Third Issue of 2009's Revue Critique de Droit International Privé

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

The first article is authored by Professor Anne Sinay Cytermann, who teaches at Paris V University. It wonders why jurisdiction and arbitration clauses are regulated differently in consumer and labour contracts (*Une disparité étonnante entre le régime des clauses attributives de juridiction et les clauses compromissoires dans le contrat de travail international et le contrat de consommation international*). The English abstract reads:

> *Although both are deemed weaker parties, the worker and the consumer do not benefit from the same protection on the international sphere, particularly as far as choice of jurisdiction clauses are concerned. Indeed, when such clauses are included in an employment contract, they are subjected to a highly restrictive regime, under which they are considered to be void when they derogate from mandatory heads of jurisdiction, while arbitration clauses cannot be invoked against the worker. On the other hand, when the same clauses appear in consumer contracts, they are exposed to a far ore liberal regime which validates in principle both choice of court and arbitration clauses. It would be preferable that a similar treatment be provided for both types of contract, along the lines of the model applicable to employment contracts.*

The second article is authored by Franco Ferrari, a professor at the University of Verona and a a visiting professor a several law schools in New York. It offers remarks on the law governing contractual obligations in absence of choice by the parties under article 4 of the Rome I Regulation (*Quelques remarques sur le droit applicable aux obligations contractuelles en l'absence de choix des parties – Art. 4 du Règlement Rome I-*):

A comparison between article 4 of the 1980 Rome Convention on the law applicable to contractual obligations, the commission's proposal in its 2003 Green Paper and the final version of the same provision in the "Rome I" Regulation shows that the latter, ostensibly a compromise between the Convention's flexibility and the proposal's rigid system of connecting factors, is in fact very close to the original model, at least such as it was implemented by the courts in the various Contracting States. Thus, while the Commission had attempted to correct the Convention's principle of proximity by introducing greater certainty in the form of rigid and autonomous connecting factors, article 4 of the Rome I Regulation, which, like the Commission's proposal, does indeed contain a list of (eight, non exclusive) connecting factors, subjects these to an escape or exception clause similar to that of the Convention, except for the fact that the negative conditions which trigger the clause are stricter. The court must examine of its own motion whether these requirements are fulfilled, even when the contract comes the difference between the Convention, in which the proximity principle presided over the determination of the applicable law in the absence of party choice, and the Regulation in which the role of this principle is less formally apparent, is in fact very limited.

In the last article, Professor Petra Hammje from Cergy University briefly presents a recent addition to the French civil code providing a choice of law rule for civil unions. There is not abstract, but I'll report shortly on this.

Finally, I am glad to report that the *Revue Critique* has recently been put online and that those articles can now be downloaded.

New Journal of International Dispute Settlement

Oxford University Press will publish a new *Journal of International Dispute Settlement* from 2010 onwards. The General Editors will be Geneva based scholars Gabrielle Kaufman-K0hler and Joost Pauwelyn, with Thomas Schultz

being the Managing Editor.

Since the 1980s, a radical development has taken place in international dispute settlement. The number of international courts, tribunals and other international dispute resolution mechanisms has increased dramatically. The number of international disputes resolved by such means has risen in even greater proportions. These disputes more and more frequently raise issues that combine private and public international law, effectively bringing back to light the deep-seated interactions that have always existed between these two traditional fields of academic study. The regulatory impact of certain branches of international dispute settlement – such as international arbitration – further create the need to take a step back and think about where we are going. The growth of the field of international dispute settlement in practice, the novelty and significance of the issues posed, and the originality of the academic angle from which such issues need to be addressed are the factors that triggered the launch of the Journal of International Dispute Settlement.

JIDS defines its mission according to these developments. It is primarily designed to encourage interest in issues of enduring importance and to highlight significant trends in the field of international dispute settlement. Heavyweight and reflective articles will find preference over news-driven works. In addition to strictly legal approaches, the journal's purview encompasses studies inspired by legal sociology, legal philosophy, the history of law, law and political science, and law and economics. It covers all forms of international dispute settlement and focuses particularly on developments in private and public international law that carry commercial, economic and financial implications. The main subjects that will be dealt with are international commercial and investment arbitration, WTO dispute resolution, diplomatic dispute settlement, the settlement of international political disputes over economic matters in the UN, as well as international negotiation and mediation. Particular attention will be paid to questions that involve a combination of private and public international law.

JIDS will address procedural issues that arise in international dispute resolution procedures, such as provisional measures; the consensual character of jurisdiction; evidence; amicus curiae interventions; res judicata, lis pendens and double fora; the procedural influence of human rights; experts and witnesses; interpretation, revision and challenge of awards and decisions; recognition and

enforcement, etc. Comparative approaches, which are attentive to the different ways that these issues are dealt with in different types of dispute resolution procedures, are of particular interest.

