Latest Issue of “Praxis des Internationalen Privat- und Verfahrensrechts” (6/2010)

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

Here is the contents:

- ***Anne Röthel/Evelyn Woitge***: “Das Kollisionsrecht der Vorsorgevollmacht” – the English abstract reads as follows:

Various European national laws have recently implemented powers of representation granted by an adult to be exercised when he or she is not in a position to protect his or her interests. The authors show the existence and scope of these powers of representation within Europe and identify the need for conflict norms for this legal institution. Based on an analysis of the respective rules in the Hague Convention on the international protection of adults, the authors highlight the need to find a national solution that acknowledges the special interests of incapable adults. They suggest a regulation for powers of representation in autonomous international private law that adapts the concept of the Hague Convention.

- ***Stefanie Sendmeyer***: “Die Rückabwicklung nichtiger Verträge im Spannungsfeld zwischen Rom II-VO und Internationalem Vertragsrecht” – the English abstract reads as follows:

In private international law, it is highly disputed whether the law applicable to claims aiming to reverse enrichment in case of a void contract is determined by Art. 10 (1) lit. e) Rome II Regulation or by Art. 10 (1) lit. e) Rome Convention or Art. 12 (1) lit. e) Rome I Regulation respectively. After a short analysis of the current state of discussion, it is shown that the argument emanates from the erroneous assumption that the question of restitution in such cases is a matter of unjust enrichment according to Art. 10 Rome II Regulation as well as a topic of private international law concerning contractual obligations. In fact, the

question has to be solved by clearly differentiating between contractual and non-contractual obligations and, therefore, between the scope of the Rome II Regulation and the scope of the instruments of private international law dealing with contractual obligations. In consistence with European international procedural law, restitution in case of a void contract is considered a contractual obligation and, therefore, the applicable law is determined by Art. 10 (1) lit. e) Rome Convention or Art. 12 (1) lit. e) Rome II Regulation respectively.

- ***Anatol Dutta:*** "Grenzüberschreitende Forderungsdurchsetzung in Europa: Konvergenzen der Beitreibungssysteme in Zivil- und Verwaltungssachen?" (on ECJ, 14.1.2010 – C-233/08 – Milan Kyrian ./. Celní úrad Tabor) **–** the English abstract reads as follows:

The dogma that claims of the State based on its penal, revenue or other public law are not enforceable abroad – a doctrine also known as the revenue rule – is more and more displaced by European instruments obliging the Member States to collect public law claims of their fellow Member States. One example for this development is the Tax Recovery Directive 76/308/EC (later: 2008/55/EC, now: 2010/24/EU) on the mutual assistance for the recovery of claims relating to taxes, duties and other measures – an instrument, which has been gradually extended to all taxes levied by the Member States. The present article, which discusses a recent decision of the European Court of Justice interpreting the Tax Recovery Directive, attempts to highlight some similarities between the European enforcement rules for public law claims and those for private law claims. These similarities do not only allow fertilisation across the public-private law border when applying and interpreting the different enforcement rules, but once more demonstrate that the revenue rule should be reconsidered.

- ***Sebastian Mock:*** "Internationale Streitgenossenzuständigkeit" **–** the English abstract reads as follows:

The international jurisdiction for claims against several defendants at the domicile of one of the defendants as today established by Art. 6 No. 1 Brussels I Regulation is unknown in several member states and consequently causes general doubts due to the existing possibilities of manipulation in this context. Although the European Court of Justice reflected these doubts by establishing the additional need of the risk of irreconcilable judgments resulting from

separate proceedings in the application of Art. 6 No. 1 Brussels Convention and Art. 6 No. 1 Lugano Convention – which was later recognized by the European legislator in the drafting of Art. 6 No. 1 Brussels I Regulation – the determination of this additional requirement is still left unclear. In its recent decision the German Federal Court of Justice delivered a rather broad understanding of this requirement. The court held that the jurisdiction under Art. 6 No. 1 Lugano Convention/Art. 6 No. 1 Brussels I Regulation does not require that all defendants have to be sued at the same time. Moreover the court held that the violation of a duty of a member of the board of directors is sufficient to establish a jurisdiction under Art. 6 No. 1 Lugano Convention/Art. 6 No. 1 Brussels I Regulation for a claim against the member of the board of directors when the plaintiff already filed a claim against the company of the director. However, the author doubts that this ruling can be considered as a general principle in the application of Art. 6 No. 1 Lugano Convention/Art. 6 No. 1 Brussels I Regulation and shows that the ruling has to be seen in context with a special provision of the applicable Swiss corporate law.

- ***Martin Schaper:*** "Internationale Zuständigkeit nach Art. 22 Nr. 2 EuGVVO und Schiedsfähigkeit von Beschlussmängelstreitigkeiten – Implikationen für den europäischen Wettbewerb der Gesellschaftsrechte" – the English abstract reads as follows:

Art. 22 (2) Brussels I Regulation establishes an exclusive jurisdiction of a Member State's court for proceedings which have as their object, among others, the nullity or the dissolution of companies and the validity of the decisions of their organs. This jurisdiction depends on where the company's seat is located. For determining this seat the court has to apply its rules of International Private Law (lex fori). Although Germany generally adheres to the real seat theory, the OLG Frankfurt a.M. (Higher Regional Court) decided that a private limited company's statutory seat is the relevant factor for determining the exclusive jurisdiction.

Since the freedom of establishment, as interpreted by the Court of Justice of the European Union, promoted corporate mobility there is an increasing demand for settling disputes not in the state of incorporation, but in the country where the major business operations take place. Therefore, the article examines the

possibility of arbitration proceedings on the nullity and avoidance of decisions taken by shareholders' meetings in an international context.

Finally, based on the experience with the state competition for corporate charters in the USA, the impact of a jurisdiction's courts and the admissibility of arbitration proceedings is analysed within the context of regulatory competition in company law in Europe.

- ***Veronika Gärtner:*** "Internationale Zuständigkeit deutscher Gerichte bei isoliertem Versorgungsausgleichsverfahren" **–** the English abstract reads as follows:

Until recently, German law did not know an explicit rule on international jurisdiction with regard to proceedings dealing with the adjustment of pension rights between divorced spouses. The Federal Court of Justice held in several judgments that international jurisdiction with regard to the adjustment of pension rights followed – also in cases where those proceedings are initiated independently from divorce proceedings – the rules of international jurisdiction with regard to the divorce proceedings due to the strong link between both issues.

With reference to this case law, the Regional Court of Karlsruhe held in its decision of 17 August 2009 (16 UF 99/09) that German courts lacked international jurisdiction with regard to (independent) proceedings on the adjustment of domestic pension rights between two Portuguese divorced spouses habitually resident in Portugal, based on the argumentation that Art. 3 Brussels II bis Regulation had to be applied analogously with regard to the question of international jurisdiction. Due to the fact that the requirements of this provision were not met, German courts were – according to the Higher Regional Court Karlsruhe – not competent to rule on the adjustment of the (German) pension rights.

This result is undoubtedly incorrect under the present legal situation: With effect of 1 September 2009 – in the course of a general revision of the procedural rules in family law and non-contentious cases – a new rule has been introduced stating explicitly that German courts have international jurisdiction

with regard to proceedings on the adjustment of pension rights inter alia in cases concerning domestic (pension) rights (§ 102 Nr. 2 FamFG).

However, the author argues that also before the entry into force of this new rule, the Regional Court of Karlsruhe should have answered the question of international jurisdiction in the affirmative: First, it is argued that the court's reference to Art. 3 Brussels II bis Regulation was misplaced since – as Recital No. 8 of the Brussels II bis Regulation illustrates – "ancillary measures" – and therefore also proceedings on the adjustment of pension rights of divorced spouses – are not included into the scope of application of Brussels II bis.

