Latest Issue of "Rabels Zeitschrift"

The latest issue of the **Rabels Zeitschrift** (Vol. 73, No. 4, October 2009) is a special issue on the occasion of the 60th birthday of *Professor Jürgen Basedow* and contains the following articles:

- ***Dietmar Baetge:*** Contingency Fees – An Economic Analysis of the Federal Constitutional Court's Decision Authorising Attorney Contingency Fees – the English abstract reads as follows:

In Germany, until recently, contingency fees were prohibited. In December 2006, the legal ban on contingency fees was declared unconstitutional by the Federal Constitutional Court (Bundesverfassungsgericht). Implementing the Court's ruling, the German legislator, in 2008, legalised contingency fees on a limited basis. This paper attempts to analyse the Constitutional Court's decision from an economic vantage point. The main constitutional reasons given to justify the legal ban on contingency fees are translated into economic terms and further elaborated. Points of discussion include the problem of moral hazard between the lawyer and the judge on the one hand and the lawyer and his client on the other. A third question dealt with in the paper is the extent to which contingency fees may influence the efficient allocation of resources. The paper concludes that access to the instrument of contingency fees should not be limited to poor clients but also extended to affluent persons.

- ***Moritz Bälz***: Japan's Accession to the CISG – the English abstract reads as follows:

On 1 July 2008 Japan, as the 71st state, acceded to the United Nations Convention on the International Sale of Goods (CISG). As of 1 August 2009, the most important convention in the field of uniform private law will thus enter into force in Japan, leaving Great Britain as the sole major trading nation not yet party to the convention. The article examines the complex reasons why Japan did not accede earlier as well as why this step was finally now undertaken. It, furthermore, offers an assessment of the importance of the CISG for Japan prior to the accession and the impact to be expected from the convention on the reform of the Japanese Civil Code which is currently under way. Finally, it is argued that Japan's accession nourishes the hope that the

CISG will spread further in Asia, thus not only extending its reach to one of the world's most dynamic regions, but also opening up opportunities for a future harmonisation of Asian contract law.

- ***Friedrich Wenzel Bulst***: The Application of Art. 82 EC to Abusive Exclusionary Conduct – the English abstract reads as follows:

The article addresses recent developments in the application of the prohibition of abuse of dominance in EC competition law. The European Commission has published a communication providing guidance on its enforcement priorities in applying Art. 82 EC to abusive exclusionary conduct of dominant undertakings. Under this more effects-based approach which focuses on ensuring consistency in the application of Arts. 81 and 82 EC as well as the Merger Regulation, priority will be given to cases where the conduct in question is liable to have harmful effects on consumers. After a brief introduction (section I), the author outlines the main elements of the communication and illustrates how the Commission's approach to providing guidance in this area has evolved since the publication of its 2005 discussion paper on exclusionary abuses (section II). The author then addresses the scope of the communication against the background of the case law on the Commission's discretion (not) to pursue cases (section III). The central concept of the communication is that of »foreclosure leading to consumer harm«. Against this background the author discusses, in the context of refusal to supply abuses both in and outside an IP context, the operationalisation of the criterion of harm to consumers (section IV) before concluding (section V).

- ***Anatol Dutta:*** The Death of the Shareholder in the Conflict of Laws – the English abstract reads as follows:

The death of the shareholder raises the question how the law applicable to the company and the law governing the succession in the deceased shareholder's estate have to be delimitated. This borderline becomes more and more relevant against the background of recent jurisprudence of the European Court of Justice (ECJ) in Centros, Überseering and Inspire Art concerning the freedom of movement of companies in the Community. On the one hand, as a consequence of this jurisprudence the laws governing the company and the succession often differ. On the other hand, the ECJ's jurisprudence might further blur the

boundaries between the laws governing companies and successions. The article tries to draw the border between the relevant choice-of-law rules. It comes to the conclusion that the consequences of the shareholder's death for the company and his share are subject to the conflict rules for companies (supra III.). More problematic, though, is the characterisation of the succession in the share of the deceased shareholder. Some legal systems contain special succession regimes for shares in certain private companies and partnerships. The article argues (supra IV.) that the succession in shares has to be dually-characterised and subjected to both, the law governing the company and the succession. Yet clashes between the applicable company and succession laws are to be solved by giving precedence to the applicable company law. The precedence of company law should be clarified by the legislator – by the German legislator when codifying the conflict rules for companies and by the European legislator when codifying the conflict rules for successions upon death (supra V.).

- ***Franco Ferrari***: From Rome to Rome via Brussels: Remarks on the Law Applicable to Contractual Obligations Absent a Choice by the Parties (Art. 4 of the Rome I Regulation)
- ***Christian Heinze***: Industrial Action in the Conflict of Laws – the English abstract reads as follows:

The introduction of a special conflicts rule for industrial action in Art. 9 Rome II Regulation can be considered as a felicitous innovation of European Private International Law. The application of the law of the country where the industrial action is to be taken or has been taken is founded on the public (social) policy concerns of the country where the action takes place and will therefore, in general, obviate the need for any enforcement of this country's strike laws by means of the ordre public or as internationally mandatory provisions (at least as far as intra-European cases are concerned). The major drawback of Art. 9 does not derive from the rule itself but rather from its restriction to »non-contractual liability«. Article 9 Rome II Regulation may therefore designate a substantive law applicable to the non-contractual liability for the industrial action which is different from the law applicable to the individual employment contract (Art. 8 Rome I Regulation) or a collective labour agreement. This may be unfortunate because the industrial action will

usually have consequences for at least the individual employment contract (e.g. a suspension of contractual obligations) which might be governed by a different law (Art. 8 Rome I Regulation) than the industrial action itself (Art. 9 Rome II Regulation). Possible conflicts between these laws can be resolved by extending the scope of Art. 9 Rome II Regulation to the legality of the industrial action in general, thus subjecting any preliminary or incidental questions of legality of industrial actions to Art. 9 Rome II Regulation while applying the lex contractus to the contractual consequences of the action.

- ***Eva-Maria Kieninger***: The Full Harmonisation of Standard Contract Terms – a Utopia? – the English abstract reads as follows:

The article discusses the proposal for a consumer rights directive of October 2008, in which the European Commission suggests to move from minimum to full harmonisation of specific areas of consumer contract law. The article specifically examines whether full harmonisation of the law relating to the judicial control of unfair contract terms, even if politically desirable, will be feasible in the context of non-harmonised national contract law. Examples are presented for cases which were decided differently by national courts on the basis of divergent rules of general contract law. The article discusses whether the Draft Common Frame of Reference (DCFR) can be used by the European Court of Justice (ECJ) and the national courts as a common yardstick to measure the unfairness of a contractual term. Two problems present themselves: one is the question of legitimacy because, until now, the DCFR is no more than a scientific endeavour which in part rests on the autonomous decisions of its drafters and does not merely present a comparative restatement of Member States' laws; second, the DCFR makes excessive use of the term »reasonableness« so that, in many instances, its ability to give guidance in the assessment of the unfairness of a specific contract term is considerably reduced. The question of legitimacy could be solved by an optional instrument which could be chosen by the parties as the applicable law.

- ***Jan Kleinheisterkamp***: Internationally Mandatory Rules and Arbitration – A Practical Attempt – the English abstract reads as follows:

This article treats the impact that internationally mandatory rules of the forum state may have on the effectiveness of arbitration agreements if the claims are

based on such internationally mandatory rules but the parties had submitted their contract to a foreign law. The specific problems of conflicts of economic regulation are illustrated and discussed on the basis of Belgian and German court decisions on disputes relating to commercial distribution and agency agreements. European courts have adopted a restrictive practice of denying the efficacy of such tandems of choice-of-law and arbitration clauses if there is a strong probability that their internationally mandatory rules will not be applied in foreign procedures. This article shows that neither this approach nor the much more pro-arbitration biased solutions proposed by critics are convincing. It elaborates a third solution which allows national courts both to reconcile their legislator's intention to enforce a given public policy with the parties' original intention to arbitrate and to optimize the effectiveness of public interests as well as that of arbitration.

