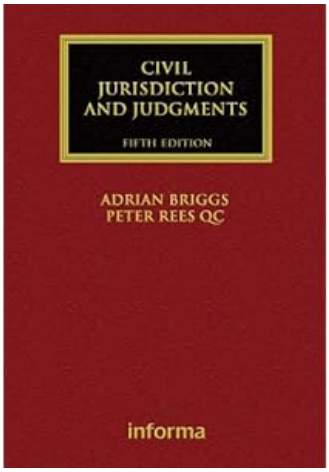
Publication: Briggs & Rees, Civil Jurisdiction and Judgments (5th edn)



Just in case you have not already ordered your copy, or one for your library, the 5th edn (2009) of Briggs & Rees, *Civil Jurisdiction and Judgments* is available. Insofar as there is blurb available, here it is:

> *The new edition has been thoroughly updated to include:*
>
> - *Major decisions of the European Court on the Brussels I Regulation, especially in relation to injunctions and arbitration, but also arising in almost every other area of civil jurisdiction and judgments*
> - *The re-worked provisions for service out of the jurisdiction*
> - *Countless new cases from the English courts*
> - *Damages claims for breach of agreements of jurisdiction and choice of law*

That doesn't really do justice to the work, or the work put into its revision (it last appeared in 2005, so some of the changes are very significant). It isn't cheap, though: £395 from either Informa or Amazon. But delve deeply, for this is worth every penny.

Hess' Response to Mourre

Burkhard Hess has posted at the Kluwer Arbitration Blog a response to *Alexis Mourre's* post which had been a reaction to *Burkhard Hess'* Guest Editorial on the question whether arbitration and European procedural law should be separated or coordinated.

Brussels I Review: Responses to the Commission's Green Paper

The contributions received by the European Commission in response to the Green Paper on the review of the Brussels I reg. (published in April 2009 together with the Commission's report on its application: see our post here) have been recently published on the DG FSJ website.

Over 120 contributions have been collected, from Member States' governments, parliaments and other public authorities, third States (Switzerland), commercial, financial and civil society organisations, NGOs, and the legal and academic sector.

Readers of this blog had the opportunity to read in draft the excellent contribution prepared by Andrew Dickinson, and some comments and responses to his analysis (see this post by Prof. Jonathan Hill and this one by Martin Illmer and Ben Steinbrück).

Among the recent academic initiatives on the review of reg. 44/2001, see also our post on the latest issue of IPRax (2/2010), where some of the papers presented at the conference held in Heidelberg in December 2009 have been published. A two-day conference, organized by the Spanish Presidency of the EU, will be held in Madrid on 15 and 16 March 2010: "Bruselas I: La reforma de la litigación internacional en Europa".

(Many thanks to Federico Garau – Conflictus Legum – and Rafael Arenas – Àrea de Dret Internacional Privat)

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

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

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

Here is the contents:

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

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

- ***Peter Schlosser***: "The Abolition of Exequatur Proceedings – Including Public Policy Review?"

The – alleged – basic paper to which reference is continuously made when

exequatur proceedings and public policy are discussed is a so-called Tampere resolution. The European Council convened in a special meeting in the Finnish city in 1999 to discuss the creation of an area of security, freedom and justice in the European Union. The outcome of this meeting was not a binding text which would have been adopted by something like a plenary session of the heads of States and Governments. Instead, the document is titled "presidency's conclusion" and is a summary drafted by the then Finish president. It is a declaration of intention for the immediate future, pre-dominantly concerned with criminal and asylum matters and not binding on any European legislator. As far as "civil matters" are concerned, the "presidency's conclusion" reads as follows: "In civil matters the European Council calls upon the Commission to make a proposal for further reduction of the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgment in the requested state. As a first step, these intermediate procedures should be abolished for titles in respect of small consumer or commercial claims and for certain judgments in the fields of family litigation (e.g. on maintenance claims and visiting rights). Such decisions would be automatically recognized throughout the Union without any intermediate proceedings or grounds for refusal of enforcement. This could be accompanied by the setting of minimum standards on specific aspects of civil procedural law. "The conclusion does no say whether it would be advisable to generally abolish intermediate procedures. It only states that intermediate procedures should be further "reduced". If one takes the view that the "first step" of reduction should be followed by a second or third one, one could refer to the regulation on "Creating a European Enforcement Order for Uncontested Claims" and to the regulation on "Creating a European Order for Payment Procedure". Not a single word mentions that at the end of all steps taken together the intermediate procedure or any control whatsoever in the requested state shall become obsolete and that even the most flagrant public policy concern shall become irrelevant. The need for a residuary review in the requested state is powerfully demonstrated by a recent ruling of the French Cour de Cassation: A woman resident in France had been ordered by the High Court of London to pay to the Lloyd's Society no less than £ 142,037. The judgment did not give any reasons for the order except for stating that "the defendant had expressed its willingness not to accept the claim and that the judge accepted the claim pursuant to rule 14 par. 3 of the Civil Procedure Rules." The relevant text of this provision is drafted as follows: "Where a party makes an admission under

