teilaussetzung des Verfahrens zur

Vollstreckbarerklärung einer griechischen „konservativen Beschlagnahme“ von Vermögen (Higher Regional Court Cologne, 15.9.2008 - 16 W 6/08) ” - the English abstract reads as follows:

Where the defendant has requested a revocation of a provisional measure according to art. 697 of the Greek law on civil procedure, this is equivalent to an ordinary appeal in the sense of art. 46 of the Brussels I regulation.

- **Marc-Philippe Weller:** “Windscheids Anspruchsbegriff im Strudel der Insolvenzrechtsarbitrage (Higher Regional Court Celle, 7.1.2010 - 6 U 60/09)” - the English abstract reads as follows:

The doctrine of actionability of a creditor’s claim can be traced back to Windscheid. From the perspective of the German lex fori the actionability has to be qualified not as a procedural but as a substantive element of the claim. As a consequence an action has to be dismissed not as (procedurally) inadmissible but as unfounded, when the creditor’s claim is non-actionable. According to French insolvency law, the creditor’s claim loses its element of actionability when an insolvency proceeding is opened. The claim even remains non-actionable when the insolvency proceeding comes to an end due to lack of assets. According to Art. 17 EuInsVO, these consequences of the French insolvency law has to be recognized in all other EU member states. The differences in the insolvency laws of the EU member states lead to arbitrary behaviour of debtors in International Insolvency Law.

- **Bettina Heiderhoff:** “Wann ist ein „Clean Break“ unterhaltsrechtlich zu qualifizieren?(Federal Supreme Court, 12.8.2009 - XII ZB 12/05) - the English abstract reads as follows:

It seemed scandalous to some when the 12th chamber of the German Supreme Court (BGH) decided, in 2009, that an English divorce judgement was only partly enforceable. However, the BGH only held that the Brussels I Regulation was not applicable as the 2004 order of the High Court concerned matrimonial property (excluded from the scope of the regulation under Article 1 sec 2 lit a) rather than maintenance (to which the regulation is applicable). It is internationally acknowledged that maintenance may be paid in a lump sum. In order to decide whether a payment serves as maintenance or as a division of

matrimonial property, one must inquire about the reasons behind the payment: i.e., where the payment serves to secure the future standard of living it functions as maintenance; however, where economic disparity sustained by one partner during the marriage is to be compensated, matrimonial property law is concerned. From an EU perspective, the main question should be whether the national courts may determine the quality of the lump sum payment or whether there should be a purely autonomous determination by the ECJ. It would certainly be frustrating if the mere use of the word “maintenance” in the national court order was held to be decisive. Objective and secure criteria for a distinction between matrimonial property and maintenance may be found, although none seem obvious at first glance. They must consider the fact that different countries have different economic realities, especially as far as housing is concerned. These questions should, however, be answered by the ECJ and the BGH should have requested a preliminary ruling.

- **Ulrike Janzen/ Veronika Gärtner:** “Kindschaftsrechtliche Spannungsverhältnisse im Rahmen der EuEheVO - die Entscheidung des EuGH in Sachen Deticek (ECJ, 23.12.2009 - Rs. C-403/09 PPU - Jasna Deticek ./ Maurizio Sgueglia)” - the English abstract reads as follows:

On 23 December 2009 the ECJ delivered its judgment in Re Deticek which has been dealt with under the urgent procedure pursuant to Art. 104b of the ECJ's Rules of Procedure. The case concerned basically the question whether courts of the Member State where the child is present, can take protective measures on the basis of Art. 20 Brussels II bis Regulation even if a court of another Member State having jurisdiction as to the substance has already taken a protective measure declared enforceable in the first Member State. The ECJ answered this question in the negative, based primarily on teleological and systematic arguments. While the authors agree with the ECJ with regard to the case in question, the approach taken by the ECJ might be challenged in several respects: First, it can be questioned whether the ECJ put too much emphasis on systematic and technical arguments such as facilitating the enforcement of decisions of another Member State as well as the deterrence from wrongful removals, while neglecting the principal aim of the Regulation's provisions on parental responsibility - safeguarding the child's best interest. In the authors' opinion, Art. 20 (1) Brussels II bis does, in principle, not allow provisional measures in situations where the court having jurisdiction as to the substance

has already taken a protective measure declared enforceable in the Member State in question, which is illustrated by the rule Art. 20 (2) Brussels II bis. However, the authors argue that - taking into account the Regulation's paramount objective - there might be a need to allow provisional measures also in these cases under certain (strict) conditions - namely if the factual situation has changed significantly subsequent to this first decision and if the new circumstances lead to the assumption of an urgent case in terms of Art. 20 (1) Brussels II bis. Secondly, the authors raise the question whether the ECJ proceeded in a methodologically correct way by examining whether the requirements for provisional measures according to Art. 20 Brussels II bis - urgency, presence of the relevant person(s) in the Member State in question, provisional nature of the measure - are met in the present case, or whether this was rather for the national court to decide. Further, in this context it is submitted that - in derogation from the position adopted by the ECJ in the present decision - it is decisive for the question whether measures can be taken under Art. 20 Brussels II bis whether the child is present in the respective Member State - and not where the parents are located.