- ***Axel Metzger***: Warranties against Third Party Claims under Arts. 41, 42 CISG – the English abstract reads as follows:

The United Nations Convention on Contracts for the International Sale of Goods (CISG) provides two regimes for warranties against third party claims. The general rule of Art. 41 establishes a strict liability rule for all third party claims not covered by Art. 42. Article 42 limits the seller's liability for infringement claims based on intellectual property. A seller under the CISG warrants only against third party intellectual property claims he »knew or could not have been unaware« at the time of the conclusion of the contract. In addition, his liability is territorially restricted to claims based on third party intellectual property rights in the countries contemplated by the parties at the conclusion of the contract. This article provides an overview of seller's warranties under Arts. 41 and 42. It examines, more specifically, whether the limited scope of seller's warranties for third party intellectual property claims is efficient and whether it is expedient from a comparative law perspective. Under a traditional economic analysis of law approach, the party who can avoid third party claims most cheaply should bear the risk of infringement claims. This will often be the seller, especially if he has produced the goods or has specific knowledge of the industry. But it may also occur that the buyer is in the superior position to investigate intellectual property rights, e.g. if the buyer is a specialized player in the industry and the seller is a mere vendor without specific knowledge in the field. Article 42 allows an efficient allocation of the risk by the court. The

party charged with the risk, be it seller or buyer, should not only warrant against third party rights he knew but also for those he could have been aware of after investigation in the patent and trademark offices of the relevant countries or through other resources. Such a duty to investigate may also exist with regard to unregistered rights like copyrights. A strict interpretation of the seller's (or buyer's) duty is in accordance with international standards. Seller's warranties are strict liabilities rules in many countries with an exception in case of bad faith on the part of the buyer.

- ***Ralf Michaels***: Rethinking the UNIDROIT Principles: From a law to be chosen by the parties towards a general part of transnational contract law – the English abstract reads as follows:

1. The most talked-about purpose of the UNIDROIT Principles of International and Commercial Contracts (PICC) is their applicability as the law chosen by the parties. However, focusing on this purpose in isolation is erroneous. The PICC are not a good candidate for a chosen law – they are conceived not as a result of the exercise of freedom of contract, but instead as a framework to enable such exercise. Their real potential is to serve as objective law – as the general part of transnational contract law. 2. This is obvious in practice. Actually, choice of the PICC is widely possible. National courts accept their incorporation into the contract; arbitrators frequently accept their choice as applicable law. However, in practice, the PICC are rarely chosen. The most important reason is that they are incomplete. They contain no rules on specific contracts. Further, they refer to national law for mandatory rules and for standards of illegality and immorality. This makes their choice unattractive. 3. The nature of the PICC is much closer to that of the U.S. Restatement of the law. The U.S. Restatement becomes applicable not through party choice but rather as an articulation of background law. Actually, this describes the way in which the PICC are typically used in practice. 4. This use as background law cannot be justified with an asserted legal nature of the PICC (their »law function«). Rather, the use is justified insofar as they fulfill two other functions: the »restatement function« (PICC as description of a common core of legal rules) and the »model function« (PICC as model for a superior law). 5. From a choice-of-law perspective, such use cannot be justified under traditional European choice of law, which designates legal orders, not incomplete codifications, as applicable. 6. By

contrast, application could be justified under U.S. choice of law. Under the governmental interest analysis, the PICC could be applicable to situations in which no state is interested in the application of its own law. Their international character qualifies the PICC for the Restatement (2d) Conflict of laws. Finally, for the better-law theory, according to which the substantive quality of a law is a criterion for choice of law, the PICC are a candidate insofar as they perform a model function. 7. In result, the PICC are comparable to general common law or the ius commune, within which regulatory rules of national, supranational and international origin act like islands. 8. Altogether, this results in a complex picture of transnational contract law, which combines national, international and non-national rules. The PICC can be no more, but no less, than a general part of this contract law.

- ***Hannes Rösler***: Protection of the Weaker Party in European Contract Law – Standardised and Individual Inferiority in Multi-Level Private Law – the English abstract reads as follows:

It is a permanent challenge to accomplish freedom of contract effectively and not just to provide its formal guarantee. Indeed, 19th century private law already included elements guaranteeing the protection of this »material« freedom of contract. However, consensus has been reached about the necessity for a private law system which also provides for real chances of self-determination. An example can be found in EC consumer law. Admittedly, this law is restrained – for reasons of legal certainty – by its personal and situational typicality and bound to formal prerequisites. However, the new rules against discrimination are dominated by approaches which strongly focus on the protection of the individual. It is supplemented by national provisions, which especially counter individual weaknesses. The autonomy of national law can be explained by the different traditions with regard to »social« contract law in the Member States. The differences are especially apparent regarding public policy, good faith or breach of duty before or at the time of contracting (culpa in contrahendo). They form another argument against the undifferentiated saltation from partial to total harmonisation of contract law.

- ***Giesela Rühl***: The Presumption of Non-Conformity in Consumer Sales Law – The Jurisprudence of the Federal Court of Justice in comparative

perspective – the English abstract reads as follows:

The Law on the Modernisation of the Law of Obligations has introduced a large number of provisions into the German Civil Code. One of these provisions has kept German courts particularly busy during the last years: § 476. The provision implements Art. 5 III of the Consumer Sales Directive and provides that any lack of conformity which becomes apparent within six months of delivery of the goods is presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity. The presumption has proved to be difficult to apply in practice: the German Federal Court of Justice (Bundesgerichtshof; hereinafter BGH) alone as issued eight – highly controversial – decisions. And numerous articles, case notes and commentaries have analysed and criticised each and every one of them. It is therefore surprising to see that both the BGH and the German literature refrain from exploiting one very obvious source of information that might help to deal with § 476: comparative law. Even though Art. 5 III of the Consumer Sales Directive has been implemented in all Member States except for Lithuania nobody has endeavoured to analyse its application in other countries to this date. The above article tries to fill this gap and looks at § 476 from a comparative perspective. It finds that courts across Europe apply the provision in the same way as the BGH regarding the exclusion and the rebuttal of the presumption. However, regarding the scope of the presumption, the BGH stands alone with its strict interpretation. In fact, no other court in Europe refuses to apply the presumption in cases in which a defect that occurs after delivery might be the result of a basic defect present at the time of delivery. The article, therefore, concludes that the BGH should rethink its position regarding the scope of the presumption and refer the next case to the European Court of Justice.

- ***Jens M. Scherpe:*** Children Born out of Wedlock, their Fathers, and the European Convention on Human Rights – the English abstract reads as follows:

Unlike in many European countries, only a father married to the mother will automatically have parental custody (elterliche Sorge) in Germany. A father not married to the mother is effectively barred from obtaining parental custody unless the mother agrees, and there is not even the possibility – unlike e.g. in

England – for the courts to interfere with the mother's decision, cf. §§ 1626a, 1672 BGB. The legal rules are based on the – somewhat questionable – assumption that the mother's motives for refusal of parental custody are based on the welfare of the child. The German statutory provisions have been challenged unsuccessfully in the German Constitutional Court (Bundesverfassungsgericht; BVerfG). However, the BVerfG voiced some doubt as to the premises upon which these rules rested and has demanded that further development be monitored closely. The vast majority of German academic authors also doubts the constitutionality of § 1626a BGB and are in favour of reforming the law. The matter is now the subject of a case pending at the European Court of Human Rights (ECtHR), Zaunegger v. Germany, in which the applicant claims, inter alia, that his right of respect for family life under Art. 8 ECHR is being violated. In previous cases, McMichael v. United Kingdom and Balbontin v. United Kingdom, challenges of Scots and English law on parental responsibility for fathers not married to the mother have failed. This article critically analyses the legal rules in England and Germany and, based on the differences between them and the relevant case law of the ECtHR, suggests that the Court will find that the German rules are indeed in breach of the European Convention. The article concludes with suggestions for reform.