rule 14.1.2 (admission by notice in writing), any other party may apply for judgment on the admission. Judgment shall be such judgment as it appears to the court that the applicant is entitled for on the admission." The judgment neither revealed at all the dates of the respective admissions made during the proceedings although the defendant had expressed its willingness to defend the case nor referred to any document produced in the course of the proceedings. One cannot but approve the ruling of the French Cour de Cassation confirming the decision of the Cour d'Appel of Rennes. The courts held that the mere abstract reference to rule 14 of the Civil Procedure Rules was tantamount to a total lack of reasons and that the recognition of such a judgment would be incompatible with international public policy. Further, that the production of documents such as a copy of the service of the action could not substitute the lacking reasoning of the judgment. The importance of the possibility to invoke public policy when necessary to hinder recognition of a judgment was evident also in the earlier Gambazzi case of the European Court of Justice (ECJ). In that case the defendant was penalized for contempt of court by an exclusion from further participation in the proceedings. The reason for the measure was the defendant's violation of a freezing and disclosure order. The ECJ ruled that in the light of the circumstances of the proceedings such a measure had to be regarded as grossly disproportionate and, hence, incompatible with the international public policy of the state where recognition was sought. In its final conclusions, general advocate Kokott emphasized that a foreign judgment cannot be recognized if the underlying proceedings failed to conform to the requirement of fairness such as enacted in Art. 6 of the European Convention on Human Rights. It is worth noting that also Switzerland refused to enforce the English judgment. The Swiss Federal Court so decided because after having changed its solicitor, Gambazzi's new solicitor was refused to study the files of the case. Even in the light of the pertinent case law regarding a very limited review in the requested state and the known promptness and efficiency of exequatur proceedings, the Commission still intends to abolish this "intermediate measure". In its Green Paper it literally states:" The existing exequatur procedure in the regulation simplified the procedure for recognition and enforcement of judgment compared to the previous systems under the 1968 Brussels Convention. Nevertheless, it is difficult to justify, in an internal market without frontiers that citizens and businesses have to undergo the expenses in terms of costs and time to assert their rights abroad." The context reveals that the term "the expenses" relates to the expenses of the exequatur procedure.

However, the European Union is not the only internal market covering multiple jurisdictions. How is the comparable issue dealt with in other integrated internal markets? This is to be shown in the first part of this contribution. In the second part, I shall analyze in more detail and without any prejudice the ostensibly old-fashioned concept of exequatur.

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

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

Member State. At first glance this provision seems to imply that recognition of civil and commercial judgments within the EU is automatic. The reality is however, somewhat more complex than that. In order for a foreign judgment to be enforceable, a declaration of enforceability is required. At the first instance, it involves purely formal checks of the relevant documents with no opportunity for the parties or the court to raise any of the grounds for refusal of enforcement. An appeal against the declaration of enforceability by the judgment debtor will trigger the application of Articles 34 and 35 which provide barriers to the recognition and enforcement of judgments. According to the European Court of Justice (ECJ), any such obstacle must be interpreted narrowly, "inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of the [Regulation]" The overwhelming majority of cases are successful and if the application is complete, then the decision is likely to be made within a matter of weeks. The Commission is of the view that given the high success rate of applications, the exequatur proceedings merely hinder free movement of judgments at the expense of the enforcement creditor and provide for delays for the benefit of the male fides judgment debtor. It is with this in mind that the Commission asks whether, in an Internal Market without frontiers, European citizens and businesses should be expected to sacrifice time and money in order to enforce their rights abroad. It is argued that in the Internal Market, free movement of judgments is necessary in order to ensure access to justice. Exequatur proceedings can create tension between Member States, creating suspicion and ultimately destroying mutual trust. It will be seen however, that total abolition of exequatur proceedings would effectively mean judgments must be recognised in every case with no ground for refusal unless the grounds for refusal are moved to the actual enforcement stage. Total abolition of the grounds for refusing enforcement would result in an unfair bias in favour of the judgment creditor to the detriment of the judgment debtor. The Commission on the one hand proposes to abolish the exequatur procedure provided by Brussels I but on the other hand, suggests that some form of "safeguard" should be preserved. The Green Paper tentatively suggests that a special review a posteriori could be put in place which would in effect create automatic recognition of a judgment reviewable only after becoming enforceable. Such an approach would enhance judicial co-operation and aid progressive equivalence of judgments from other Member States. Yet it is questioned whether allowing an offending judgment to be enforced in the first place, only to review it a posteriori is the most effective way of dealing with the

problem. It is instead argued that a provision similar to that of Article 20 of the Hague Child Abduction Convention could strike a fair balance between the interests of the judgment creditor and debtor.As Brussels I stand it is open to the judgment debtor to appeal the declaration of enforceability. The appellant may claim a breach of public policy or lack of due process in the service of the documents instituting proceedings which may amount to a breach of Article 6 of the European Convention on Human Rights (ECHR). The grounds to refuse recognition of a foreign judgment are restrictive and under no circumstances may the "substance" of the judgment be reviewed. Such a review of the substance would seriously undermine the mutual trust between courts of the European Union. However, the public policy exception does allow States to uphold essential substantive rules of its own system by refusing to enforce judgments from other EU States that infringe the fundamental principles of its own law. The question is whether Member States will be prepared to abandon the "public policy" defence and thereby give up this right to protect the fundamental principles of their substantive law? Will they be content to have a defence that simply focuses on protecting the fundamental rights of the defendant?