The journal will also include substantive aspects pertaining to those fields of the law that are shaped by international courts and tribunals, be they of an interstate, private or mixed character. Hence, substantive issues in international economic law and international investment law will be considered, so long as the link to international dispute settlement is clearly established. This will include questions of substantive law properly speaking, but also more general aspects of the substantive evolution of international law, covering issues such as the proliferation of international dispute settlement mechanisms and the ensuing fragmentation of international law.

JIDS is intended not only for academics with an interest in international dispute settlement, international arbitration, private or public international law. It is also intended for practitioners who are looking for a single source that captures the fundamental trends with the field, allowing them to anticipate new issues and new ways to resolve them. Graduate and post-graduate students, government officials, in-house lawyers dealing with international disputes, and people working for international courts and tribunals and for international arbitration institutions should also find interest in this journal.

The contents of the first two issues of the Journal can be found here.

Surprise? Yes and No

I am grateful to Horatia Muir Watt, a professor of private international and comparative law at the Paris Institute of Political Science, to have accepted to comment on the recent In Zone Brands *decision of the* Cour de cassation *ruling that an American anti-suit injunction could be declared enforceable in France*.

To my mind, this case was well decided. But did it really come as such a surprise,

as Gilles' and Raphael's comments seem to imply? Well, yes and no. But before explaining why, I want to start with two parentheses about legal comparison.

1. Firstly, it is wise before drawing conclusions from a decision of the Cour de cassation to consulting the accompanying preparatory documents (the "Rapport" of the juge-rapporteur, whose name figures at the bottom of the decision and from whom the Report can be obtained directly, when it is not published spontaneously on the Cour de cassation's website, and/or the "avis" of the Advocate general). The attention of the common law world has often been drawn to the importance of these documents, particularly since Mitch Lasser's magnificent "Judicial Self-Portraits" [1], in which he explains that behind the concise one-sentenced syllogism which constitutes an "arrêt", the various rapports and avis which accompany the decision are functional equivalents to the longer motivation of judgments in the common law tradition – and may indeed reveal dissenting opinions within the court ¨[2]. In this particular case, the thoughtful Report of Madame Pascal makes it easier to understand, for instance, how the procedure developed before the lower courts and, perhaps more importantly, the position of the Cour de cassation in respect of the implications of West Tankers.
2. Secondly, countries belonging to the civilian legal tradition do not constitute a homogeneous block with a single legal perspective on such institutions as anti-suit injunctions. Of course, the coexistence of the civilian and common law cultures within the European common judicial area has now revealed profound divergences on jurisdictional issues – unsurprisingly, since such issues are linked to conceptions about the very function of adjudication – , and it may well have been that before the antisuit/forum non conveniens crisis, such differences were underestimated on the civilian side, either through the inadequacy of comparative legal studies, or in a misguided quest for legal uniformity. However, while the epistemological and methodological divide between these two legal traditions is undisputable, it does not mean that within the civilian "camp", there are not equally significant differences in legal reasoning or indeed in judicial policy. In the particular case of anti-suit injunctions (and much could also be said in the same vein about forum non conveniens), the French courts cannot be said to have been hostile to anti-suit injunctions (beyond the dictum in the Stolzenberg decision, to

> which I shall come back) and their position on this point certainly cannot be inferred from the often cited German or Belgian cases which have explicitly refused to recognize or enforce anti-suit injunctions. Moreover, legal scholarship on this point, to which the Rapport is extremely attentive, has been far from antagonistic.

This having been said, the content of the arrêt of 14th October 2009 appears to me to conform to the general orientation of the Cour de cassation's case-law. Firstly, as the report itself emphasises, the Cour has itself, in a pre-Regulation insolvency case, awarded something that looks very like an anti-suit injunction, in the form of an order to desist from judicial proceedings abroad sanctioned by an "astreinte" (a sum of money by way of a private penalty to be paid to the claimant per day of non-performance/obedience to the order): see Banque Worms (Cass civ 1re, 19 nov. 2002). In that case, the Advocate general's Conclusions and the Report, which cite Gilles Cuniberti's own work on this point, show that the Court was paying particular attention to the risks attendant to the use of such injunctions insofar as they might be perceived to intrude on the jurisdiction of foreign courts, and is careful to emphasize that the French courts were themselves asserting jurisdiction in this case on grounds which justified their attempt to retain the proceedings before them. Secondly, the Cour de cassation was recently willing to allow effect to be given to an American judgment awarding a large penalty against a company director for contempt of court (Cass civ 28 janvier 2009, n° 07-11.729 Bull civ. I, n°15), sweeping aside the argument according to which contempt of court is quasi-penal in nature and therefore contrary to French public policy. This was already the Cour de cassation's position in Stolzenberg (Cass civ 1re, 30 juin 2004, which the French challenger invokes here). The latter case, however, contained an obiter dictum (interestingly characterized as such in Mme Pascal's Report) according to which anti-suit injunctions (as opposed to freezing orders) "affect the jurisdiction of foreign courts". This dictum must however be interpreted in the light of Banque Worms, also cited by the Report , and, beyond the fact that the Stolzenberg case actually gave effect to a Mareva injunction, seems mainly to have been designed to draw the attention of the lower courts once again to the potential risks involved in enjoining foreign proceedings – but does not necessarily exclude the use of such measures when protecting choice of forum agreements, or at least, when protecting the jurisdiction of the chosen court to decide on the validity of the clause.