- ***Wolfgang Wurmnest***: Unilateral Restrictions of Parallel Trade by Dominant Pharmaceutical Companies – Protection of Innovation or Anti-competitive Market Foreclosure? – the English abstract reads as follows:

The elimination of cross-border barriers to trade as means of encouraging competition in the single market lies at the heart of EC-competition policy. Limitations of parallel trade were therefore treated as restrictions of competition. With regard to the pharmaceutical sector the merit of such a competition policy has been called into question. It is said that the unique features of the market for pharmaceuticals, namely the existence of price regulation at the national level for prescription medicines, makes parallel trade socially undesirable as it does not foster real price competition and undermines investment in R&D to the detriment of the consumer. Hence, unilaterally imposed restrictions of parallel trade by dominant producers, such as supply quota systems, should not be regarded as a violation of Art. 82 EC. This article discusses the legal and economic arguments in favour of a policy shift in light of the recent case Lélos v. GlaxoSmithKline. In this case the European Court of

Justice (ECJ) has held that a pharmaceutical company in a dominant position cannot be allowed to cease honouring the ordinary orders of an existing customer for the sole reason that the customer engages in parallel trade, but that Art. 82 EC does not prohibit a dominant undertaking from refusing to fill orders that are out of the ordinary in terms of quantity in order to protect its commercial interests. It is argued that the ECJ was right in denying pharmaceutical companies a general right to limit the flow of pharmaceutical products by unilateral measures as the pro-competitive effects of parallel trade are greater than often assumed.

- ***Nadjma Yassari:*** The Reform of the Spousal Share under Iranian Succession Law – An example of the transformability of Islamic law – the English abstract reads as follows:

It is generally held that Islamic law is a static system of rules, unable to accommodate change. This is especially thought true of family and succession laws that are firmly rooted in a religious foundation. Nonetheless, one can observe in the last decades how active the Iranian legislator has been in reforming its family laws, with the result that a number of traditional provisions have undergone remarkable changes. Most recently, the Iranian Parliament ventured into the field of succession law by amending the inheritance portion received by the surviving wife, which so far had been limited to movables. Under the new regulations, she takes her portion also from immovable property. The previous limitations placed on the inheritance portion of the widow have no base in the Koran, the primary source of Islamic shi'i law, and were deduced from another primary source of law, notably the traditions of the twelve Imams. This article examines the religious foundations of the inheritance rule on the spousal share, its codification in the Iranian Civil Code and the proposed amendments by the Iranian Parliament. It shows how the Iranian Parliament by emphasising another interpretation of the sources has been successful in changing a rule that has prevailed in Iranian law for over 80 years. Without doubt, this reform is a significant step towards the harmonisation of the widow's inheritance share and the elimination of the harsh economic consequences of the rule as it stood. Beyond this effect however it can also be taken as an illustration of the way legal development can be set within an Islamic framework. Moreover, it shows that it is ultimately the intrinsic structure of the sources of Islamic law and the methods by which law

is deduced from them that makes reform possible.

The Mess of Manifest Disregard

What is the impact of the much commented decision of the U.S. Supreme Court *Hall Street Associates v. Mattel Inc.* on the doctrine of manifest disregard of the law? This judicially crafted ground for vacatur of arbitral awards empowers American courts to review awards on the merits, which is an old difference between the common law and the civil law worlds.

Hall Street was not about whether manifest disregard was good law. It was about whether parties could change the grounds for vacatur of awards. As the Court held that the American *Federal Arbitration Act* (FAA) should be strictly applied and thus that the parties did not have such power, *Hall Street* immediately raised the issue of whether it impacted the power of courts to continue to use judicially crafted exceptions to the FAA such as manifest disregard.

A recent article by Hiro Aragaki (*The Mess of Manifest Disregard*, 119 Yale L.J. Online 1 (2009)) summarizes how U.S. Courts have reacted, and shows that there is a split in the making among circuits in the U.S. For some, *Hall Street* has indeed spelled the end of manifest disregard, while for others, manifest disregard remains, but must now be founded in one of the statutory grounds of the FAA. Aragaki offers a third interpretation.

The article, which has the great advantage of being unusually short (14 pages) by American standards, can be downloaded here.

Cuadernos de Derecho Transnacional, 2009-2

The second issue of the *Cuadernos de Derecho Transnacional*, the Spanish online journal created by Profs. Calvo Caravaca and Carrascosa Gonzalez (see presentation post), has been published last week. The magazine, wholly available under this net address, contains articles and notes written by from authors of different nationalities (Spanish, Italian and Portuguese). All of them are summarized in an English abstract.

Table of contents (Studies)

Abstract: Within the framework of the companies of the group, the parties that have not signed the international contract often take part in its negotiation, execution and termination. When the aforementioned contract includes an arbitration clause, the question arises as to whether the clause would affect these non-signatories; that is to say, whether these parties are allowed to undertake legal proceedings or can have claims filed against them in court. According to the "group of companies" doctrine which is, in specific circumstances, widely accepted in arbitral and state practice, the effects of the arbitration agreement would extend to the non-signatories of the companies of the group even though they have not signed the contract in which the arbitration clause is written.

Abstract: This study analyses Article 7 of the Rome I Regulation. This Article establishes the law applicable to insurance contracts covering a large risk whether or not the risk covered is situated in a Member State, and to all other insurance contracts covering risks situated inside the territory of the Member States. An insurance contract covering a large risk shall be governed by the law chosen by the parties. In the absence of choice, it shall be governed by the law of the country where the insurer has his habitual residence unless the contract is manifestly more closely connected with another country. When an insurance contract covers a non-large risk situated within the EU, party autonomy is limited.

To the extent that the law applicable has not been chosen, such a contract shall be governed by the law of the Member State in which the risk is situated at the time of conclusion of the contract. In accordance with Article 7, additional rules shall apply to compulsory insurances.

A.L. Calvo Caravaca, "El Reglamento Roma I sobre la ley aplicable a las obligaciones contractuales: cuestiones escogidas"
Abstract: The Rome I Regulation has tried to improve the 1980 Rome Convention. The final result has been uneven. This study focuses on three matters. Firstly, it explains how to select the law applicable to the contract (Art. 3 Rome I Regulation). It will be a controversial regulation because of the connection between jurisdiction and applicable law as well as its opposition to the new Lex mercatoria. Secondly, consumer contracts are examined (Art. 6 Rome I Regulation). The concept of consumer contracts includes any contract concluded by a natural person with another person acting in the exercise of his trade or profession. However, it does not solve two matters: if overriding mandatory provisions are applicable to those contracts and how to protect active consumers. Lastly, although Article 9 is inspired by Article 7 of the Rome Convention, it adds two innovations: a controversial Community definition of overriding mandatory provisions, and when to give effect to overriding mandatory provisions of a different law from the one of the forum.

E. Castellanos Ruiz, "Las normas de Derecho Internacional Privado sobre consumidores en la Ley 34/2002 de servicios de la sociedad de la información y de comercio electrónico"
Abstract: The rules of private law on consumers in Directive 2000/31 of 8 June 2000 on certain legal aspects of the information society, in particular electronic commerce in the Internal Market (Directive on e-commerce) and the Act transposing the Directive on the legal Spanish Law 34/2002 of July 11, services of information society and electronic commerce are very rare, and most have a "character clarification". These rules of private international law clarificatory highlighted in the arts. 26 and 29 of the LSSI concerning the law applicable to electronic contracts and determining the place of conclusion of contracts online, respectively.

C. Llorente Gómez de Segura, "La ley aplicable al contrato de transporte internacional según el Reglamento Roma I"
Abstract: Contracts of carriage have received a specific legal treatment under the

Rome I Regulation following a trend initiated by the Rome Convention. However, Rome I has not merely introduced cosmetic changes with respect to the Rome Convention but has produced new rules particularly, although not exclusively, regarding carriage of passengers. In addition, this article aims to be a reference guide for the analysis of the Rome I general rules in order to facilitate its application to contracts of carriage.