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

Recent litigation relating to the recognition and enforcement of US class action judgments or settlements under Member States' common private international law (still applicable to relationships with third States), along with current trends in their domestic legislation towards the acceptance of representative, class or group actions, herald a whole set of new issues linked to the appearance of collective redress within the common area of justice. It is the thesis of this paper that the Brussels I Regulation in its present form is ill-equipped to deal with the onslaught of aggregate claims, both in its provisions on jurisdiction and as far as the free movement of judgments and settlements is concerned. It may well be that the same could be said for the conflict of laws rules in Regulations Rome I and Rome II, which were also designed to govern purely individual relationships. Indeed, one may wonder whether the difficulties which arise under this heading are not the sign of an at least partial

obsolescence of the whole European private international law model, insofar as it rests upon increasingly outdated conceptions of the dynamics, function, structure and governance requirements of litigation and adjudication. Although this conclusion may seem radical, it is in fact hardly surprising. Indeed, as it has been rightly observed, within the civilian legal tradition which is the template for the conceptions of adjudication and jurisdiction underlying the Brussels I Regulation (like the other private international law instruments applicable in the common area of justice), the recourse to group litigation, which is now beginning to appear in the European context as one of the most effective means of improving ex post accountability of providers of mass commodities freely entering the market, represents a "sea-change" in legal structures, away from exclusive reliance on public enforcement.

- ***Burkhard Hess***: "Cross-border Collective Litigation and the Regulation Brussels I"

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

Injunctions Directive 98/27/EC permits consumer associations from another state to institute proceedings for the infringement of consumer laws in the Member State where the infringement was initiated. However, this directive has not been very successful. It has only been applied in a few cross-border cases.

- ***Luca G. Radicati di Brozolo***: "Choice of Court and Arbitration Agreements and the Review of the Brussels I Regulation"

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

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

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

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

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

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

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

- ***Gilles Cuniberti***: "Debarment from Defending, Default Judgments and Public Policy"

The origin of the Gambazzi case is to be found in the collapse of a Canadian investment company, Castor Holding Ltd., at the beginning of the 1990s. Castor had been incorporated in Montreal in 1977. Its first president was a German-born Canadian businessman named Karsten von Wersebe. In the 1980s, however, its main manager became a German national named Otto Wolfgang Stolzenberg. Marco Gambazzi was a Swiss lawyer who had specialized in assets management. He first invested in Castor, and was then offered to become a member of the board of directors of the company. In 1992, however, Castor was declared insolvent. Dozens of suits followed. First, the trustee (syndic) sought

to challenge payments made by Castor before 1992. He focused on a Can$ 15 million distribution of dividends to shareholders at the end of 1990, which he was eventually able to claim back after establishing that the company was already insolvent in 1990. More importantly, many investors sued the auditors of Castor, Coopers & Lybrand, who had certified its accounts between 1978 and 1991. After more than ten years of litigation, there was still no judgment on the merits, which led the Montreal Court of appeal to conclude that "it is not exaggerated to say that the Castor Holding case has been an exceptional one in Canadian legal history, a genuine judicial derailment". In 1996, a remarkable decision was made by a handful of Canadian investors. DaimlerChrysler Canada and certain pension and other benefit funds that it had established for its employees decided to initiate proceedings in London against four individuals formerly involved in the management of Castor (Stolzenberg, Gambazzi, von Wersebe and Banziger) and more than thirty corporate entities allegedly related to them. The plaintiffs argued that they had been defrauded by the defendants in Canada, and thus sought restitution. The reason why the proceedings were brought to England is unclear. There was virtually no connection between the case and the United Kingdom. The only exception was that Stolzenberg once owned a house in London, as he owned others in Paris and, it seems, Germany, Canada and South America. But even that house, which was the sole connecting factor which was likely to give jurisdiction to the English court over the entire case and the thirty-six defendants, was sold before the defendants were served with the writ instituting the proceedings in March 1997. Unsurprisingly, therefore, the jurisdiction of the English court was challenged. The case went up to the House of Lords which eventually ruled that the date which mattered to appreciate whether one defendant was domiciled in England and could thus be the anchor allowing to drag an infinite number of co-defendants to London was the time when the writ was issued by the English court. In this case, that meant May 1996, because the English court had permitted the plaintiffs to postpone service of the writ in order to enable them, first, to conduct ex parte hearings of several days for the purpose of convincing the court that it should grant a world wide freezing order, and, second, to carefully prepare simultaneous service so that none of the defendants could escape the English trial by initiating parallel proceedings elsewhere. The only reasonable explanation for choosing to bring the case to England is the availability of powerful interim measures which have turned London into a magnet forum for international fraud cases. English world wide freezing orders

and, even more importantly, English disclosure orders seem to be remarkably and uniquely efficient in the process of tracing stolen assets, so much so that an English court once called them one of the two nuclear weapons of English civil procedure. If other jurisdictions have not been able to tackle as efficiently the issue of international frauds, alleged victims cannot be blamed for seeking justice where it can effectively be achieved. But the quest for justice, or for making England the jurisdiction of choice, cannot justify everything. In this case, available nuclear weapons were used to their full capacity. This certainly enabled plaintiffs to secure a decisive victory. But this was at the costs of the fairness that the English legal system ought to have afforded to the defendants.