Further, the author argues that the negation of international jurisdiction in cases concerning domestic (pension) rights leads to a denial of justice. Therefore it is argued that international jurisdiction could – and should – have been assumed on the basis of general principles of jurisdiction.

- ***Gerhard Hohloch/ Ilka Klöckner:*** "Versorgungsausgleich mit Auslandsberührung – vom alten zum neuen Recht – Korrektur eines Irrwegs" – the English abstract reads as follows:

On the 11th of February 2009, the Federal Supreme Court of Justice has had its first opportunity to decide whether or not the Dutch provisions on pension rights adjustment were to be regarded as equivalent to the German "Versorgungsausgleich" (VA) in the matter of Art. 17 III 1 EGBGB. Though until then this was generally accepted, the Court decided to deviate from the established opinion. In the course of the 2009 Reform, Art. 17 III EGBGB was revised and significantly restricted regarding its field of application. According to this new regulation, German law must now be applicable in order for the plaintiff to successfully be able to claim an adjustment of pension rights in Germany. Starting off with a critical examination of the Supreme Court's decisions, the authors then point out the impact of the Court's adjudication on the interpretation and the application of the new Art. 17 III EGBGB.

- ***Pippa Rogerson*:** Forum Shopping and Brussels II bis (on: High Court of Justice, 19.4.2010 – [2010] EWHC 843 (Fam) – JKN v JCN)

Sometimes real life cases focus academic attention on important issues of

principle. In JKN v JCN a husband and wife from New York had been living in London for 12 years and had four young children together. Then they returned to New York where they are all now residing for the foreseeable future. The marriage has broken down and a divorce, financial settlement and arrangements for the children are required. Which court should deal with these matters? The wife commenced proceedings in England under Brussels II bis and the husband in New York. The parties had both UK and US citizenship and the husband at that time was still resident in England. Both parties were pursuing proceedings in a court which provided that party with some advantages. Ideally, the parties should come to a settlement without needing the court's determination. If not, preferably a single court should adjudicate matters. This is achieved within the EU by the lis pendens rule in Brussels II bis. However, there is no similar regime operating with non-Member States. A proliferation of judgments over the same matter is wasteful of the parties' time and assets as well as of the courts' resources. It also leads to problems of enforcement of possibly irreconcilable judgments.

- **Axel Kunze/ Dirk Otto:** "Internationale Zwangsvollstreckungszuständigkeit, rechtliche Grenzen und Gegenmaßnahmen" (on: New York Court of Appeals, Opinion v. 4.6.2009) – the English abstract reads as follows:

A New York Court recently ruled that courts in New York have international competence to order the cross-border attachment of rights and securities held by a foreign party with a foreign bank abroad as long as the foreign bank carries out business in the state of New York. This decision potentially exposes foreign banks operating in New York state to attachment disputes. The article describes the impact of the decision and compares it with the legal situation in Germany and other EU countries. The authors come to the conclusion that under German law, EU law as well as under the Lugano Convention a court may not order the attachment of claims located in other countries. In order to limit the risk for banks from being caught in the middle, the authors suggest contractual arrangements that would enable banks to "vouch in" customers into disputes before U.S. courts to ensure that banks are not liable if they comply with U.S. rulings. On the other hand customers could initiate legal steps in their home jurisdiction to prevent a bank from transferring assets/securities abroad; such an injunction would also be recognized by U.S. courts.

- ***Bartosz Sujecki*:** "Zur Anerkennung und Vollstreckung von deutschen Kostenfestsetzungsbeschlüssen für einstweilige Verfügungen in den Niederlanden" – the English abstract reads as follows:

The Dutch Supreme Court (Hoge Raad) had to give an answer to the question whether a German decision on the amount of cost (Kostenfestsetzungsbeschluss) related to an interim injunction (einstweilige Verfügung) can be recognized and enforced in the Netherlands. Since the German interim injunction was given in an ex parte procedure and the cost decision was not contested by the defendant, the question arose whether such an uncontested decision can be qualified as a "decision" according to article 32 of the Brussels I Regulation and can be enforced in the Netherlands. This paper discusses and analyzes the decision of the Dutch Supreme Court.

- ***Gerhard Hohloch:*** "Feststellungsentscheidungen im Eltern-Kind-Verhältnis – Zur Anwendbarkeit von MSA, KSÜ und EuEheVO" – the English abstract reads as follows:

The article discusses the Austrian Supreme Court's order issued on May 8th 2008, concerning the applicability of the 1961 Hague Convention "[…] on the protection of minors" on declaratory actions in statutory custody cases. It refers to the international jurisdiction rules (including "Regulation Brussels IIa") as well as to the conflict of law rules. As the significance of the Court's assessment extends beyond the Austrian-German border, the main emphasis is put on how the problems of the case at issue are to be treated in Germany, and furthermore on the impact the 1996 Hague Convention "[…] on the protection of Children" – which is expected to come into force soon – will have on the legal situation in Germany and in Austria.

- ***Oliver L. Knöfel:*** "Nordische Zeugnispflicht – Grenzüberschreitende Zivilrechtshilfe à la scandinave" **–** the English abstract reads as follows:

The article gives an overview of the mechanisms of judicial assistance in the taking of evidence abroad in civil matters as maintained by the five Nordic Countries (Denmark, Finland, Iceland, Norway, Sweden). In Central and Western Europe, it is little-known that the Nordic Countries have, since the 1970s, erected an autochthonous system of judicial assistance differing quite

significantly from the long-standing habits of taking evidence abroad as established by the Hague Conference or recently by the European Union. According to specific reciprocal legislation, Nordic residents are obliged to appear before the courts of any Nordic country, and to give evidence. Thus, there is hardly any need to have a foreign Nordic witness examined by her home court according to a letter rogatory, or to take evidence directly on foreign soil. The article aims at exploring this extraordinary mode of international judicial co-operation with special reference to Swedish procedural law. It is shown that the Nordic mechanism is a product of a very high level of convergence in the field of civil procedure, and that this is due to a common core of Nordic legal cultures.

- ***Reinhard Giesen*** on a decision of the Norwegian Supreme Court on the applicable law with regard to defamation: "Das Recht auf freie Meinungsäußerung und der Schutz der persönlichen Ehre im Kontext unterschiedlicher Kulturen" (on: Norges Høyesterett, 2.12.2009 – HR-2009-2266-A)
- ***Kurt Siehr*** on the Austrian Supreme Court's decision of 18 September 2009 dealing with the question of the applicability of Brussels II bis with regard to the return of abducted children – in particular in cases where the child is over 16 years old : "Zum persönlichen Anwendungsbereich des Haager Kindesentführungsübereinkommens von 1980 und der EuEheVO "Kind" oder "Nicht-Kind" – das ist hier die Frage!" (on: Austrian Supreme Court, 18.9.2009 – 6 Ob 181/09z)
- ***Erik Jayme*** on the inaugural lecture held by Professor Martin Gebauer in Tübingen on 16 July 2010

No Renvoi in Dallah

The United Kingdom Supreme Court delivered its judgment in *Dallah* on November 3rd, 2010.

Readers will recall that the case was concerned with an arbitral award made by

an ICC tribunal in Paris. Dallah was seeking enforcement in England. The Supreme court confirmed that the award would not be declared enforceable for lack of jurisdiction of the tribunal over the defendant, the Government of Pakistan (for more details see our previous post here). The case raised a variety of issues of English international commercial arbitration law that I will leave to my learned English coeditors. But it also raised a most interesting issue of conflict of laws involving French private international law.

The issue was which law governed the validity/existence of an arbitration agreement. English law and the New York Convention provide that, in the absence of a choice by the parties, the validity of an arbitral agreement is governed by "*…the law of the country where the award was made*." In this case, that was French law. And the Supreme Court applied French law.