D. Moura Vicente, "Liberdades comunitárias e Direito Internacional Privado"
Abstract: The «unity in diversity» demanded by European integration requires a system of coordination of the laws of the Member-States which is compatible with the free movement of persons, goods, services and capitals within the European Community. In recent legislative acts of the Community, as well as in the case-law of the European Court of Justice, a trend can be noticed towards the adoption of rules concerning the law applicable to private international relationships exclusively connected with the European internal market or calling for a principle of mutual recognition in the regulation of those relationships. This papers aims at determining whether and in what measure this «Private International Law of the internal market», which seems to be on the rise, involves a change of paradigm, from the standpoint of the methods and solutions that it enshrines, when compared with the common conflict of laws rules.

G. Pizzolante, "I contratti con i consumatori e la nuova disciplina comunitaria in materia di legge aplicabile alle obbligazioni contrattuali"
Abstract: The «Rome I» Regulation has converted the 1980 Rome Convention into a Community instrument. In relation to consumer contracts, the Regulation has expanded the scope of material application of Article 6. Under the new text, with certain exceptions, the special provision dealing with consumer contracts appliesto any contract entered into between a professional and a consumer, regardless of its object. This paper analyses in particular two aspects (a) the reasons that justified the modifications (b) its scope (subjective and objective) of application. It also shows the development of European consumer contract law within the whole area of European contract law and analyses the inclusion into EC directives on consumer protection of specific provisions as to their international scope in order to ensure their effective and uniform application to international consumer transactions. In fact, certain number of directives contain a provision that, although not being a conflict of laws' rule, have an impact on the applicable law to a contract. If the contract has a direct link to the territory of one

or more Member States, these provisions provide for the application of Community law even if the parties chose the law of a third country.

F. Seatzu, “La Convenzione europea dei diritti dell’uomo e le libertà di iniziativa imprenditoriale e professionale”
Abstract: This article looks at different aspects of the concept of “economic initiative” and delineate its indicia for the purpose of human rights discourse. It discusses the meaning of the notion of economic initiative as a human rights within the context of European Convention on Human Rights. The author argues that a theoretical framework is required in order to clarify how far the Convention allows public authorities to interfere with economic rights. The article addresses a number of issues, including the following questions: what is economic initiative? Is economic initiative a human rights? How are economic rights limited? How far can public authorities legitimately interfere with human rights? In order to do this, the author examines case law of the Convention organs and reflects on the result of cases in the light of the theoretical framework that has been established.

P. Zapatero Miguel, “Diplomacia y cultura legal en el sistema GATT/OMC”
Abstract: The GATT/WTO system has evolved from a diplomacy-based system to a rule-oriented system. This cultural process in which lawyers finally triumphed over diplomats as key professionals running the regime was the direct result of an internal battle over technical qualifications inside the GATT that lasted several decades. Legal techniques have significantly reinforced the multilateral trading system
in comparative institutional terms. However, incremental legalization and judicialization has inevitably broadened the scope of trade justiciability, reaching a critical point that generates some criticism and concern. From the point of view of institutional design, this flexible and adaptative regime is among the most powerful and advanced multilateral artifacts in international legal arquitecture.

*A **Varia** section follows, also enclosing English abstracts.*

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (5/2009)

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

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

- ***Christoph Althammer***: "Verfahren mit Auslandsbezug nach dem neuen FamFG" – the English abstract reads as follows:

The new "Law on procedure in matters of familiy courts and non-litigious matters" (FamFG) contains a chapter that deals with international proceedings. The author welcomes this innovation for German law in non-litigious matters as there is an increase of cross-border disputes in this subject matter. He especially welcomes that the rules on international procedure are no longer fragmented but are part of one comprehensively codified regulation. The author then highlights these rules on international procedures. Subsection 97 establishes the supremacy of international law. The following subsections (98 to 106) regulate the international jurisdiction of German courts in international procedures. Finally, subsections 107 to 110 detail principles for the recognition and enforcement of a foreign judgement.

- ***Florian Eichel:*** "Die Revisibilität ausländischen Rechts nach der Neufassung von § 545 Abs. 1 ZPO" – the English abstract reads as follows:

So far, s. 545 (1) German Code of Civil Procedure (Zivilprozessordnung – ZPO) prevented foreign law from being the subject of Appeal to the German Federal Court of Justice (Bundesgerichtshof – BGH); s. 545 (1) ZPO stipulated that exclusively Federal Law and State Law of supra-regional importance can be subject of an appeal to the BGH. The BGH could review foreign law only indirectly, namely by examining whether the lower courts had determined the foreign law properly – as provided for in s. 293 ZPO. The new wording of

s. 545 (1) allows the BGH to examine foreign law: now every violation of the law can be subject of an appeal. However, this change in law was motivated by completely different reasons. Parliament did not even mention the foreign law dimension in its legislative documents although this would be a response to the old German legal scholars' call for enabling the BGH to review the application of foreign law. The essay methodically interprets the amendment and comes to the conclusion that the new s. 545 (1) ZPO indeed does allow the appeal to the BGH on aspects of foreign law.

- ***Stephan Harbarth/Carl Friedrich Nordmeier:*** "GmbH-Geschäftsführerverträge im Internationalen Privatrecht – Bestimmung des anwendbaren Rechts bei objektiver Anknüpfung nach EGBGB und Rom I-VO" – the English abstract reads as follows:

According to German substantive law, a contract for management services (Anstellungsvertrag) concluded between a German private limited company (Gesellschaft mit beschränkter Haftung) and its director (Geschäftsführer) is only partially subject to labour law. The ambiguous character of the contract is reflected on the level of private international law. The present contribution deals with the determination of the law applicable to such service contracts in the absence of a choice of law, i.e. under art. 28 EGBGB and art. 4 Rome I-Regulation. As the director normally does not establish a principal place of business, the closest connection principle of art. 28 sec. 1 EGBGB applies. Art. 4 sec. 1 lit. b Rome I-Regulation contains an explicit conflict of law rule regarding contracts for the provision of services. If the director's habitual residence is not situated in the country of the central administration of the company, the exemption clause, art. 4 sec. 3 Rome I-Regulation, may apply. Compared to the determination of the applicable law to individual employment contracts, art. 30 EGBGB and art. 8 Rome I-Regulation, there is no difference regarding the applicable law in the absence of a choice of law provision.

- ***Michael Slonina***: "Aufrechnung nur bei internationaler Zuständigkeit oder Liquidität?" – the English abstract reads as follows:

In 1995 the European Court of Justice stated that Article 6 No. 3 is not applicable to pure defences like set-off. Nevertheless, some German courts and authors still keep on postulating an unwritten prerequisite of jurisdiction for

set-off under German law which shall be fulfilled if the court would have jurisdiction for the defendant's claim under the Brussels Regulation or national law of international jurisdiction. The following article shows that there is neither room nor need for such a prerequisite of jurisdiction. To protect the claimant against delay in deciding on his claim because of "illiquidity" of the defendant's claim, German courts can only render a conditional judgment (Vorbehaltsurteil, §§ 145, 302 ZPO) on the claimants claim, and decide on the defendants claims and the set-off afterwards. As there is no prerequisite of liquidity under German substantial law, German courts can not simply decide on the claimant's claim (dismissing the defendants set-off because of lack of liquidity) and they can also not refer the defendant to other courts, competent for claims according to Art. 2 et seqq. Brussels Regulation.

- ***Sebastian Krebber***: "Einheitlicher Gerichtsstand für die Klage eines Arbeitnehmers gegen mehrere Arbeitgeber bei Beschäftigung in einem grenzüberschreitenden Konzern" – the English abstract reads as follows:

Case C-462/06 deals with the applicability of Art. 6 (1) Regulation (EC) No 44/2001 in disputes about individual employment contracts. The plaintiff in the main proceeding was first employed by Laboratoires Beecham Sévigné (now Laboratoires Glaxosmithkline), seated in France, and subsequently by another company of the group, Beecham Research UK (now Glaxosmithkline), registered in the United Kingdom. After his dismissal in 2001, the plaintiff brought an action in France against both employers. Art. 6 (1) would give French Courts jurisdiction also over the company registered in the United Kingdom. In Regulation (EC) No 44/2001 however, jurisdiction over individual employment contracts is regulated in a specific section (Art. 18–21), and this section does not refer to Art. 6 (1). GA Poiares Maduro nonetheless held Art. 6 (1) applicable in disputes concerning individual employment contracts. The European Court of Justice, relying upon a literal and strict interpretation of the Regulation as well as the necessity of legal certainty, took the opposite stand. The case note argues that, in the course of an employment within a group of companies, it is common for an employee to have employment relationships with more than one company belonging to the group. At the end of such an employment, the employee may have accumulated rights against more than one of his former employers, and it can be difficult to assess which one of the

former employers is liable. Thus, Art. 6 (1) should be applicable in disputes concerning individual employment contracts.