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

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

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

The legal feud between Danone and Wahaha, both being leading beverage manufacturers in the Chinese market, had developed into one of the most significant investment disputes in the history of the People's Republic of China.

A number of arbitration proceedings and civil actions were filed inside and outside China. In particular, several arbitration proceedings pending before the Swedish Chamber of Commerce since May 2007, the outcome of which was supposed to largely decide that of the disputes between the two parties, had drawn considerable public attention. Despite the surprising settlement shortly before the arbitration tribunals rendered their decisions, the disputes between Danone and Wahaha offer a valuable opportunity to inquire into the law and practice of arbitration relating to foreign investments in China. This case note will first comment on the award of a Chinese domestic arbitration proceeding dealing with one of the major issues of the whole disputes – the ownership of the trademark "Wahaha" – and then discuss questions that were relevant to the proceeding in Stockholm.

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

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

- ***Erik Jayme*** on the meeting of the European Group for Private International Law in Padua in September 2009: “Die Vereinheitlichung des Internationalen Privat- und Verfahrensrechts in der Europäischen Union: Tendenzen und Widerstände Tagung der „Europäischen Gruppe für Internationales Privatrecht“ (GEDIP) an der Universität Padua”
- ***Marc-Philippe Weller*** on the Heidelberg symposium on the occasion of the 75th birthday of Prof. Dr. Dr. h.c. mult. Erik Jayme: “Symposium zu Ehren von Erik Jayme”

Mourre on Hess’ Guest Editorial

Alexis Mourre has posted a response to Burkhard Hess’ Guest Editorial on whether Arbitration and European Procedural Law should be Coordinated or Separated at the Kluwer Arbitration Blog.

Fourth Complutense Seminar on Private International Law

On 11 and 12 March, 2010, a new edition (the fourth) of the Private International Law Seminar organized by Prof. Fernández Rozas and De Miguel Asensio will take place in Madrid . This Seminar, which has proven to be one of the most important and successful in the area of Private International Law in Spain both by the extent of the audience and the quality of the speakers, will be held this time under the name “Litigación civil internacional: nuevas perspectivas europeas y de terceros Estados”. As in previous editions, the meeting will bring together numerous experts, academics and lawyers from both Spain and abroad, covering different areas of Private International Law. This edition will gather representatives from Spain, several European countries (Spain, Portugal, France,

Italy, Germany, United Kingdom, Luxembourg, Romania) and also from other continents (Panama, Argentina, Cuba and Japan). Spanish, English and French will be spoken -though no translation is provided.

The Congress shall have four sessions, called respectively International jurisdiction in the European Union; Cross-border effectiveness of resolutions and documents in the European Union; Third States and comparative point of view; and International commercial arbitration and State jurisdiction. Each of them involves several lectures, followed by the reading of papers and a final debate. The program and the registration form (registration is free) can be found here.

As in previous editions, most of the contents of the Seminar will be later published in the Anuario Español de Derecho Internacional Privado.

International Conference in Verona

The Verona University School of Law will host a conference titled

Conflict of Laws in International Commercial Arbitration

The conference will take place from 18-20 March 2010 in Verona and will cover in particular the following topics:

- conflict of law questions concerning arbitration agreements
- jurisdiction of arbitral tribunals
- the law applicable to the merits
- arbitration procedure

There is no registration fee, however, registration is required. For further information and registration please contact Dr. Francesca Ragno (francesca.ragno@univr.it) and see the detailed conference programme which can be found here.

Dallah, Renvoi and Transnational Law

In December, three members of the UK Supreme Court granted leave to appeal in *Dallah v. Pakistan*.

The case concerns the enforcement of an ICC arbitral award in the UK. In a nutshell, the Ministry of Religious Affairs of Pakistan had negotiated with Saudi company Dallah a contract whereby Dallah would provide services (building accomodation in particular) for Pakistani pilgrims visiting Mecca for the Hajj. But the contract was eventually signed by a Pakistani Trust which was to later on lose legal personality under Pakistani law. When the dispute arose, Dallah initiated arbitration proceedings against the Government of Pakistan.

The central issue was therefore whether the arbitral tribunal had jurisdiction over the Government of Pakistan, which was not a signatory of the contract including the arbitration clause. A distinguished arbitral tribunal sitting in Paris held that it had. Both the English High Court and the English Court of appeal disagreed and thus denied enforcement.