The problem with this view is that, if one were to ask a French court whether it would apply French law in such case, it would most certainly say no. Since the *Dalico* case in 1993, the French Supreme Court for private and criminal matters (*Cour de cassation*) has ruled that international arbitration agreements are not governed by any national law. This might look like a remarquable statement. It has shocked many French lawyers. It seems to have equally shocked quite a few Law Lords (more on this later). But however shocking it might be, it is a clear statement. According to the French *Cour de cassation*, French law does not govern the validity of arbitration agreements when the seat of the arbitration is in France. And one would think that the *Cour de cassation* knows what it is talking about when it comes to French law.

Which law governs then? Well, the two French law experts in this case had offered a reasonable interpretation. Their Joint Memorandum stated:

> *"Under French law, the existence, validity and effectiveness of an arbitration agreement in an international arbitration need not be assessed on the basis of national law, be it the law applicable to the main contract or any other law and can be determined according to rules of transnational law. To this extent, it is open to an international arbitral tribunal the seat of which is in Paris to find that the arbitration agreement is governed by transnational law".*

After citing *Dalico*, Lord Mance also started to explain:

> *15. This language suggests that arbitration agreements derive their existence, validity and effect from supra-national law, without it being necessary to refer to any national law.*

Indeed.

Renvoi or not _renvoi_?

There was therefore an interesting issue before the English Supreme court. Its choice of law rule designated French law, but the French choice of law rule did not designate French susbtantive law. The question of *renvoi* had thus to be asked: would the English court ignore that French law did not want to be applied, or would it take it into consideration?

One possible answer could have been that, in the English conflict of laws, the scope of *renvoi* is limited to family law, and that, in all other fields, English courts do not care about foreign choice of law rules. Alternatively, the English Court could have answered that the New York Convention excludes *renvoi*. Lord Collins did suggest so. He cited one author to this effect. It is disappointing that he did not mention all the others, in particular the numerous Swiss scholars who have argued to the contrary.

But this is not the main answer that Lord Collins gave. The distinguished jugde ruled that there could be no *renvoi*, because the applicable French choice of law rule designated French law. He held:

> *124 … it does not follow that for an English court to test the jurisdiction of a Paris tribunal in an international commercial arbitration by reference to the transnational rule which a French court would apply is a case of renvoi. Renvoi is concerned with what happens when the English court refers an issue to a foreign system of law (here French law) and where under that country's conflict of laws rules the issue is referred to another country's law. That is not the case here. What French law does is to draw a distinction between domestic arbitrations in France, and international arbitrations in France. It applies certain rules to the former, and what it describes as transnational law or rules to the latter.*

So, in a nutshell, although the *Cour de cassation* rules that transnational law

applies, that is not the content of French law. French law provides for the application of rules specifically designed for international arbitration, and these rules are French.

Lord Mance would certainly not have disagreed with this. He ruled:

> *15. … the true analysis is that French law recognizes transnational principles as potentially applicable (…), such principles being part of French law.*

Lord Mance, however, might not have been absolutly sure about this. He thus found useful to state that this had to be a correct view, since both barristers appearing before the Court also agreed. Just as 60 million Frenchmen can't be wrong, how could three English lawyers get it wrong on French law (even after two senior French lawyers had concluded differently)?

Lord Collins and Lord Mance's London Lectures

Are Lord Collins and Lord Mance right when they say that what French courts mean, or are doing, is to lay down French rules of international arbitration? Maybe. Quite a few French scholars have written exactly this. It might be, as Lord Collins put it, that French courts are wrong, and that what they do is is only to "describe" that transnational law applies. Yet, none of these scholars is authoritative when it comes to laying down rules of French law. Neither are Lord Collins or Lord Mance. Only French courts are. What they "describe" *is* French law.

The Lords sitting in the English Supreme Court were acting in a judicial capacity. They were faced with a question of foreign law. Their job was therefore to assess its content, and, for that purpose, they were to look at French *authorities*. Instead, the English Supreme Court explained how French law ought to be understood despite clear judgments of France's highest court ruling otherwise. It made an interesting academic point. But one would have thought that foreign law is a fact that ought to be assessed rather than an idea that can be endlessly discussed.

No doubt, French academics who disagree with this cases will appreciate the judgment in *Dallah*. It is less clear that the *Cour de cassation* will appreciate as much to have been lectured by Lord Collins and Lord Mance on the French

conflict of laws.

Don’t Dallah … Book Now

On 3 November 2010, the UK Supreme Court issued its decision in Dallah Real Estate & Tourism Holding Company v The Ministry of Religious Affairs, Pakistan [2010] UKSC 46, with the members of the Court unanimously declining to enforce under Part III of the Arbitration Act 1996 (giving effect to the UK’s obligations under the New York Convention) an award made by an ICC Tribunal sitting in Paris.

The decision (and earlier stages of the litigation) addressed several important issues, including the scope and manner of the Court’s review under section 103(2)(b) of the 1996 Act (Article V(1)(a) New York Convention), the place of the doctrine of “competence-competence” within the Act and the application of arbitration agreements to non-signatories. The ruling and judgments of the Supreme Court on these issues will almost certainly have a significant and longstanding effect on UK arbitration practice, while influencing debate and practice in other countries.

British Institute of International and Comparative Law (through its Herbert Smith Senior Research Fellow, Dr Eva Lein) has organised a rapid response seminar to discuss the ruling and implications of Dallah case. The seminar will be held at the Institute’s headquarters from **17:15 to 18:45 0n Wednesday 24 November 2010** (followed by a drinks reception). The assembled panel of experts will include:

- David Brynmor Thomas, Herbert Smith LLP
- Dr Stavros Brekoulakis, Queen Mary, University of London
- Ali Malek QC, 3 Verulam Buildings
- Duncan Speller, Wilmer Cutler Pickering Hale and Dorr LLP

Registration and other details of the seminar are available here.

UPDATE: We mistakenly referred to September as the month for this seminar. That has now been corrected – it was, of course, meant to say November. Many thanks to those who emailed pointing out the typo. The time and list of speakers have also been updated.

Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr

As we pointed out in a previous post, a very rich collection of essays **in honor of Prof. Kurt Siehr** on his 75th birthday has been recently published by Eleven International Publishing and Schulthess, under the editorship of *Katharina Boele-Woelki*, *Talia Einhorn*, *Daniel Girsberger* and *Symeon Symeonides*: **Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr**. A previous *Festschrift* was dedicated to Prof. Siehr in 2000: "Private Law in the International Arena – From National Conflict Rules Towards Harmonization and Unification: Liber amicorum Kurt Siehr" (see Google Books).

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Title: **Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr**, edited by *Katharina Boele-Woelki*, *Talia Einhorn*, *Daniel Girsberger*, *Symeon Symeonides*; Eleven International Publishing – Schulthess, The Hague – Zürich, 2010, 918 pages.

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Katharina Boele-Woelki Talia Einhorn Daniel Girsberger Symeon Symeonides

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Vacancies at the Secretariat of the ICC

The Secretariat of the ICC International Court of Arbitration is currently recruiting two deputy counsels, one to deal principally with parties from Eastern Europe, another to deal principally with Europe, Africa and the Middle East.

The closing dates for applications are October 4th for the first position, October 11th for the second.

More details can be found here.

European Parliament Resolution on Brussels I

On September 7th, the European Parliament adopted a Resolution on the Implementenation and the Review of the Brussels I Regulation.