- ***Urs Peter Gruber*** on the ECJ's judgment in case C-195/08 PPU (Inga Rinau): "Effektive Antworten des EuGH auf Fragen zur Kindesentführung" – the English abstract reads as follows:

According to the Brussels IIa Regulation, the court of the Member State in which the child was habitually resident immediately before the unlawful removal or retention of a child (Member State of origin) may take a decision entailing the return of the child. Such a decision can also be issued if a court of another Member State has previously refused to order the return of the child on the basis of Art. 13 of the 1980 Hague Convention. Furthermore in this case, the decision of the Member State of origin is directly recognized and enforceable in the other Member States if the court of origin delivers the certificate mentioned in Art. 42 of the Brussels IIa Regulation. In a preliminary ruling, the ECJ has clarified that such a certificate may also be issued if the initial decision of non-return based on Art. 13 of the 1980 Hague Convention has not become res judicata or has been suspended, reversed or replaced by a decision of return. The ECJ has also made clear that the decision of return by the courts of the Member State of origin can by no means be opposed in the other Member States. The decision of the ECJ is in line with the underlying goal of the Brussels IIa Regulation. It leads to a prompt return of the child to his or her Member State of origin.

- ***Peter Schlosser***: "EuGVVO und einstweiliger Rechtsschutz betreffend schiedsbefangene Ansprüche".
  The author comments on a decision of the Federal Court of Justice (5 February 2009 – IX ZB 89/06) dealing with the exclusion of arbitration provided in Art. 1 (2) No. 4 Brussels Convention (now Art. 1 (2) lit. d Brussels I Regulation). The case concerns the declaration of enforceability of a Dutch decision on a claim which had been subject to arbitration proceedings before. The lower court had argued that the Brussels Convention was not applicable according to its Art. 1 (2) No.4 since the decision of the Dutch national court included the arbitral award. The Federal Court of Justice, however, held – taking into consideration that

the arbitration exclusion rule is in principle to be interpreted broadly and includes therefore also proceedings supporting arbitration – that the Brussels Convention is applicable in the present case since the provisional measures in question are aiming at the protection of the claim itself – not, however, at the implementation of arbitration proceedings. Thus, the exclusion rule does not apply with regard to provisional measures of national courts granting interim protection for a claim on civil matters even though this claim has been subject to an arbitral award before.

- ***Kurt Siehr*** on a decision of the Swiss Federal Tribunal (18 April 2007 – 4C.386/2006) dealing with PIL aspects of money laundering: "Geldwäsche im IPR – Ein Anknüpfungssystem für Vermögensdelikte nach der Rom II-VO"

- ***Brigitta Jud/Gabriel Kogler***: "Verjährungsunterbrechung durch Klage vor einem unzuständigen Gericht im Ausland" – the English abstract reads as follows:

It is in dispute whether an action that has been dismissed because of international non-competence causes interruption of the running of the period of limitation under § 1497 ABGB. So far this question was explicitly negated by the Austrian Supreme Court. In the decision at hand the court argues that the first dismissed action causes interruption of the running of the period of limitation if the first foreign court has not been "obviously non-competent" and the second action was taken immediately.

- ***Friedrich Niggemann*** on recent decisions of the French Cour de cassation on the French law on subcontracting of 31 December 1975 (Loi n. 75-1334 du 31 décembre 1975 – Loi relative à la sous-traitance version consolidée au 27 juillet 2005) in view of the Rome I Regulation: "Eingriffsnormen auf dem Vormarsch"

- ***Nadjma Yassari***: "Das Internationale Vertragsrecht des Irans" – the English abstract reads as follows:

Contrary to most regulations in Arab countries, Iranian international contract law does not recognise the principle of party autonomy in contractual obligations as a rule, but as an exception to the general rule of the applicability

of the lex loci contractus (Art. 968 Iranian Civil Code of 1935). Additionally, the parties of a contract concluded in Iran may only choose the applicable law if they are both foreigners. Whenever one of the parties is Iranian, the applicable law cannot be determined by choice, unless the contract is concluded outside Iran. However, in a globalised world with modern communication technologies, the determination of the place of the conclusion of the contract has become more and more difficult and the Iranian rule causes uncertainty as to the applicable law. Although these problems are seen in the Iranian doctrine and jurisprudence, the rule has not yet been challenged seriously. A way out of the impasse could be the Iranian Act on International Arbitration of Sept. 19, 1997. Art. 27 Sec. I of the Arbitration Act allows the parties to freely choose the applicable law of contractual obligations, without any restriction. However, the question whether and how Art. 968 CC restricts the scope of application of Art. 27 Arbitration Act has not been clarified and it remains to be seen how cases will be handled by Iranian courts in the future.

Futher, this issue contains the following information:

- ***Erik Jayme*** on the conference of the German Society of International Law which has taken place in Munich from 15 – 18 April: "Moderne Konfliktsformen: Humanitäres Völkerrecht und privatrechtliche Folgen – Tagung der Deutschen Gesellschaft für Völkerrecht in München"
- ***Marc-Philippe Weller*** on a conference on the Rome I Regulation taken place in Verona: "The Rome I-Regulation – Internationale Tagung in Verona"

Dublin Conference on Rome I and Brussels I Regulations

The Commercial Law Centre at University College Dublin has arranged a morning conference next Thursday (17 September 2009, 8:45am-1pm) dealing with the

Rome I and Brussels I Regulations.

According to the conference materials on the CLC's website:

> *The Rome I Regulation on the Law Applicable to Contractual Obligations, replacing the Rome Convention comes into effect on 17th December 2009.*
>
> *A thorough familiarity with this Regulation is essential for all professionals engaged in drafting, reviewing and litigating international commercial agreements.*
>
> *At this seminar, a panel of distinguished experts will review some key elements in the Regulation:*
>
> 1. *What limitations does the Regulation place on the freedom of parties to an international contract to choose the governing law?*
> 2. *Where the parties fail to select a governing law, how do courts and practitioners determine the relevant law?*
> 3. *How does Rome I apply to the difficult issue of contracts on financial instruments?*
>
> *The remainder of the seminar will focus on some key issues under Brussels I Regulation:*
>
> - *How do practitioners ensure effective choice of court agreements under Brussels I?*
> - *How will the Hague Choice of Court Convention, recently signed by the European Community and which seeks to establish a global choice of court regime, interact with Brussels I.*
> - *How effective are dispute resolution agreements which embody both litigation and arbitration options?*
>
> *As a consequence of increasing globalisation, the problem of concurrent international procedures is becoming more frequent. The seminar will consider the vexed question, discussed recently in Ireland in GOSHAWK DEDICATED, of whether a Brussels Regulation court as the domiciliary court of the defendant, can stay proceedings in favour of earlier proceedings begun in a non-member state court.*
>
> *This seminar will provide a unique opportunity for practitioners involved in*

international litigation to learn about the new developments and to engage in discussion with an international panel of speakers.

As well as the author of this post, the speakers include Michael Collins SC (Chairman, Bar Council of Ireland), Michael Wilderspin (Legal Services, Commission), Dr Joanna Perkins (Financial Markets Law Committee), Geraldine Andrews QC (Essex Court Chambers) and Liam Kennedy (A&L Goodbody).