- **Sergej Kopylov:** “Zur Verbürgung der Gegenseitigkeit zwischen der Russischen Föderation und Deutschland (Oberstes Wirtschaftsgericht der Russischen Föderation, 7.12.2009 - VAS 13688/09)” - the English abstract reads as follows:

In German-Russian legal relations, there is a considerable need for certainty relating to the enforcement (exequatur) of Russian decisions in Germany and vice versa. On this issue, the supreme Russian commercial court (arbitration court) adopted a position in a ruling dated 07/12/2009 and declared a Dutch judgement enforceable. The decision is a further step towards establishing a practice of recognition and enforcement of European decisions in Russia and thus towards guaranteeing reciprocity also with Germany. In the commercial courts' now also recognising British and Dutch court rulings - in addition to the already existing treaties under international law concluded with numerous EU Member States on the recognition and enforcement of court decision - they have created a mutual legal platform, also facilitating “in the triangle” recognition. In the interim, the French courts have issued exequatur for Russian decisions in civil matters.

- **Erik Jayme** on the conference of the German-Lusitanian Lawyers' Association in Osnabrück: "Internationales Erbrecht und lusophone Rechte"
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ERA Conference on Brussels I Revision

A conference organized by the European Law Academy (ERA) on the recast of the Brussels I Regulation will take place in Trier (Germany) on 26 and 27 May 2011. Renowned speakers will discuss the main issues of the revision: abolition of exequatur, provisional and protective measures, disputes involving third country defendants, efficiency of choice of court agreements, and the interface between litigation and arbitration.

The conference aims to provide an in-depth analysis of the recast and to promote a far-reaching and thorough debate concerning the most important or complex issues inherent to cross-border litigation in Europe.

For more information and registration [click here](#).

Fourth Issue of 2010's Revue Critique de Droit International Privé

The last issue of the *Revue critique de droit international privé* was just released. It contains two articles and several casenotes. The full table of content can be found [here](#).



In the first article, Dr. Marius Kohler and Dr. Markus Buschbaum discuss the concept of recognition of authentic instruments in the context of cross-border successions (*La « reconnaissance » des actes authentiques prévue pour les successions transfrontalières. Réflexions critiques sur une approche douteuse entamée dans l'harmonisation des règles de conflits de lois*). The English abstract reads:

However advantageous the introduction of a European inheritance certificate may be, as envisaged by the Commission's proposed Regulation on international successions, it is in its current form likely to create friction because of the way in which it organises the relationship with national inheritance certificates. It would therefore be wise to restrict the use of the European certificate to international successions, where it could then be drafted on basis of the national one, and to limit its effects to the Member States of destination. Moreover, as far as the free circulation of authentic instruments in general is concerned, the Regulation raises serious misgivings as to the use made by the proposal of the concept of mutual recognition. It appears that this concept - appropriate as it is for judicial decisions - is unsuitable to promote the circulation of authentic instruments.

In the second article, Professor Malik Laazouzi, who teaches at St Etienne University, discusses the impact of the recent *Inserm* decision of the French *Tribunal des conflits* (a translation of which can be found [here](#)) on choice of law in administrative contracts (*L'impérativité, l'arbitrage international des contrats administratifs et le conflit de lois. A propos de l'arrêt du Tribunal des conflits du 17 mai 2010, Inserm c/ Fondation Saugstad*). I am grateful to the author for providing the following summary:

The Inserm case deals primarily with international arbitration issues. But the way of reasoning used to decide the case could also interfere with the handling of public law matters involving French public entities in private international law by French jurisdictions.

How did the issue occur ?

A French public law entity (Inserm) entered into a contract with a Norwegian Fondation (Letten F. Sugstad) in order, inter alia, to achieve the implementation of a research facility in France, including a construction project. An arbitration occurred to decide over the termination of the agreement by the Fondation. The arbitral award, rendered in France, dismissed Inserm's claims. The French entity then applied to set aside the award simultaneously before french civil and administrative courts. To assert the jurisdiction of the letter, Inserm argued that the dispute arose out of a French administrative contract.

The case has given rise to the intricate issue of allocation of jurisdiction between civil and administrative courts. As a matter of consequence, it has been brought before the Tribunal des conflits.

The question which the Tribunal des conflits had to solve is complicated to enunciate. Which one of the French civil or administrative courts have jurisdiction to set aside an international arbitral award rendered in France, in a dispute arisen out of the performance or termination of a contract to be performed on the French territory and entered into between a French public law entity and a foreign individual or entity ?