The Resolution addresses many issues. On whether to abolish exequatur, the Parliament:

> *2. Calls for the requirement for exequatur to be abolished, but considers that this must be balanced by appropriate safeguards designed to protect the rights of the party against whom enforcement is sought; takes the view therefore that provision must be made for an exceptional procedure available in the Member State in which enforcement is sought; considers that this procedure should be available on the application of the party against whom enforcement is sought to the court indicated in the list in Annex III to the Regulation; takes the view that the grounds for an application under this exceptional procedure should be the following: (a) that recognition is manifestly contrary to public policy in the*

Member State in which recognition is sought; (b) where the judgment was given in default of appearance, that the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so; (c) that the judgment is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought, and (d) that the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; further considers that an application should be able to be made to a judge even before any steps are taken by way of enforcement and that if that judge rules that the application is based on serious grounds, he or she should refer the matter to the court indicated in the list in Annex III for examination on the basis of the grounds set out above; advocates the addition of a recital in the preamble to the effect that a national court may penalise a vexatious or unreasonable application, inter alia , in the order for costs;

3. Encourages the Commission to initiate a public debate on the question of public policy in connection with private international law instruments;

4. Considers that there must be a harmonised procedural time-frame for the exceptional procedure referred to in paragraph 2 so as to ensure that it is conducted as expeditiously as possible, and that it must be ensured that the steps which may be taken by way of enforcement until the time-limit for applying for the exceptional procedure has expired or the exceptional procedure has been concluded are not irreversible; is particularly concerned that a foreign judgment should not be enforced if it has not been properly served on the judgment debtor;

5. Argues not only that there must be a requirement for a certificate of authenticity as a procedural aid so as to guarantee recognition, but also that there should be a standard form for that certificate; considers, to this end, that the certificate provided for in Annex V should be refined, while obviating as far as possible any need for translation;

6. Believes that, in order to save costs, the translation of the decision to be enforced could be limited to the final order (operative part and summary grounds), but that a full translation should be required in the event that an application is made for the exceptional procedure;

Full text of the resolution after the break.

Many thanks to Jan von Hein for the tip-off.

European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/2140(INI))

The European Parliament ,– having regard to Article 81 of the Treaty on the Functioning of the European Union,– having regard to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters(1) (hereinafter “the Brussels I Regulation” or “the Regulation”),– having regard to the Commission’s report on the application of that regulation (COM(2009)0174),– having regard to the Commission’s Green Paper of 21 April 2009 on the review of the Brussels I Regulation (COM(2009)0175),

– having regard to the Heidelberg Report (JLS/2004/C4/03) on the application of the Brussels I Regulation in the Member States and the responses to the Commission’s Green Paper,

– having regard to its resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme(2) , specifically the sections “Greater access to civil justice for citizens and business” and “Building a European judicial culture”,

– having regard to the Union’s accession to the Hague Conference on private international law on 3 April 2007,

– having regard to the signature, on behalf of the Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements on 1 April 2009,

– having regard to the case law of the Court of Justice, in particular Gambazzi v. DaimlerChrysler Canada (3) , the Lugano opinion(4) , West Tankers (5) , Gasser v. MISAT (6) , Owusu v. Jackson (7) , Shevill (8) ,Owens Bank v. Bracco (9) , Denilauer (10) , St Paul Dairy Industries (11) and Van Uden (12) ;

– having regard to the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters(13) , Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims(14) , Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure(15) , Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure(16) , Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations(17) and Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000(18) ,

– having regard to Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)(19) ,

– having regard to the opinion of the European Economic and Social Committee of 16 December 2009,

– having regard to Rules 48 and 119(2) of its Rules of Procedure,

– having regard to the report of the Committee on Legal Affairs (A7-0219/2010),

A. whereas Regulation No 44/2001, with its predecessor the Brussels Convention, is one of the most successful pieces of EU legislation; whereas it laid the foundations for a European judicial area, has served citizens and business well by promoting legal certainty and predictability of decisions through uniform European rules – supplemented by a substantial body of case-law,– and avoiding parallel proceedings, and is used as a reference and a tool for other instruments,

B. whereas, notwithstanding this, it has been criticised following a number of rulings of the Court of Justice and is in need of modernisation,

C. whereas abolition of exequatur – the Commission’s main objective – would expedite the free movement of judicial decisions and form a key milestone in the building of a European judicial area,

D. whereas exequatur is seldom refused: only 1 to 5% of applications are appealed and those appeals are rarely successful; whereas, nonetheless, the time and expense of getting a foreign judgment recognised are hard to justify in the single market and this may be particularly vexatious where a claimant wishes to seek enforcement against a judgment debtor’s assets in several jurisdictions,

E. whereas there is no requirement for exequatur in several EU instruments: the European enforcement order, the European payment order, the European small claims procedure and the maintenance obligations regulation(20) ,

F. whereas abolition of exequatur should be effected by providing that a judicial decision qualifying for recognition and enforcement under the Regulation which is enforceable in the Member State in which it was given is enforceable throughout the EU; whereas this should be coupled with an exceptional procedure available to the party against whom enforcement is sought so as to guarantee an adequate right of recourse to the courts of the State of enforcement in the event that that party wishes to contest enforcement on the grounds set out in the Regulation; whereas it will be necessary to ensure that steps taken for enforcement before the expiry of the time-limit for applying for review are not irreversible,

G. whereas the minimum safeguards provided for in Regulation No 44/2001 must be maintained,

H. whereas officials and bailiffs in the receiving Member State must be able to tell that the document of which enforcement is sought is an authentic, final judgment from a national court,

I. whereas arbitration is satisfactorily dealt with by the 1958 New York Convention and the 1961 Geneva Convention on International Commercial Arbitration, to which all Member States are parties, and the exclusion of arbitration from the scope of the Regulation must remain in place,

J. whereas the rules of the New York Convention are minimum rules and the law of the Contracting States may be more favourable to arbitral competence and arbitration awards,

K. whereas, moreover, a rule providing that the courts of the Member State of the seat of the arbitration should have exclusive jurisdiction could give rise to considerable perturbations,

L. whereas it appears from the intense debate raised by the proposal to create an exclusive head of jurisdiction for court proceedings supporting arbitration in the civil courts of the Member States that the Member States have not reached a common position thereon and that it would be counterproductive, having regard to world competition in this area, to try to force their hand,

M. whereas the various national procedural devices developed to protect arbitral jurisdiction (anti-suit injunctions so long as they are in conformity with free movement of persons and fundamental rights, declaration of validity of an arbitration clause, grant of damages for breach of an arbitration clause, the negative effect of the ‘Kompetenz-Kompetenz principle’, etc.) must continue to be available and the effect of such procedures and the ensuing court decisions in the other Member States must be left to the law of those Member States as was the position prior to the judgment in West Tankers ,

N. whereas party autonomy is of key importance and the application of the lis pendens rule as endorsed by the Court of Justice (e.g. in Gasser) enables choice-of-court clauses to be undermined by abusive “torpedo” actions,

O. whereas third parties may be bound by a choice-of-court agreement (for instance in a bill of lading) to which they have not specifically assented and this may adversely affect their access to justice and be manifestly unfair and whereas, therefore, the effect of choice-of-court agreements in respect of third parties needs to be dealt with in a specific provision of the Regulation,

P. whereas the Green Paper suggests that many problems encountered with the Regulation could be alleviated by improved communications between courts; whereas it would be virtually impossible to legislate on better communication between judges in a private international law instrument, but it can be promoted as part of the creation of a European judicial culture though training and recourse to networks (European Judicial Training Network, European Network of Councils for the Judiciary, Network of the Presidents of the Supreme Courts of the EU, European Judicial Network in Civil and Commercial Matters),

Q. whereas, as regards rights of the personality, there is a need to restrict the possibility for forum shopping by emphasising that, in principle, courts should accept jurisdiction only where a sufficient, substantial or significant link exists with the country in which the action is brought, since this would help strike a better balance between the interests at stake, in particular, between the right to freedom of expression and the rights to reputation and private life; whereas the problem of the applicable law will be considered specifically in a legislative initiative on the Rome II Regulation; whereas, nevertheless, some guidance should be given to national courts in the amended regulation,