Conference on European Procedural Law

The Institute for Comparative Law, Conflict of Laws and International Business Law (University of Heidelberg) and the European Commission will organise the 2nd Conference on European Procedural Law in Heidelberg titled

The Future of European Civil Procedural Law

—

Reforming the Regulation Brussels I

The conference will address in particular the following topics:

- the abolition of exequatur proceedings
- defendants in third states
- cross-border collective litigation and the Regulation Brussels I
- provisional and protective measures
- arbitration and choice of court agreements

The conference is co-organised by the Journal of Private International Law and the journal "Praxis des Internationalen Privat- und Verfahrensrechts" (IPRax) and will be held at the Hotel "Der Europäische Hof" in **Heidelberg on December 11th and 12th 2009.**

More information can be found here.

UPDATE: *A detailed conference programme and information on the registration procedure is now available here.*

BIICL event: Lis Pendens in International Litigation

The British Institute of International and Comparative Law (BIICL) hosts an event titled **"Lis Pendens in International Litigation"** as part of the Herbert Smith Private International Law Seminar Series at the BIICL.

What is this event about? The question of international lis pendens has long been controversial, but has taken on new and urgent importance in our age. Globalization has driven an unprecedented rise in forum shopping between national courts, but also the proliferation of new international tribunals has brought with it new challenges of interaction in today's fragmented international legal system. The response to these challenges also has profound theoretical implications for the interaction of legal systems in today's pluralistic world. This seminar will analyse the problems of parallel litigation across the landscape of international litigation – from private international litigation, through international commercial arbitration and investment treaty arbitration, to public international law.

Venue: The venue is Charles Clore House, 17 Russell Square, London, WC1B 5JP.

Date: Tuesday 27 October 2009 17:30 to 19:30

Chair: The Rt Hon Lord Collins, Lord of Appeal in Ordinary
Speaker: Campbell McLachlan QC, Professor of Law at Victoria University of Wellington; member of Bankside Chambers and Auckland & Essex Court Chambers, London

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (4/2009)

Recently, the July/August issue of the German legal journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was released.

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

- ***Anatol Dutta***: "Das Statut der Haftung aus Vertrag mit Schutzwirkung für Dritte" – the English abstract reads as follows:

> *The autonomous characterisation of national legal institutions is one of the challenging tasks of European private international law. This article attempts to determine the boundaries between the Rome I and the Rome II Regulation with regard to damages of third parties not privy to the contract but closely connected to one of the parties. Notably, German and Austrian law vest contractual rights in such third parties, especially in order to close gaps in tort law. It is argued here that those third party rights, although based on contract according to national doctrine, are to be characterised as a non-contractual obligation and governed by the Rome II regime (infra III). Under Rome II, in principle, the general conflict rule for torts in Art. 4(1) applies; if the damage suffered by the third party is caused by a product, the liability towards the third party is subject to the special rule in Art. 5(1) (infra IV). Hence, the law governing the contract from which the third party rights are derived plays only a minor role (infra V): for those third party rights neither the special rule for culpa in contrahendo in Art. 12(1) – insofar as pre-contractual third party rights are concerned – nor the escape clauses in Art. 4(3) and Art. 5(2) lead to the law which governs the contract.*

- ***Ivo Bach***: "Neuere Rechtsprechung zum UN-Kaufrecht" – the English

abstract reads as follows:

The number of case law on the CISG increases exponentially. Thanks to online databases such as the one of Pace University or CISG-online a majority of cases are internationally available. The rapid increase of case law, however, complicates the task of staying up to date in this regard. This contribution shall be the first of a series that summarises the recent developments in case-law and at the same time categorises the cases in regard to their topic and in regard to their importance. The series aligns with the date the respective decisions become available to the general public, i. e. the date they are published on the CISG-online database, rather than the date of the decision. This contribution covers the cases with CISG-online numbers 1600–1699.

- ***Alice Halsdorfer***: "Sollte Deutschland dem UNIDROIT-Kulturgutübereinkommen 1995 beitreten?" – the English abstract reads as follows:

The ratification of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 is the perfect occasion to raise the question whether or not Germany should strive for an additional ratification of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995. While many contracting states of the UNESCO Convention 1970 did not implement comprehensive return claims for illegally exported cultural objects, the self-executing UNIDROIT Convention 1995 provides such claims and in addition further claims for stolen cultural objects. One of the major difficulties is the absence of provisions on property rights. It may be argued an initial lack or intermediate loss of ownership should not affect return claims for cultural objects with the consequence that the last possessor has to be considered the rightful claimant. Further, it may be argued that the return of cultural objects includes necessarily a transfer of possession but not a transfer of property. However, the return of cultural objects to the state from which these cultural objects have been unlawfully removed may influence the applicable law and indirectly affect property rights. Since this effect is achieved only under the condition that the lex rei sitae is replaced by the lex originis, it might be advisable to extend the scope of the ss 5 (1), 9 of the German Law on the Return of Cultural Objects in the event of a future ratification of the UNIDROIT

Convention 1995.

- ***Martin Illmer***: "Anti-suit injunctions zur Durchsetzung von Schiedsvereinbarungen in Europa – der letzte Vorhang ist gefallen" – the English abstract reads as follows:

Yet another blow for the English: the final curtain for anti-suit injunctions to enforce arbitration agreements within the European Union has fallen. As the augurs had predicted, the ECJ, following the AG's opinion, held that anti-suit injunctions enforcing arbitration agreements are incompatible with Regulation 44/2001. Considering the previous judgments in Marc Rich, van Uden and Turner as well as the civil law approach of the Regulation, the West Tankers judgment does not come as a surprise. It accords with the system and structure of the Regulation. De lege lata the decision is correct. Moaning about the admittedly thin reasoning and an alleged lack of convincing arguments does not render the decision less correct. Instead, the focus must shift to the already initiated legislative reform of Regulation 44/2001. Meanwhile, one may look for alternatives within the existing system to hold the parties to the arbitration (or jurisdiction) agreement, foreclosing abusive tactics by parties filing actions in certain Member States notorious for protracted court proceedings.

- ***Matthias Kilian***: "Die Rechtsstellung von Unternehmensjuristen im Europäischen Kartellverfahrensrecht"
  The article reviews the judgment given by the European Court of First Instance in the joined cases T-125/03 and T-253/03 (*Akzo Nobel Chemicals Ltd. and Akcras Chimcals Ltd. ./. Commission of the European Communities*) which can be found here.

- ***Rainer Hüßtege***: "Der Europäische Vollstreckungstitel in der Praxis"
  The article reviews a decision by the Higher Regional Court Stuttgart (23.10.2007 – 5 W 29/07) dealing with the requirements of a European Enforcement Order Certificate in terms of Art. 9 Regulation (EC) No. 805/2004 stating that the issue of the ceritificate requires according to Art. 6 No. 1 (c) inter alia that the court proceedings in the Member State of origin met the requirements as provided for the proceeding of uncontested claims. This requirement was not met in the present case since the summons was not served in accordance with Art. 13 (2) of the

Regulation.

- ***Christoph M. Giebel***: "Die Vollstreckung von Ordnungsmittelbeschlüssen gemäß § 890 ZPO im EU-Ausland" – the English abstract reads as follows:

Under German law, the State is exclusively responsible for enforcing contempt fines issued by German courts. Thus, the State collects the contempt fine through its own public authorities ex officio. This approach is in contrast to the legal situation in several other EU Member States that allow the judgment creditors not only to decide upon the enforcement of the contempt fine but also to keep the funds obtained through the enforcement. In terms of EU cross border enforcement, it is commonly accepted that for example a French "astreinte" may be enforced in Germany by invoking Art. 49 of the Regulation (EC) No. 44/2001. However, it is still doubtful whether or not German judgment creditors could similarly enforce a German contempt fine in another EU Member State. These doubts were recently intensified by a resolution rendered by the Higher Regional Court of Munich on 3rd December 2008 – 6 W 1956/08 – (not res judicata). The Higher Regional Court of Munich has refused to confirm a contempt fine issued by the Regional Court of Landshut as a European Enforcement Order under the Regulation (EC) No. 805/2004. The Higher Regional Court of Munich basically argues that the judgment creditor has no legitimate interest to apply for such confirmation due to the German legislator having attributed the responsibility for the enforcement exclusively to the State. The arguments put forward by the Higher Regional Court of Munich would also rule out any cross border enforcement of German contempt fines according to the rules of the Regulation (EC) No. 44/2001. This would lead to a considerable disadvantage of German judgment creditors within the Common Market. In the article, the author discusses in detail the arguments put forward by the Higher Regional Court of Munich both from a German and European Community law perspective. The author comes to the conclusion that prior-ranking European Community law demands that German contempt fines may also be enforced in other EU Member States both on the basis of the Regulations (EC) No. 44/2001 and No. 805/2004. In reconciling the requirements of European Community and German law, the author proposes that the judgment creditor shall be entitled to act on the basis of a representative action for the State. The funds obtained through the

enforcement in the relevant EU Member State shall therefore invariably be paid to the relevant State treasury in Germany.