The debate before the English courts was and I guess will be about a variety of issues of English and international arbitration law that I will barely touch upon here, including discretion to refuse enforcement under the 1958 New York Convention or the standard of review of arbitral decisions on jurisdiction. But the case also raised a very interesting and arguably novel issue of choice of law. And it involved not only the English but also the French conflict of laws.

Choice of Law in England

The starting point of the reasoning was section 103(2)(b) of the English *Arbitration Act* 1996 , which provides that recognition or enforcement of a New York Convention award may be refused if the person against whom it is invoked

proves that "*…the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made*." Section 103(2)(b) of the Act implements the second part of Article V (a)(1) of the New York Convention in English law.

In the absence of any choice by the parties, the applicable statutory provision of the forum provided that the validity of the arbitration agreement was governed by the law of the seat of the arbitration, which was Paris, France. As a consequence, the English courts applied French law to determine whether Pakistan was bound by the arbitration agreement.

Choice of Law in France

This conclusion, however, was problematic for two reasons. The first is that the arbitral tribunal had actually not applied French law in order to decide the issue. It had applied "transnational principles". Under French law, it was perfectly entitled to do so. Even in the absence of any choice of law made by the parties, Article 1496 of the French Code of Civil Procedure provides that arbitrators may apply any "rules of law" that they deem appropriate. ICC rules, which were applicable, provide the same. In other words, the English courts decided to review the decision of the arbitrators on jurisdiction pursuant to a law (French law) that the arbitrators had not meant to apply, and had no obligation to apply according to the law of the seat of the arbitration.

Furthermore, when French courts review decisions of arbitrators on jurisdiction, they do not apply French law either. For almost 20 years and the *Dalico* decision in 1993, French courts have held that arbitration agreements are not governed by any national law, and that it is only necessary to assess whether the parties have actually consented to go to arbitration. This is only a factual enquiry. No national law applies.

***Renvoi* to Transnational Law?**

So, the French and the English do not have the same choice of law rules. Is that novel in private international law? Not really. For long, conflict lawyers have advocated to take into account foreign choice of law rules in order to coordinate legal systems. For some reason, even the English call it *renvoi*. So, in this case, the issue certainly arose as to whether English courts should have considered French choice of law rules.

The question was well perceived by Aikens J. in first instance. In his judgment of August 1st, 2008, he wondered:

> *78. … Does the phrase "within the law of the country where the award was made" in section 103(2)(b) include a reference to the conflict of laws rules of that country?*

Most unfortunately, however, the two French experts had written in their Joint Memorandum:

> *"Where a French court is called upon to decide the challenge of an arbitral award rendered by a tribunal seated in France, it has not to apply French conflict of laws in order to determine whether the arbitral tribunal has jurisdiction".*

This statement was misleading. It is true that French law does not have a typical choice of law rule for the purpose of determining whether an arbitration agreement is valid. But French law cannot avoid having an answer to the question of when is an arbitration agreement valid in an international dispute. And the answer is the *Dalico* rule, which provides that no national law governs, and that it is only necessary to assess whether there was actual consent.

Indeed, the French law experts further wrote in their Joint Memorandum:

> *"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".*

Aikens J. understood this as follows:

> *93. As I read this statement, the second sentence states a general principle of French law which permits a court to hold that an arbitration agreement is governed by a system of law other than a national law. The first sentence stipulates that, as a matter of French law, "transnational law" can be applied to*

> *issues of the specific questions of the existence, validity and effectiveness of an arbitration agreement in an international arbitration. I think that both of these principles must be regarded as French conflict of laws rules. (…)*

Aikens J.'s understanding of French private international law was perfectly sensible. There is a French choice of law rule, and it provides for the application of a non national set of rules of decision. In other words, and although Aikens J. did not say so, there was a *renvoi* from French law to transnational law.

Applying French Substantive Law?

Both Aikens J. and the Court of appeal ruled that the English court should apply French law. One reason was of course the misleading statement of the French experts on the French conflict of laws. But other reasons were offered.

For the Court of appeal, Moore-Bick LJ held that the English court "was bound by section 103(2) of the Act to apply French law to the facts as he found them" (§ 25). It is true that neither the *Act* nor the New York Convention mention *renvoi*, but none of these norms provide that courts may not apply *renvoi* either.

In first instance, Aikens J. referred to the leading commentary of Van den Berg on the New York Convention which states that conflict of laws rules of the Convention "are to be treated as uniform". Although the English judge characterized Van den Berg's book as "authoritative", it must be recognized that quite a few scholars do not share this opinion. In particular, many Swiss conflict and arbitration scholars have submitted that *renvoi* should be accepted when the choice of law rule of the seat of the arbitration is more favourable than the rule of the New York Convention, which is the case of the Swiss rule since the Swiss conflict of laws was reformed in 1987. And, indeed, given that the New York Convention includes article VII which enables states to apply more favourable regimes, it seems hard to argue that the main point of the Convention was to lay down uniform rules.

Applying French Choice of Law Rules?

So, does this mean that the English court should have taken into account French conflict of laws rules? It is submitted that, in principle, the answer is yes.