R. whereas, as regards provisional measures, the Denilauer case-law should be clarified by making it clear that ex parte measures can be recognised and enforced on the basis of the Regulation provided that the defendant has had the opportunity to contest them,

S. whereas it is unclear to what extent protective orders aimed at obtaining information and evidence are excluded from the scope of Article 31 of the Regulation,

Comprehensive concept for private international law

1. Encourages the Commission to review the interrelationship between the different regulations addressing jurisdiction, enforcement and applicable law; considers that the general aim should be a legal framework which is consistently structured and easily accessible; considers that for this purpose, the terminology in all subject-matters and all the concepts and requirements for similar rules in all subject-matters should be unified and harmonised (e.g. lis pendens , jurisdiction clauses, etc .) and the final aim might be a comprehensive codification of private international law;

Abolition of exequatur

2. Calls for the requirement for exequatur to be abolished, but considers that this must be balanced by appropriate safeguards designed to protect the rights of the party against whom enforcement is sought; takes the view therefore that provision must be made for an exceptional procedure available in the Member State in which enforcement is sought; considers that this procedure should be available on the application of the party against whom enforcement is sought to the court indicated in the list in Annex III to the Regulation; takes the view that the grounds for an application under this exceptional procedure should be the following: (a) that recognition is manifestly contrary to public policy in the Member State in which recognition is sought; (b) where the judgment was given in default of appearance, that the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so; (c) that the judgment is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought, and (d) that the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; further considers that an application should be able to be made to a judge even before any steps are taken by way of enforcement and that if that judge rules that the application is based on serious grounds, he or she should refer the matter to the court indicated in the list in Annex III for examination on the basis of the grounds set out above; advocates the addition of a recital in the preamble to the effect that a national court may penalise a vexatious or unreasonable application, inter alia , in the order for costs;

3. Encourages the Commission to initiate a public debate on the question of public policy in connection with private international law instruments;

4. Considers that there must be a harmonised procedural time-frame for the exceptional procedure referred to in paragraph 2 so as to ensure that it is conducted as expeditiously as possible, and that it must be ensured that the steps which may be taken by way of enforcement until the time-limit for applying for the exceptional procedure has expired or the exceptional procedure has been concluded are not irreversible; is particularly concerned that a foreign judgment should not be enforced if it has not been properly served on the judgment debtor;

5. Argues not only that there must be a requirement for a certificate of authenticity as a procedural aid so as to guarantee recognition, but also that there should be a standard form for that certificate; considers, to this end, that the certificate provided for in Annex V should be refined, while obviating as far as possible any need for translation;

6. Believes that, in order to save costs, the translation of the decision to be enforced could be limited to the final order (operative part and summary grounds), but that a full translation should be required in the event that an application is made for the exceptional procedure;

Authentic instruments

7. Considers that authentic instruments should not be directly enforceable without any possibility of challenging them before the judicial authorities in the State in which enforcement is sought; takes the view therefore that the exceptional procedure to be introduced should not be limited to cases where enforcement of the instrument is manifestly contrary to public policy in the State addressed since it is possible to conceive of circumstances in which an authentic act could be irreconcilable with an earlier judgment and the validity (as opposed to the authenticity) of an authentic act can be challenged in the courts of the State of origin on grounds of mistake, misrepresentation, etc. even during the course of enforcement;

Scope of the Regulation

8. Considers that maintenance obligations within the scope of Regulation No 4/2009/EC should be excluded from the scope of the Regulation, but reiterates that the final aim should be a comprehensive body of law encompassing all subject-matters;

9. Strongly opposes the (even partial) abolition of the exclusion of arbitration from the scope;

10. Considers that Article 1(2)(d) of the Regulation should make it clear that not only arbitration proceedings, but also judicial procedures ruling on the validity or extent of arbitral competence as a principal issue or as an incidental or preliminary question, are excluded from the scope of the Regulation; further considers that a paragraph should be added to Article 31 providing that a judgment shall not be recognised if, in giving its decision, the court in the Member State of origin has, in deciding a question relating to the validity or extent of an arbitration clause, disregarded a rule of the law of arbitration in the Member State in which enforcement is sought, unless the judgment of that Member State produces the same result as if the law of arbitration of the Member State in which enforcement is sought had been applied;

11. Considers that this should also be clarified in a recital;

Choice of court

12. Advocates, as a solution to the problem of “torpedo actions”, releasing the court designated in a choice-of-court agreement from its obligation to stay proceedings under the lis pendens rule; considers that this should be coupled with a requirement for any disputes on jurisdiction to be decided expeditiously as a preliminary issue by the chosen court and backed up by a recital stressing that party autonomy is paramount;

13. Considers that the Regulation should contain a new provision dealing with the opposability of choice-of-court agreements against third parties; takes the view that such provision could provide that a person who is not a party to the contract will be bound by an exclusive choice-of-court agreement concluded in accordance with the Regulation only if: (a) that agreement is contained in a written document or electronic record; (b) that person is given timely and adequate notice of the court where the action is to be brought; (c) in contracts for carriage of goods, the chosen court is (i) the domicile of the carrier; (ii) the place of receipt agreed in the contract of carriage; (iii) the place of delivery agreed in the contract of carriage, or (iv) the port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; considers that it should further be provided that, in all other cases, the third party may bring an action before the court otherwise competent under the Regulation if it appears that holding that party to the chosen forum would be blatantly unfair;

Forum non conveniens

14. Suggests, in order to avoid the type of problem which came to the fore in Owusu v. Jackson , a solution on the lines of Article 15 of Regulation No 2201/2003 so as to allow the courts of a Member State having jurisdiction as to the substance to stay proceedings if they consider that a court of another Member State or of a third country would be better placed to hear the case, or a specific part thereof, thus enabling the parties to bring an application before that court or to enable the court seised to transfer the case to that court with the agreement of the parties; welcomes the corresponding suggestion in the proposal for a regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession(21) ;

Operation of the Regulation in the international legal order

15. Considers, on the one hand, that the question whether the rules of the Regulation should be given reflexive effect has not been sufficiently considered and that it would be premature to take this step without much study, wide-ranging consultations and political debate, in which Parliament should play a leading role, and encourages the Commission to initiate this process; considers, on the other hand, that, in view of the existence of large numbers of bilateral agreements between Member States and third countries, questions of reciprocity and international comity, the problem is a global one and a solution should also be sought in parallel in the Hague Conference through the resumption of negotiations on an international judgments convention; mandates the Commission to use its best endeavours to revive this project, the Holy Grail of private international law; urges the Commission to explore the extent to which the 2007 Lugano Convention(22) could serve as a model and inspiration for such an international judgments convention;

16. Considers in the meantime that the Community rules on exclusive jurisdiction with regard to rights in rem in immovable property or tenancies of immovable property could be extended to proceedings brought in a third State;

17. Advocates amending the Regulation to allow reflexive effect to be given to exclusive choice-of-court clauses in favour of third States” courts;

18. Takes the view that the question of a rule overturning Owens Bank v. Bracco should be the subject of a separate review;

Definition of domicile of natural and legal persons

19. Takes the view that an autonomous European definition (ultimately applicable to all European legal instruments) of the domicile of natural persons would be desirable, in order in particular to avoid situations in which persons may have more than one domicile;

20. Rejects a uniform definition of the domicile of companies within the Brussels I Regulation, since a definition with such far-reaching consequences should be discussed and decided within the scope of a developing European company law;