- ***Felipe Temming***: "Zur Unterbrechung eines Kündigungsschutzprozesses während des U.S.-amerikanischen Reorganisationsverfahrens nach Chapter 11 Bankruptcy Code"
  The article reviews a judgment of the German Federal Labour Court (27.02.2007 – 3 AZR 618/06) dealing with the interruption of an action for protection against dismissal according to the reorganization proceedings under Chapter 11 U. S. Bankruptcy Code.

- ***Kurt Siehr:*** "Ehescheidung deutscher Juden"
  The article reviews a judgment of the German Federal Court of Justice (28.05.2008 – XII ZR 61/06) concerning in particular the question whether divorce proceedings before a Rabbinical Court in Israel lead to the result that the plea of lis alibi pendens has to be upheld in German divorce proceedings. As stated by the Federal Court of Justice this could only be the case if the Jewish divorce could be recognised in Germany. This was answered in the negative by the Federal Court of Justice under the given circumstances confirming its previous case law according to which a divorce before a Rabbinical Court constitutes an extra-judicial divorce – and not a sovereign act – which can, under German law, only be recognised if the requirements of the law applicable according to German PIL (Art. 17 EGBGB) are satisfied. Due to the fact that in the present case German law was applicable with regard to the divorce according to Art. 17 EGBGB, this was not the case.

- ***Frank Spoorenberg/Isabelle Fellrath***: "Offsetting losses and profits in case of breach of commercial sales/purchase agreements under Swiss law and the Vienna Convention on the International Sale of Goods"

This contribution analyses the computation of damages that may be awarded in order to compensate the buyer for the losses incurred on the substitution transactions as a result of the seller's default in a commercial sales/purchase agreement. It discusses more specifically the possible compensation of substitution and additional losses with any profits incurred on a single substitution transaction, and on successive substitution transactions, focusing on the articulation of the international and Swiss law provisions governing

general losses and substitutions losses. Reference is made by ways of illustration to a recent unpublished ICC arbitration award addressing the issue from a set off perspective.

- ***Dirk Otto***: "Formalien bei der Vollstreckung ausländischer Schiedsgerichtsentscheidungen nach dem New Yorker Schiedsgerichtsabkommen" – the English abstract reads as follows:

The author criticises a decision of Austria's Supreme Court which required a party seeking to enforce a foreign arbitration award in Austria to submit a legalised original or certified/legalised copy of the arbitration award although the defendant never disputed that a submitted simple copy was authentic. The author submits the correct approach would have been to require compliance with the formalities of Art. IV of the New York Convention only if (i) defendant disputes the authenticity of a copy or (ii) the enforcing court has to pass default judgment as only in these situations there is a genuine need to prove the conformity of documents.

- ***Götz Schulze***: "Anerkennung von Drittlandscheidungen in Frankreich" – the English abstract reads as follows:

The author analyses two judgments of the French Court of Cassation pertaining to the incidental recognition of foreign divorce decrees under French law. In the first case, a Moroccan wife had filed for divorce in France. The conciliation hearings were opposed by the husband, who claimed that the marriage had already been dissolved by a final Moroccan divorce decree. The second case regarded a French married couple who had been resident in Texas. Upon separation, the husband returned to France, where he filed a petition for divorce. The admissibility of the latter was contested because divorce proceedings were already pending in Texas, which finally led to a final divorce decree. Since the cases did not fall within the scope of the Brussels II Regulation, French procedural law was applicable. In both cases, the question at stake was whether the courts had to take into account the foreign judgments when assessing the admissibility of the divorce petition. The Court of Cassation answered in the affirmative. It held that national courts have to determine the recognition of foreign divorce decrees in every stage of the procedure as an incidental question. It thereby overruled an earlier judgment, according to

which the recognition of foreign judgments was reserved for the "juge de fond" and could not be determined in conciliation hearings or summary proceedings. It also held that recognition could not be denied for reasons beyond the three exhaustive grounds of non-recognition established under French law, which are lack of international jurisdiction, misuse of rights, and public policy. In the second case, the lower court had denied recognition because the divorce decree had not been registered with the register office. The reported judgments herald an important shift in French procedural law and were unanimously welcomed by legal writers. Not only did the Court of Cassation interpret national civil procedural law in a manner as to align it with art. 21 (4) Brussels II Regulation. It also overcame the long criticised procedural privileges for French nationals. As the court made clear, art. 14 Code of Civil Procedure, which grants to every French national an international venue within the domestic territory, cannot be read as to inversely hinder the recognition of a foreign judgment.

Futher, this issue contains the following information:

- The new German choice of law rules as amended due to the adaptation to Regulation (EC) No. 593/2008 (Rome I) which are applicable from 17 December 2009: "Das EGBGB in der ab 17.12.2009 geltenden Fassung"
- ***Erik Jayme/Carl Friedrich Nordmeier*** report on two PIL conferences held in Lausanne: "Zwanzig Jahre schweizerisches IPR-Gesetz – Globale Vergleichung im Internationalen Privatrecht"
- ***Ralf Michaels/Catherine H. Gibson*** report on the conference held at Duke Law School on 9 February 2008 titled: "The New European Choice-of-Law Revolution: Lessons for the United States?"
- ***Hilmar Krüger*** reports on the wife's right of succession under Iranian law: "Neues zum Erbrecht der überlebenden Ehefrau nach iranischem Recht"
- ***Hilmar Krüger*** reports on the recognition of foreign decisions in the field of family law in Turkey: "Zur Anerkennung familienrechtlicher Entscheidungen in der Türkei"

Publication: The University of Pennsylvania Journal of International Law

The *University of Pennsylvania Journal of International Law* (Volume 30, Number 4) has recently published a symposium in celebration of its anniversary. Private international lawyers will be interested in the following contributions:

International Litigation and Arbitration

- Gary Born, *The Principle of Judicial Non-Interference in International Arbitral Proceedings*
- Catherine A. Rogers, *Lawyers Without Borders*
- David J. McLean, *Toward a New International Dispute Resolution Paradigm: Assessing the Congruent Evolution of Globalization and International Arbitration*
- Jonathan C. Hamilton, *Three Decades of Latin American Commercial Arbitration*

Private International Law

- David P. Stewart, *Private International Law: A Dynamic and Developing Field*

Stewart's article, in particular, provides an excellent overview of the field from the perspective of a US lawyer.

Brussels I Review – Jonathan Hill

Jonathan Hill is Professor of Law at the University of Bristol. He is the author of *Cross-Border Consumer Contracts* (OUP 2008), *The Conflict of Laws* (with CMV Clarkson, 3rd edn, OUP 2006), *International Commercial Disputes in English Courts* (Hart 2005) and is a former editor of *Dicey*.

Comments on the Review of the Brussels I Regulation

Those who have an interest in private international law (PIL) in Europe have been presented with a valuable opportunity to offer their thoughts on how the Brussels I Regulation should evolve. It has been obvious for many years (indeed, in relation to certain issues, for decades) that the Brussels system is subject to certain weaknesses. At last, there is a chance that (some of) these weaknesses may be addressed.