The Tribunal des conflits decided, on 17 may 2010, that the application to set aside the award in such a case is to be brought before civil courts, even if the contract is an administrative one under French law. This solution allows an exception when the contract entered into by a french public entity is governed by a mandatory administrative regime. In this particular case, administrative courts retain jurisdiction to decide over challenges to the arbitral award.

This decision is strictly limited to some international arbitration matters involving a contract entered into by a french public entity. When it is not the case - i.e. when no french public entity is involved - French administrative courts does not intervene at all.

This case is worth mentioning within the field of private international law. The distinction it introduces between mandatory and non mandatory administrative rules in the international arena could reshape the very idea of the split in methods to solve conflict of laws issues according to the public or private law

nature of the rules at stake.

Symposium on Chinese - EU Private International Law

Tsinghua University School of Law, Strasbourg University and China-EU 
School of Law will co-organize an International Symposium on *The Law
applicable to International Contracts: A Comparison between Chinese New
Private International Law and EU Private International Law* on 28 -29 March 2011
at Tsinghua University in Beijing.

Programme:

First Day, 28 March 2011

8h45 Registration

9h00 Opening Ceremony

Chairperson, CHEN Weizuo, Director of the Research Centre for Private
International Law and Comparative Law, Tsinghua University School of Law

9h-9h15 Welcome Address by Professor WANG Zhenmin, Dean of Tsinghua
University School of Law (to be confirmed)

9h15-9h30 Speech by Professor HUANG Jin, President of China University of
Political Science and Law (to be confirmed)

9h30-9h40 Speech by Professor Ninon Colneric, Co-Dean of China EU School of
Law

9h40-9h45 Speech by Mrs. Danièle Alexandre, Emeritus Professor at University of
Strasbourg

9h45-9h55 Photo Session for All Participants, Mingli Building, Tsinghua
Univeristy

Section I - The Chinese New PIL Statute and its Innovations

9h55-10h25 An Overview of the New Chinese PIL, Professor HUANG Jin,

President of China University of Political Science and Law (to be confirmed)

10h25-10h40 Coffee/Tea Break

10h40-11h10 Enactment of the Chinese New PIL Statute, Report by a Member of the Legislative Affairs Commission of the Standing Committee of the National People's Congress (Department Chief Mrs. YAO Hong or Her Deputies)

11h10-11h40 The New Chinese PIL and Foreign-Related Trials of Chinese Courts, Ms. Judge WANG Yun, Deputy Chief Judge of the Fourth Civil Division of the Supreme People's Court of the PRC

11h40-12h10 Discussions

12h20 Lunch

14h Chairperson: (to be determined)

14h-14h40 China's New PIL and International Commercial Arbitration, Ms. DONG Jingjing, Ph.D. Candidate at University of Strasbourg

14h40-15h20 The Role of the Principle of Party Autonomy and the Principle of the Closest Connection in China's New PIL, CHEN Weizuo, Director of the Research Centre for Private International Law and Comparative Law, Tsinghua University School of Law

15h20-16h Comments on the Chinese New PIL Statute: A European Perspective, Mr. Nicolas Nord, University of Strasbourg

16h-16h30 Discussions

16h30-16h45 Coffee/Tea Break

Section II - Conflicts of Law Rules of Chinese PIL and EU PIL in Contractual Matters, Comparative Perspectives

16h45 Chairperson: DU Huangfang, Professor at Renmin University Law School

16h45-17h25 The Notion of Contract in Chinese and EU PIL, Gustavo Vieira da Costa Cerqueira, University of Strasbourg

17h25-18h05 The Principle of Party Autonomy in EU PIL: impact and significance, Ms. Delphine Porcheron, University of Strasbourg

18h05-18h25 Discussions

Second Day, 29 March 2011

9h Chairperson: CHEN Weizuo, Director of the Research Centre for Private International Law and Comparative Law, Tsinghua University School of Law

9h-9h40 The Law Applicable to a Contract in the Absence of a Choice by the Parties in Chinese New PIL and EU PIL, (to be determined).

9h40-10h20 Conflicts of Law Rules and the Protection of the Weaker Party in EU PIL and Chinese New PIL, Mrs. Danièle Alexandre, Emeritus Professor at University of Strasbourg

10h20-11h Exceptions Based on Public Policy and Overriding Mandatory Provisions in EU PIL and Chinese New PIL, Mr. Nicolas Nord, University of Strasbourg

11h-11h30 Discussions

11h30 -11h45 Coffee/Tea Break

11h45-11h55 Closing Address, One of the Leaders of Tsinghua University School of Law

12h End of the Symposium

12h10 Lunch

Location: Law School of Tsinghua University, Mingli Building, Tsinghua University, Haidian District, Beijing, P.R. China

No registration fee required.