Interest rates

21. Considers that the Regulation should lay down a rule so as to preclude an enforcing court from declining to give effect to the automatic rules on interest rates of the court of the State of origin and applying instead its national interest rate only from the date of the order authorising enforcement under the exceptional procedure;

Industrial property

22. Considers that, in order to overcome the problem of “torpedo actions”, the court second seised should be relieved from the obligation to stay proceedings under the lis pendens rule where the court first seised evidently has no jurisdiction; rejects the idea, however, that claims for negative declaratory relief should be excluded altogether from the first-in-time rule on the ground that such claims can have a legitimate commercial purpose; considers, however, that issues concerning jurisdiction would be best resolved in the context of proposals to create a Unified Patent Litigation System;

23. Considers that the terminological inconsistencies between Regulation No 593/2008 (“Rome I”)(23) and Regulation No 44/2001 should be eliminated by including in Article 15(1) of the Brussels I Regulation the definition of “professional” incorporated in Article 6(1) of the Rome I Regulation and by replacing the expression “contract which, for an inclusive price, provides for a combination of travel and accommodation” in Article 15(3) of the Brussels I Regulation by a reference to the Package Travel Directive 90/314/EEC(24) as in Article 6(4)(b) of the Rome I Regulation;

Jurisdiction over individual contracts of employment

24. Calls on the Commission to consider, having regard to the case-law of the Court of Justice, whether a solution affording greater legal certainty and suitable protection for the more vulnerable party might not be found for employees who do not carry out their work in a single Member State (e.g . long distance lorry drivers, flight attendants);

Rights of the personality

25. Believes that the rule in Shevill needs to be qualified; considers, therefore, that, in order to mitigate the alleged tendency of courts in certain jurisdictions to accept territorial jurisdiction where there is only a weak connection with the country in which the action is brought, a recital should be added to clarify that, in principle, the courts of that country should accept jurisdiction only where there is a sufficient, substantial or significant link with that country; considers that this would be helpful in striking a better balance between the interests at stake;

Provisional measures

26. Considers that, in order to ensure better access to justice, orders aimed at obtaining information and evidence or at preserving evidence should be covered by the notion of provisional and protective measures;

27. Believes that the Regulation should establish jurisdiction for such measures at the courts of the Member State where the information or evidence sought is located, in addition to the jurisdiction of the courts having jurisdiction with respect to the substance;

28. Finds that “provisional, including protective measures” should be defined in a recital in the terms used in the St Paul Dairy case;

29. Considers that the distinction drawn in Van Uden, between cases in which the court granting the measure has jurisdiction over the substance of the case and cases in which it does not, should be replaced by a test based on the question of whether measures are sought in support of proceedings issued or to be issued in that Member State or a non-Member State (in which case the restrictions set out in Article 31 should not apply) or in support of proceedings in another Member State (in which case the Article 31 restrictions should apply);

30. Urges that a recital be introduced in order to overcome the difficulties posed by the requirement recognised in Van Uden for a “real connecting link” to the territorial jurisdiction of the Member State court granting such a measure, to make it clear that in deciding whether to grant, renew, modify or discharge a provisional measure granted in support of proceedings in another Member State, Member State courts should take into account all of the circumstances, including (i) any statement by the Member State court seised of the main dispute with respect to the measure in question or measures of the same kind, (ii) whether there is a real connecting link between the measure sought and the territory of the Member State in which it is sought, and (iii) the likely impact of the measure on proceedings pending or to be issued in another Member State;

31. Rejects the Commission’s idea that the court seised of the main proceedings should be able to discharge, modify or adapt provisional measures granted by a court from another Member State since this would not be in the spirit of the principle of mutual trust established by the Regulation; considers, moreover, that it is unclear on what basis a court could review a decision made by a court in a different jurisdiction and which law would apply in these circumstances, and that this could give rise to real practical problems, for example with regard to costs;

Collective redress

32. Stresses that the Commission’s forthcoming work on collective redress instruments may need to contemplate special jurisdiction rules for collective actions;

Other questions

33. Considers, on account of the special difficulties of private international law, the importance of Union conflicts-of-law legislation for business, citizens and international litigators and the need for a consistent body of case-law, that it is time to set up a special chamber within the Court of Justice to deal with references for preliminary rulings relating to private international law;

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34. Instructs its President to forward this resolution to the Council and the Commission.

Latest Issue of “Praxis des Internationalen Privat- und Verfahrensrechts” (5/2010)

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

Here is the contents:

- ***Peter Mankowski****:* “Ausgewählte Einzelfragen zur Rom II-VO: Internationales Umwelthaftungsrecht, internationales Kartellrecht, renvoi, Parteiautonomie” – the English abstract reads as follows:

The Rome II Regulation is up for regular review in the near future. Some of its rules deserve closer consideration. This relates in particular to Art. 7 on environmental liability which does not address the paramount question to which extent permissions granted by one Member State influence liability. Insofar a detailed solution by way of recognition is proposed. Another field open for reform is party autonomy under Art. 14. Insofar a number of proposals is submitted generally attempting to bring Art. 14 better in line with other rules of Community law. A systematic restructuring of Art. 6 (3) on competition law is advocated for, too. In contrast, it does not appear to alter anything with regard to the exclusion of renvoi.

- ***Beate Gsell/Felix Netzer***: “Vom grenzüberschreitenden zum potenziell grenzüberschreitenden Sachverhalt – Art. 19 EuUnterhVO als Paradigmenwechsel im Europäischen Zivilverfahrensrecht” – the English abstract reads as follows:

This article sheds light on a new development in European Civil Procedure Law caused by Article 19 Regulation (EC) No 4/2009 of 18 December 2008 on maintenance obligations. It illustrates the differences between Article 19 Regulation (EC) No 4/2009 and related Articles in the Regulations on the

European enforcement order for uncontested claims, the European order for payment procedure and the European small claims procedure. The authors demonstrate that Article 19 (EC) No 4/2009 provides the defendant with an autonomous right to apply for a review of a national court's decision in order to compensate the abolition of the exequatur. Thereby European Civil Procedure Law does not confine its scope to cross-border cases, but, on the grounds of an only potential Europe-wide recognition and enforcement of judgements, intervenes in merely national procedures as well. After discussing the consequences of this principle change in European Civil Procedure Law, the authors doubt the EU's competence under Article 65 EC or Article 81 TFEU to intervene in national procedure law as regulated in Article 19 (EC) No 4/2009.

- ***Anne Röthel/Evelyn Woitge***: "Das ESÜ-Ausführungsgesetz – effiziente Kooperation im internationalen Erwachsenenschutz" – the English abstract reads as follows:

The coming into force of the Hague Convention on the International Protection of Adults on 1 January 2009 gives reason to examine the German Implementation Act. Its purpose is to include the regulations of the Convention into the internal German system for the protection of adults who are suffering from an impairment or an insufficiency in their personal facilities and therefore are not able to safeguard their own interests. In this article, the authors show the major content of the Implementation Act and discuss how the rules on jurisdiction, applicable law and international recognition and enforcement of protective measures laid down by the Convention fit into existing German law. Also, they highlight the concept of administrative co-operation between member states drawn up by the Convention and put into effect by national law.

- ***Jörn Griebel***: "Einführung in den Deutschen Mustervertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen von 2009" – the English abstract reads as follows:

The article comments on the new German Model BIT (bilateral investment treaty) of 2009. After a general description of its content, some changes of the new model in comparison to its predecessors are addressed. Against the background of various models by other states, the question will be raised as to whether some necessary changes were omitted. It is also discussed to what

degree different approaches to reforming model BITs are due to political reasons and/or different approaches to treaty drafting.