- Yet, one should not overlook the difficulties, both practical and doctrinal, that this would create.

To begin with, one would have to determine the content of those transnational rules which French courts hold applicable. Certainly, the arbitral tribunal could do so in this case. But how easily could an English court do it? Here is what Aikens J. had to say about it:

> *93 As I read this statement, the second sentence states a general principle of French law which permits a court to hold that an arbitration agreement is governed by a system of law other than a national law. (…) The statement cannot, of course, identify any principles of "transnational law" by which to test the existence, validity and effectiveness of an arbitration agreement in an international arbitration. That, I suppose, is a matter for a "transnational law" expert; none gave evidence before the court.*

Then, it would be necessary to find a legal ground for justifying taking into account French conflict of laws rules.

The first doctrine which comes to mind is obviously *renvoi*. But the forum is an English court, and I understand that the doctrine of "total renvoi" is not widely accepted in English law. An extension to the field of arbitration would be quite a novelty.

Another solution might be to take the French rules into account for the purpose of exercising discretion under Article V of the New York Convention. Article V provides that enforcing courts "may" deny recognition to awards when one of the grounds of Article V is established. English courts have held repeatedly that this means that they have discretion to still enforce an award when such a ground can be proved. They have also ruled, including in *Dallah*, that this discretion is not open or broad, but limited. It might be appropriate to use this discretion for allowing the enforcement of an award comporting with the law of the seat of the arbitration, including its conflict of laws rules.

Choice of Law in American Courts 2009

Once again, Dean Symeon Symeonides has compiled his annual choice of law survey. Here is the abstract:

"This is the Twenty-Third Annual Survey of American Choice-of-Law Cases. It is written at the request of the Association of American Law Schools Section on Conflict of Laws and is intended as a service to fellow teachers and students of conflicts law, both within and outside the United States. Its purpose is to inform, rather than to advocate.

The Survey covers cases decided by American state and federal appellate courts from January 1 to December 31, 2009, and posted on Westlaw before the end of the year. Of the 1,490 conflicts cases meeting both of these parameters, the Survey focuses on those cases that may contribute something new to the development or understanding of conflicts law – and particularly choice of law.

For the conflicts afficionados, 2009 brought many noteworthy developments, including the enactment of the second choice-of-law codification for tort conflicts in the United States, and a plethora of interesting cases, such as the following:

– Several cases brought under the Alien Torts Statute (ATS) involving human rights abuses in foreign sites, including Iraq's Abu Ghraib prison, one case denying a Bivens remedy to a victim of "extraordinary rendition," and one case allowing an ATS action against an American pharmaceutical company for nonconsensual medical experiments on children in Nigeria;

– Two cases holding that the Holy See was amenable to suit under the tortious activity exception of the Foreign Sovereign Immunity Act for sexual abuses allegedly committed by clergymen in the United States;

– Two cases declaring unconstitutional two California statutes (dealing with Nazi looted artwork and the Armenian Genocide, respectively) as infringing on the Federal Government's exclusive power over foreign affairs;

– Several cases dealing with the recognition of same-sex marriages and their

implications on issues of parentage, adoption, and child custody; Several cases striking down (and a few enforcing) class-action or class-arbitration waivers in consumer contracts;

– A Minnesota case holding that Panama's blocking statute did not prevent dismissal on forum non conveniens grounds an action arising from events occurring in Panama; and

– A case of legal malpractice for mishandling a conflicts issue, a case involving alienation of affections and "criminal conversation," and the usual assortment of tort, product liability, and statute of limitation conflicts."

The full survey is available for free here.

Thanks to Dean Symeonides for providing this valuable resource on the state of American conflicts law.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (1/2010)

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

It contains the following **articles/case notes (including the reviewed decisions)**:

- ***Heinz-Peter Mansel/Karsten Thorn/Rolf Wagner***: "Europäisches Kollisionsrecht 2009: Hoffnungen durch den Vertrag von Lissabon" – the English abstract reads as follows:

> *This article provides an overview on the developments in Brussels concerning the judicial cooperation in civil and commercial matters from November 2008*

until November 2009. It summarizes the current projects in the EC legislation and presents some new instruments. Furthermore, it refers to the national German laws as a consequence of the new European instruments. This article also shows the areas of law where the EU has made use of its external competence. With regard to the ECJ, important decisions and some pending cases are presented. In addition, the article deals with important changes as to judicial cooperation resulting from the Treaty of Lisbon. It is widely criticised that the Hague Conference on Private International Law and the European Community should improve their cooperation. An important basis for the enhancement of this cooperation is the exchange of information among all parties involved. Therefore, the present article turns to the current projects of the Hague Conference as well.