I have read Andrew Dickinson's posts with interest and I do not intend to comment on every point which he makes or to offer my own personal answer to every question which the Commission has posed in its Green Paper. Before turning to some of the specific questions on which the Commission is consulting, I have a couple of general observations.

First, Andrew has drawn attention to the unsatisfactory nature of the some of the ECJ's jurisprudence in the context of the Brussels Convention/ Brussels I Regulation and the need for institutional reform. I suspect that even the ECJ's greatest supporters would not try to argue that the ECJ has always covered itself in glory when considering the provisions of the Convention/Regulation. My own feeling is that some criticism has been somewhat exaggerated and has not sufficiently acknowledged that the Court's room for manoeuvre is restricted by a legal text which does not say (and, frequently, cannot plausibly be twisted to say) what one wants it to say. Nevertheless, the PIL community is entitled to better than the fare which has been served up by the ECJ in recent years. The suggestion that, within the ECJ, there should be established a specialist chamber (of PIL experts) to deal with references under the Brussels I Regulation (and other PIL instruments) has been knocking around for well over 30 years. Such

reform is seriously overdue.

Secondly, the goal of promoting the 'good functioning of the internal market' inevitably provides the backdrop to much of the Commission's discussion. From the perspective of PIL, this focus runs the risk of distorting priorities. What I would like to see is a principled system of PIL rules which will serve the collective interests of the international litigation community; whether or not this advances the internal market is not my primary concern. So, from my perspective, a rule which arguably has the effect of strengthening the internal market (for example, by simplifying the enforcement of judgments granted against defendants domiciled in a third state) is still a bad rule if it unjustifiably discriminates against non-EU defendants.

The wider international picture

1. One of the most unattractive features of the Regulation is the fact that a judgment granted in one member state against a third state defendant is entitled to recognition and enforcement in other member states, regardless of the basis on which the court of origin assumed jurisdiction. In terms of principle, this approach is indefensible. At the jurisdictional stage, the protection against exorbitant jurisdiction rules which the Regulation offers to EU defendants is not extended to third state defendants; but, at the enforcement stage, non-EU defendants are, nevertheless, exposed to the principle of full faith and credit.

One possible solution is to extend the rules of special jurisdiction in arts 5 and 6 to defendants not domiciled in a member state. Andrew suggests that such extension should not, however, prejudice the application of art 4(1). I am not opposed to Andrew's suggestion – but I think that any retention of art 4(1) should be subject to a qualification. As regards a defendant not domiciled in a member state, recognition and enforcement under Chapter 3 should depend on the court of origin having assumed jurisdiction on a Regulation basis – or in circumstances in which, had the defendant been domiciled in a member state, the court of origin would have been entitled to assume jurisdiction under the Regulation.

2. Should the Brussels I Regulation be extended to cover the recognition/enforcement of third state judgments? I do not think that there is a compelling case for it to do so. There is no obvious community interest in seeking to determine the circumstances in which a New York judgment is enforceable in

England (or France or any other member state). It is imperative that the Community legislator takes seriously the limits of its legislative competence.

3. There is one area involving the relationship between member states and non-member states which needs attention. Whereas art 34(4) deals with the potential problems of conflicting judgments, the Regulation's silence on potential jurisdictional conflicts between member states and third states is a significant omission. Whatever solution the ECJ might come to in the Goshawk reference, and notwithstanding the arguments surrounding the theory (or theories) of the 'reflexive effect' of arts 22, 23, 27 and 28, there is a good case for including within the Brussels I Regulation rules which make provision for proceedings to be stayed or jurisdiction to be declined in cases involving a relevant connection with a non-member state (such as cases where there is a jurisdiction clause in favour of a third state). Some indication of what such rules might look like has been suggested by the European Group for Private International Law (EGPIL). (See arts 22bis, 23bis and 30bis of EGPIL's Proposed Amendment of Regulation 44/2001 in Order to Apply it to External Situations. While I would not necessarily want to commit myself to EGPIL's proposed text, EGPIL's basic approach strikes me as the most plausible solution to the problems posed by the Court of Appeal's second question in Owusu (ie, the question that the ECJ declined to answer in that case).

Arbitration

In principle, there is a lot to be said for Article 1(2)(d) in its current version. The idea that 'arbitration' should be excluded in its entirety from the Brussels I Regulation is intuitively attractive as it marks out arbitration as a field of dispute resolution which is separate from litigation. Of course, there is an interface (court proceedings which relate to arbitration) and the ECJ's rulings in Van Uden and West Tankers muddy the waters to such an extent that it is essential that the whole question of the relationship between the Regulation and arbitration is revisited. Doing nothing in this area is not a realistic option.

From the jurisdictional point of view, various elements are required. First, the arbitration exception should be removed. Secondly, there needs to be a new rule in Article 22 which, as regards court proceedings relating to arbitration, confers exclusive jurisdiction on the courts of the (putative) seat of arbitration. Thirdly, there is a good case for extending the approach of art 27 to arbitration

proceedings. So, if C refers a dispute to arbitration and D initiates court proceedings, the court (which is second seised) should automatically stay its proceedings (without embarking on an investigation of whether the alleged arbitration agreement is valid or not) and, then, if the arbitral tribunal determines that it does have jurisdiction under the arbitration agreement, decline jurisdiction.

In terms of the recognition/enforcement of judgments, a provision dealing with the potential conflict between judgments and awards – along the lines of art 34(4) – would be beneficial. The problem posed by cases where the court of origin wrongly assumes jurisdiction notwithstanding a binding dispute resolution agreement should be addressed. Art 35(1) needs to be amended to allow a defence to recognition/enforcement along the lines of section 32 of the Civil Jurisdiction and Judgments Act 1982. Where the court of origin wrongly assumes jurisdiction in defiance of a valid arbitration clause, the ensuing judgment should not normally be given effect outside the country of origin. In terms of PIL's priorities, upholding the integrity of dispute resolution agreements (by denying cross-border recognition/enforcement of judgments granted by a non-contractual forum) should be a higher priority than promoting the free flow of judgments regardless of the legitimacy of the assumption of jurisdiction by the court of origin.

Choice of court agreements, lis pendens and related actions

The foregoing paragraph runs in parallel with Andrew's succinct summary of what is currently wrong under the Brussels I Regulation (as interpreted by the ECJ) with regard to choice of court agreements. The problems surrounding the Gasser decision are well known and there seems to be widespread agreement that its effects need to be reversed. Giving priority to the (putative) contractual forum (and strengthening the effect of jurisdiction agreements by amending the defences to recognition/enforcement) seems the most sensible way forward.

Provisional measures

I agree with the majority of Andrew's post on this topic. A court seised of substantive proceedings has jurisdiction to grant, in the context of those

proceedings, whatever provisional measures are available under its procedural law and art 31 is irrelevant. Where, however, under art 31 court B is acting in support of substantive proceedings brought (or to be brought) in another member state (in court A), one has to accept that court A is the primary court and court B is the secondary court. The 'real connecting link' requirement of Van Uden has to be understood in that context. While I agree that the Van Uden requirement is not easy to interpret and apply, there must be limits on what court B can do by way of granting provisional measures of support and some mechanism is required to enable those limits to be set.

In view of the fact that the purpose of art 31 is to allow the granting of measures of support, it makes sense to allow the primary court to decide whether or not the measures granted by the secondary court really are supportive or not. In a situation where the rationale for the grant of a provisional measure is to assist the primary court, how can it be said that it would unduly impinge on national judicial sovereignty to allow the primary court to modify or discharge such a measure if the primary court considers it unhelpful? As things currently stand, a court which, although well-intentioned, is insensitive to (or ignorant of) the system of civil procedure adopted by the primary court may grant provisional measures under art 31 which the primary court considers inappropriate or unduly intrusive. The simplest and most efficient way of counteracting such 'unhelpful' support – and promoting better cross-border judicial co-ordination – is to allow the primary court to 'correct' the situation by modifying such measures. If this solution were adopted, there would be no need for the 'real connecting link' requirement: the secondary court could grant whatever measures it thought would be helpful; the primary court could modify or discharge those measures which it did not consider to be so.