- ***Axel Metzger***: "Zum Erfüllungsortgerichtsstand bei Kauf- und Dienstleistungsverträgen gemäß der EuGVVO" – the English abstract reads as follows:

The Car Trim decision of the ECJ puts a spotlight on two important and yet unsettled questions regarding the jurisdiction at the place of performance in sales and service contracts under Art. 5 Nr. 1 lit. b Brussels I Regulation. The author agrees with the Court's ruling that contracts for the supply of goods to be manufactured or produced should be characterised as sales contracts as long as the purchaser has not supplied the materials. However, the ruling should not be generalised to all types of mixed contracts with service components. The Car Trim decision is also correct in localising the place of performance in case of a sale involving carriage of goods at the place where the purchaser obtained actual power of disposal over the goods at the final destination and not at the place at which the goods are handed over to the first carrier for transmission to the purchaser. Finally, the author examines some of the general questions on autonomous interpretation of Art. 5 Nr. 1 lit. b Brussels I Regulation raised by the Court.

- ***Ben Steinbrück***: "Internationale Zuständigkeit deutscher Gerichte für selbstständige Beweisverfahren in Schiedssachen" – the English abstract reads as follows:

The author comments on a decision of the Higher Regional Court Düsseldorf (7 February 2008 – I-20 W 152/07), which deals with the competence of German courts to preserve evidence for use in foreign arbitration proceedings. The court ruled that parties who agree that their dispute shall be resolved by a foreign arbitral tribunal pursuant to a foreign law derogate the German courts' international jurisdiction to make (interim) orders in independent proceedings for the taking of evidence ("selbständiges Beweisverfahren"). This decision is not in line with German arbitration law. According to §§ 1025 Abs. 2, 1033 of the German Code of Civil Procedure German courts arbitration agreements conferring jurisdiction on a foreign arbitral tribunal do not affect the German courts' competence to grant interim relief. It follows that these competences,

including the power to preserve evidence, can only be excluded by an explicit agreement to that effect.

- ***Rolf A. Schütze*** on the principle of reciprocity in relation to South Africa: "Zur Verbürgung der Gegenseitigkeit im Verhältnis zu Südafrika"
- ***Peter Kindler***: "Zum Kollisionsrecht der Zahlungsverbote in der Gesellschaftsinsolvenz" – the English abstract reads as follows:

Under German law, the managing director of a company is obliged to reimburse the company any payment that has been made to a third party – e.g. a creditor or a shareholder – after the company's insolvency or over-indebtedness (see, e.g. sec. 64 of the law pertaining to private companies ltd. by shares – GmbHG).1 The Berlin Kammergericht holds that this rule of law also applies to a managing director of a company registered abroad – in this case a British Ltd. – with its centre of main interests in Germany (sec. 3 of the EC Regulation 1346/2000 on cross border insolvency). The author welcomes this decision.

- ***Fabian Wall***: "Enthält Art. 21 Abs. 1 AEUV eine „versteckte" Kollisionsnorm?" – the English abstract reads as follows:

According to the judgment of the European Court of Justice in the case "Grunkin and Paul", Article 21 TFEU (ex Article 18 TEC) awards the right to every citizen of the Union that each Member State has to recognise a surname which has been formerly determined and lawfully registrated in a civil register of another Member State. Until now, it is uncertain how the demand of the Court of Justice can be implemented in german practice. This is demonstrated by a case decided recently by the Higher Regional Court of Munich. The legal question is whether Article 21 TFEU should be interpreted as a target which leaves the national authorities the choice of form and methods of implementation or whether Article 21 TFEU should be interpreted as a "hidden" conflict of laws rule which is directly applicable in all Member States.

- ***Martin Illmer***: "La vie après Gasser, Turner et West Tankers – Die Anerkennung drittstaatlicher anti-suit injunctions in Frankreich" – the English abstract reads as follows:

The strong winds from Luxembourg blowing in the face of anti-suit injunctions have extinguished the remedy within the territorial and substantive scope of the Brussels I Regulation. Yet, anti-suit injunctions are not dead even within the European Union. Rather, the focus shifts to the remaining areas of operation. One of these areas concerns anti-suit injunctions issued by non-member state courts against parties initiating proceedings before member state courts. Since the Brussels I Regulation does not cover extra-territorial scenarios, the rationale of the ECJ's judgments in Gasser, Turner and West Tankers does not apply. Faced with such an anti-suit injunction, it is entirely up to the national law of the respective Member State whether or not to recognize it. While the Belgian and German courts had refrained to do so in the past, the French Cour de Cassation in a recent straight forward judgment has had no difficulty in recognizing and enforcing an anti-suit injunction of a US state court (Georgia).

- ***Ulrich Spellenberg*** on Art. 23 Brussels I Regulation: "Der Konsens in Art. 23 EuGVVO – Der kassierte Kater"
- ***Carl Friedrich Nordmeier***: "Portugal: Änderungen im internationalen Zuständigkeitsrecht" – the English abstract reads as follows:

By art. 160 of law n. 52/2008 of 28 of August 2008, Portugal reformed its autonomous rules on jurisdiction, art. 65 and 65-A of the Civil Procedure Code. This contribution gives a short overview of the new rules, focussing especially on the applicability in time.

- ***Christoph Benicke***: "Die Neuregelung des internationalen Adoptionsrechts in Spanien" – the English abstract reads as follows:

With the law 54/2007 of 28 December 2007 the Spanish legislator has enacted a special law on international adoption which encompasses rules on jurisdiction, applicable law and the recognition of foreign adoption decisions in Spain. The new law has the advantage that it summarizes the scattered arrangements into one piece of legislation. It also represents a step forward in that the transformation of a weak foreign adoption in a strong adoption is now possible. But the reform remains half hearted as it restricts the recognition of a weak foreign adoption to cases where none of the parties has the Spanish nationality. In addition, both the conflict of laws rule and the rules on the recognition of foreign adoption decisions are substantively implausible. Most

schemes have been taken over from the existing legal situation which had in great part been formed by decisions of the General Directorate of public registries and of the notary system (Dirección General de los Registros y del Notariado) without of systematic guideline. Significantly, there are many technical shortcomings in the legislation. Overall, the new law fails to create a modern, autonomous international adoption law. This is all the more striking since the motives express the aim to reach the standard of the Hague Adoption Convention of 1993.

- ***Viviane Reding*** on the European Civil Code and PIL: "Zum Europäischen Zivilgesetzbuch und IPR"
- ***Rolf Wagner***: "Die zivil(verfahrens-)rechtlichen Komponenten des Aktionsplans zum Stockholmer Programm" – the English abstract reads as follows:

The "Stockholm Programme – An open and secure Europe serving and protecting the citizens" covering the period 2010–2014 defines strategic guidelines for legislative and operational planning within the area of freedom, security and justice. Recently the European Commission finalized an action plan. The action plan entails lists of measures with time limits implementing the Stockholm Programme. The article provides an overview on this action plan.

Second Issue of 2010's Revue de l'Arbitrage

The second issue of 2010's French *Revue de l'arbitrage* was released in July.

It contains three articles, one of which addresses an issue of private international law. It is authored by Mathias Audit, who is professor of law at the University Paris Ouest (formerly Paris 10) and discusses the influence of the recent *INSERM* judgment of one of French supreme courts on the regime of arbitration of

disputes arising out of international administrative contracts (*Le nouveau régime de l'arbitrage des contrats administratifs internationaux (à la suite de l'arrêt rendu par le Tribunal des conflits dans l'affaire* INSERM)). The English abstract reads:

> *Pursuant to a judgment of 17 May 2010, the "Conflicts Court" ("Tribunal des conflits") laid down the first foundations for the international arbitral regime to be applied to administrative contracts concluded by French public bodies with foreign contracting parties. The Court has in particular decided to entrust to administrative courts the review of awards issued under certain types of such contracts. Using this judgment as a starting point, this article aims to review more generally this new regime which now applies to arbitration of disputes arising under international administrative contracts.*

Yearbook of Private International Law, vol. XI (2009)

The **XI volume (2009) of the Yearbook of Private International Law** (YPIL), published by Sellier – European Law Publishers in association with the Swiss Institute of Comparative Law (ISDC), is out. The Yearbook, edited by *Andrea Bonomi* and *Paul Volken*, contains a huge number of articles, national reports, commentaries on court decisions and other materials, up to nearly 650 pages.