- ***Ulrich Magnus***: "Die Rom I-Verordnung" – the English abstract reads as follows:

December 17, 2009 is a marked day for international contract law in Europe. From that day on, the court of the EU Member States (except Denmark) have to apply the conflicts rules of the Rome I Regulation to all transborder contracts concluded on or after that day. Fortunately, the Rome I Regulation builds very much on the fundaments of its predecessor, the Rome Convention of 1980, and amends that Convention only moderately. Though progress is limited, the amendments should not be underestimated. First, the communitarisation of international contract law will secure a stricter uniform interpretation of the Rome I Regulation through the European Court of Justice. Secondly, the changes strengthen legal certainty and reduce to some extent the courts' discretion, however without sacrificing the necessary flexibility. This is the case in particular with the requirements for an implicit chance of law, which now must be clearly demonstrated; with the escape clauses, which come into play when a manifestly closer connection points to another law or with the definition of overriding mandatory provisions, which apply irrespective of the law otherwise applicable (Art. 9 par. 1). Legal certainty is also strengthened by a number of clarifying provisions, among them that the franchisee's and distributor's law governs their contracts, that set-off follows the law of the claim against which set-off is asserted or that the redress claim of one joint debtor against another is governed by the law that applies to the claiming debtor's obligation forwards the creditor. Thirdly, the protection of the weaker

party through conflicts rules has been considerably extended and aligned to the Brussels I Regulation. Yet, some weaknesses have survived. These are the continuity of the confusing coexistence of the Rome I conflicts rules and further special conflicts rules in a number of EU Directives on consumer protection, the hardly convincing system of differing conflicts rules on insurance contracts and still open questions us to the rules applicable to assignments and their scope. It is to be welcomed that the Rome I Regulation itself (Art. 27) has already set these problems on the agenda for further amendment.

- ***Peter Kindler***: "Vom Staatsangehörigkeits- zum Domizilprinzip: das künftige internationale Erbrecht der Europäischen Union" – the English abstract reads as follows:

On October 14, 2009 the Commission of the European Communities has adopted a "Proposal for a Regulation of the European Parliament and of the Council 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" (COM [2009] 154 final 2009/0157 [COD] (SEC [2009] 410), (SEC [2009] 411). Its aim is to remove obstacles to the free movement of persons in the Union resulting from the diversity of both the rules under substantive law and the rules of international jurisdiction or of applicable law, the multitude of authorities to which international successions matters can be referred and the fragmentation of successions which can result from these divergent rules. According to the Proposal the competence lies with the Member state where the deceased had their last habitual residence, and this includes ruling on all elements of the succession, irrespective of whether adversarial or non-adversarial proceedings are involved (Article 4). The author welcomes this solution considering that the last habitual residence of the deceased will frequently coincide with the location of the deceased's property. As to the applicable law, the Proposal again uses the last habitual residence of the deceased as the principal connection factor (Article 16), but at the same time allows the testators to opt for their national law as that applying to their successions (Article 17). In this respect, the author is critical on the universal nature of the proposed Regulation (Article 25) and, inter alia, advocates the admission of referral in case the last habitual residence of the deceased is located outside the European Union. Furthermore, the author is in favour of a wider range of choice-of-law-options for the testator as foreseen in the Hague

Convention 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons.

- ***Wolfgang Hau***: "Doppelte Staatsangehörigkeit im europäischen Eheverfahrensrecht" – the English abstract reads as follows:

The question how multiple nationality is to be treated under the European rules on matrimonial matters was rather misleadingly answered by Alegría Borrás in her Official Report on the Brussels II Convention and it is still open in respect of the Regulation No 2201/2003. In the Hadadi case, the European Court of Justice has now pointed out that every nationality of a Member State held by both spouses is to be taken into account regardless of its effectivity. The Hadadi case directly concerns only the rather particular context of Article 64 (4) of the Regulation. In this case note it is argued that the considerations of the ECJ are convincing and also applicable to more common settings of the multiple-nationality problem within the Brussels II regime. On the occasion of the ongoing reform of the Regulation, it should however be carefully considered whether nationality of the spouses is an appropriate and indispensable basis of jurisdiction anyway.

- ***Jörg Dilger:*** "EuEheVO: Identische Doppelstaater und forum patriae (Art. 3 Abs. 1 lit. b)" – the English abstract reads as follows:

The essay reviews another judgment of the European Court of Justice relating to the Regulation (EC) No. 2201/2003 (Brussels IIA). Having to deal with spouses sharing the common nationality of two member states (Hungary and France), the ECJ – following the convincing AG's opinion – held that where the court of a member state addressed had to verify, pursuant to Article 64 (4), whether the court of a member state of origin of a judgment would have had jurisdiction under Article 3 (1) (b), the court had to take into account the fact that the spouses also held the nationality of the member state of origin and that therefore the courts of the latter could also have had jurisdiction under that provision. Since the spouses might seize a court of the member state of their choice, the evolving conflict of jurisdictions had to be solved by means of the lis alibi pendens rule (Article 19 (1)). Given the special procedural situation, the author starts by analyzing the transitional rule in Article 64 (4) which

empowers the courts of one member state to examine the jurisdiction of another member state's courts. He then examines the ECJ's reasoning and comes to the conclusion that de lege lata the ECJ's decision is correct. He finally shows that the ECJ's solution is not limited to transitional cases falling within the scope of Article 64, but applies to all the cases in which the court seized – which, not having jurisdiction pursuant Articles 3 to 5, considers having resort to jurisdiction according to its national law ("residual jurisdiction") – has to examine whether the courts of another member state have jurisdiction under the regulation (Article 17). Moreover, the solution elaborated by the ECJ also applies to spouses who share the common nationality of a member state and the common domicile pursuant to Article 3 (1) b, (2).

- ***Felipe Temming***: "Europäisches Arbeitsprozessrecht: Zum gewöhnlichen Arbeitsort bei grenzüberschreitend tätigen Außendienstmitarbeitern" – the English abstract reads as follows:

The Austrian High Court of Vienna has published a judgment on the topic of jurisdiction where an employee is relocated from Austria to Germany but the relocation never took effect. The employee was relocated pursuant to sections 99 and 95(3) Betriebsverfassungsgesetz, which raised the question of a change of jurisdiction according to Art. 19 No. 2 lit. a Regulation 44/2001/EC. The proceedings before the regional court of Innsbruck were brought by a sales representative against his Berlin-based employer in an action for payment. The employee was domiciled near Innsbruck from where he serviced customers in the area of Innsbruck and South-Germany and was transferred to Berlin however the employee became ill and the transfer never took effect. The case note first addresses issues regarding the personal scope of the Betriebsverfassungsgesetz in cross-border and external situations (part II.). It argues that the membership in an undertaking is the preferable criterion in order to establish the necessary link and only a consistent approach will lead to coherent and fair results. The case note then briefly revisits the long-standing jurisprudence of the European Court of Justice on matters of the habitual – usual – work place according to Art. 5 No. 1 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which was incorporated into Art. 19 of Regulation 44/2001/EC (part III.). The case note furthermore refers to section 48(1a)

Arbeitsgerichtsgesetz which came into effect on 1 April 2008 and gives German labour courts jurisdiction at the habitual work place in matters solely internal to Germany. Art. 19 No. 2 lit. a of Regulation 44/2001/EC founds its counterpart in this new German law. The enactment of section 48(1a) Arbeitsgerichtsgesetz is consistent with Germany's Federal Labour Court which has set out in several cases the doctrine of the uniform place of performance of work as the criterion for jurisdiction in labour law cases and in so doing has followed the path laid down by the ECJ in the early Ivenel case. The legislation enacts the decisions which have been held by the Federal Labour Court and had not been supported by leading German scholars. The case note ends with concluding remarks (part IV.)

- ***Marianne Andrae/Steffen Schreiber***: "Zum Ausschluss der Restzuständigkeit nach Art. 7 EuEheVO über Art. 6 EuEheVO" – the English abstract reads as follows:

The article deals with a decision of the Austrian Supreme Court of Justice concerning the exclusion of residual jurisdiction according to art. 7 Brussels IIa Regulation in case there is no jurisdiction under art. 3–5 Brussels IIa Regulation but the defendant spouse is a national of a Member State. The authors agree with the decision. Only if no member state has jurisdiction on the lawsuit and if the rules of jurisdiction in art. 3–5 are not exclusive for any action against the defendant spouse, does art. 7 allow to determine the jurisdiction according to the law of the relative Member State. According to art. 6, the rules of jurisdiction in art. 3–5 are exclusive if the defendant spouse has his/her habitual residence in a Member State or if he/she is a national of a Member State. However, it is not necessary for the exclusion of residual jurisdiction under art. 6 that any member state actually has jurisdiction under art. 3–5. Even though the abatement of art. 6 and the introduction of new rules of residual jurisdiction may be desirable, this effect must not be achieved by simply interpreting the current art. 6 this way.

- ***Katharina Jank-Domdey/Anna-Dorothea Polzer: "***Ausländische Eheverträge auf dem Prüfstand der Common Law Gerichte" – the English abstract reads as follows:

Courts in a number of important common law jurisdictions until recently gave

little or no weight to prenuptial contracts entered into in civil law jurisdictions such as France or Germany. These contracts typically contain provisions as to the spouses' marital property regime or their maintenance after divorce. Recent decisions, however, show a clear trend towards the enforceability of such agreements. The paper discusses the judgments of the Court of Appeals of New York in Van Kipnis v. Van Kipnis (11 NY3d 573) involving a French separation of property agreement and of the Court of Appeal of England and Wales in Radmacher v. Granatino ([2009] EWCA Civ 649), involving a German contract providing for the separation of property and the exclusion of spousal maintenance in case of divorce, and looks at their precedents. While none of the courts concludes that the foreign law under which the contracts were made must be applied they in fact enforce the spouses' agreements as to the financial consequences of their divorce. According to the English court, however, giving due weight to a foreign prenuptial agreement is subject to the principle of fairness and must safeguard the interests of the couple's children.

- ***Sven Klaiber*** on the new Algerian international civil procedural law as well as arbitration law: "Neues internationales Zivilprozess- und Schiedsrecht in Algerien"
- ***Erik Jayme*** on the third Heidelberg conference on art law: "Kunst im Markt – Kunst im Streit Internationale Bezüge und weltweiter Kampf um Urheberrechte – III. Heidelberger Kunstrechtstag"