Here's the full list of contributions (available as .pdf on the publisher's website, where the volume can be purchased, also in electronic format):

Doctrine

- *Erik Jayme*, Party Autonomy in International Family and Succession Law: New Tendencies;
- *Ralf Michaels*, After the Revolution – Decline and Return of U.S. Conflict

of Laws;

- *Diego P. Fernández Arroyo*, Private International Law and Comparative Law: A Relationship Challenged by International and Supranational Law;
- *Koji Takahashi*, Damages for Breach of a Choice-of-Court Agreement: Remaining Issues;
- *Eva Lein*, A Further Step Towards a European Code of Private International Law: The Commission Proposal for a Regulation on Succession;
- *Giulia Rossolillo*, Personal Identity at a Crossroads between Private International Law, International Protection of Human Rights and EU Law;
- *Urs Peter Gruber / Ivo Bach*, The Application of Foreign Law: A Progress Report on a New European Project;
- *Juan José Alvarez Rubio*, Contracts for the International Carriage of Goods: Jurisdiction and Arbitration under the New UNCITRAL Convention 2008.

Private International Law in China – Selected Topics

- *Yongping Xiao / Weidi Long*, Contractual Party Autonomy in Chinese Private International Law;
- *Qisheng He*, Recent Developments with Regards to Choice of Law in Tort in China;
- *Renshan Liu*, Recent Judicial Cooperation in Civil and Commercial Matters between Mainland China and Taiwan, the Hong Kong S.A.R. and the Macao S.A.R.;
- *Weidong Zhu*, Law Applicable to Arbitration Agreements in China;
- *Yongping Xiao*, Foreign Precedents in Chinese Courts;
- *Guoqiang Luo (Steel Rometius)*, Crime of Law-Bending Arbitration in Chinese Criminal Law and Its Effects on International Commercial Arbitration;
- *Fang Xiao*, Law Applicable to Arbitration Clauses in China: Comments on the Chinese People's Supreme Court's Decision in the *Hengji Company* Case.

National Reports

- *Didier Opertti Badán / Cecilia Fresnedo de Aguirre*, The Latest Trends in Latin American Private International Law: the Uruguayan 2009 General

Law on Private International Law;

- *Jeffrey Talpis / Gerald Goldstein*, The Influence of Swiss Law on Quebec's 1994 Codification of Private International Law;
- *Yasuhiro Okuda*, Initial Ownership of Copyright in a Cinematographic Work under Japanese Private International Law;
- *Elisabeth Meurling*, Less Surprises for Spouses Moving Within the Nordic Countries? Amendments to the 1931 Nordic Convention on Marriage;
- *Andreas Fötschl*, The Common Optional Matrimonial Property Regime of Germany and France – Epoch-Making in the Unification of Law.

News from UNCITRAL

- *Jenny Clift*, International Insolvency Law: the UNCITRAL Experience with Harmonisation and Modernisation Techniques.

Court Decisions

- *Zeno Crespi Reghizzi*, 'Mutual Trust' and 'Arbitration Exception' in the European Judicial Area: The *West Tankers* Judgment of the ECJ;
- *Mary-Rose McGuire*, Jurisdiction in Cases Related to a Licence Contract Under Art. 5(1) Brussels Regulation: Case-Note on Judgment ECJ Case C-533/07 – *Falco Privatstiftung and Thomas Rabitsch* v. *Gisela Weller-Lindhorst*;
- *Antonio Leandro*, *Effet Utile* of the Regulation No. 1346 and *Vis Attractiva Concursus*. Some Remarks on the *Deko Marty Judgment*;
- *Ben Steinbrück*, Jurisdiction to Set Aside Foreign Arbitral Awards in India: Some Remarks on an Erroneous Rule of Law;
- *Gilberto Boutin*, *Forum non conveniens* and *Lis alibi pendens* in International Litigation in Panama.

Forum

- *Fabrizio Marongiu Buonaiuti*, *Lis Alibi Pendens* and Related Actions in Civil and Commercial Matters Within the European Judicial Area;
- *Caroline Kleiner*, Money in Private International Law: What Are the Problems? What Are the Solutions?;
- *Benedetta Ubertazzi*, Intellectual Property and State Immunity from Jurisdiction in the New York Convention of 2004.

See also our previous posts on the 2006, 2007 and 2008 volumes of the YPIL.

(*Many thanks to Gian Paolo Romano, Production Editor of the YPIL)*

Yves Fortier Chair at McGill

Applications are currently invited for the L. Yves Fortier Chair in International Arbitration and International Commercial Law tenable in the Faculty of Law, McGill University

The L. Yves Fortier Chair in International Arbitration and International Commercial Law, endowed in 2009, has been created through the generous support of Rio Tinto Alcan Inc., in order to bring a leading scholar and teacher in the field of international arbitration and commercial law to the Faculty of Law at McGill University. The Chair is named in honour of L. Yves Fortier, BCL'58, formerly Canada's Ambassador, Permanent Representative, Chief Delegate to the General Assembly of the United Nations and former Chairman of the Board of Alcan Inc.

The Faculty seeks applications from scholars of international reputation in the field of international commercial law and arbitration. The purpose of the Chair is to reinforce a Canadian locus for the study and research in these fields. Through his or her engagement in teaching and research, the chair holder will advance the understanding of theoretical and practical dimensions of international commercial law including trade and investment, formal and informal regulatory models, corporate governance and responsibility as well as dispute resolution. The chair holder will teach and supervise undergraduate students and graduate students at the master and doctoral levels in the Faculty of Law. The chair holder will endeavour to establish, where appropriate, relationships with other scholars, civil servants, international organizations and experts in non-governmental organizations.

Given the bilingual environment of McGill's Faculty of Law, the chair holder will be expected to evaluate written and oral work presented by students in both

English and French.

The position is tenured and the Chair is fully endowed. In addition to a proven record as a teacher and a scholar, the successful candidate would ideally have experience interacting with international organizations and national governments. The salary and the academic rank will reflect the successful candidate's qualifications and experience. The term for the chair is seven years and is renewable. The appointment would commence January or July 1, 2011.

The Faculty of Law at McGill University was established in 1848. Its undergraduate program represents an international benchmark for contemporary legal education, and leads to the joint award of the Bachelor of Civil Law (B.C.L.) and Bachelor of Laws (LL.B.) degrees. The graduate program comprises both a non-thesis master's degree and substantial research degrees at the master and doctoral levels. Through its research programs and pedagogical initiatives it reflects a central commitment to the study of legal traditions, comparative law and the internationalization of law. In conjunction with this overarching mission for the study of law at McGill University, four areas of academic priority have been identified by the Faculty: Transsystemic Legal Education; Trade, Mobility and Enterprise; Public Policy and Private Resources; and Human Rights and Legal Pluralism.

The L. Yves Fortier Chair in International Arbitration and International Commercial Law will be invited to stimulate research and teaching at the intersection of these four areas, and, in so doing, to contribute to the University's national and international profile as well as to the Faculty of Law's expertise in comparative law.

How to apply

Applications and nominations, accompanied by a complete curriculum vitae, are now invited and will be considered as of October 15, 2010. Applications should be addressed to Professor Geneviève Saumier, Chair, Staff Appointments Committee, Faculty of Law, McGill University. Applications should be sent by electronic mail to Linda.coughlin@mcgill.ca