This latter consideration seems to have been decisive in the present case. The Report underlines, citing various scholarly opinions on this point, that in circumstances such as this, the injunction is merely designed to ensure the performance of the parties' contract (which of course includes the choice of forum clause). And, as Adrian Briggs has already pointed out, this is excellent judicial policy. The recognition of the American judgment here means that the French courts seized in apparent violation of the clause have refrained from ruling on its validity, in favour of the decision of the chosen court on this point. True, one might wonder why the detour via the enforcement of the American injunction was necessary: did it not suffice that the French court, whose jurisdiction was challenged on the basis of the choice of forum agreement, decline to exercise such jurisdiction, at least pending the decision of the American court? The explanation appears to be that the American judgment was presented very quickly with a view to obtain an exequatur, and, on appeal, the Court of Versailles had not yet had the opportunity to hear the appeal on the jurisdictional issue. If one takes the sole issue of jurisdiction, it might of course have made more practical sense for the Court to stay the exequatur proceedings until it had decided on the (lack of) jurisdiction of the French courts under the choice of forum clause (or at least, ruled on the basis of Kompetenz-Kompetenz). But since the American judgment appears to have contained both the injunction and a decision on the merits, allowing enforcement meant that the jurisdictional issue and the issue of the French distributor's debt were on fact resolved in one fell swoop. Of course, as Raphael points out, enforcing the injunction may mean that the Cour de cassation is ready to go further than English courts, which stop short of enforcing foreign judicial orders which are not purely monetary. However, this point needs to be clarified in future cases, since the injunction came as a package with the judgment on the merits.

Perhaps the most interesting aspect of the Cour de cassation's decision, here again enlightened by the report, concerns its reading of the implications of West Tankers. The report clearly opines that while the Cour de cassation is now bound not to allow recognition of, say, an English anti-suit injunction when the enjoined proceedings are in France (or indeed before an arbitrator in France) , it remains free to recognize injunctions issued by the courts of third states. This of course is where things become sticky. Of course, the choice of forum agreement concerns the court of a third state and is as such apparently outside the bounds of the Brussels Regulation. But then, of course, so were the arbitration proceedings in

West Tankers. In that case, the fact that the party in apparent breach of the arbitration clause had seized the court of a Member State (with jurisdiction under the Regulation? this requirement is no doubt superfluous) was enough to prohibit the use of the injunction by the English courts, under the "effet utile" and mutual trust doctrines. Do the latter apply here? Could such principles prevent the court of a Member State from declining its own jurisdiction in favour of the courts of a third state? Surely not? But this very question shows that the problem may well not lie in the anti-suit aspect of things at all, but in Owusu and its (unclear) implications as to the scope of the Regulation as far as choice of law agreements in favour of the courts of third states are concerned, when the defendant is domiciled in a Member State. Does it really make any difference here where the French court declines jurisdiction on the basis of a choice of forum agreement (either because it says it is valid under principles of common French private international law or because it decides to apply the Kompentez-Kompetenz principle in favour of the chosen court's jurisdiction to rule on its own jurisdiction under the agreement) or because it decides to recognise an American anti-suit injunction? For the moment, as the Cour de cassation's decision shows (cf Konkola Mines), national courts are resisting the expansion of the Regulation into the relationship between a Member state and a third state, as far as choice of law agreements are concerned. But current work in progress within the European institutions and study groups is now envisaging this relationship, which may make a case for the ratification of the 2005 Hague Convention. In the meantime, if priority was recognised to the (presumptively) chosen forum to rule on its own jurisdiction, whether it be a court or an arbitrator, or in a Member State or not, life would no doubt be a little simpler.

[1] "Judicial (Self-)Portraits: Judicial Discourse in the French Legal System," 104 *Yale Law Journal* 1325-410 (1995).

[2] It is also important, of course, not to underestimate the procedural constraints which weigh on the Cour de cassation (and which are high-lighted by the report when it discusses the legal arguments raised by the parties), which is bound by the way in which the legal issue is framed before it (by virtue of what is known here as the "linguistic police" of the judiciary), and whose decisions may not have the same significance according to whether the Court quashes the decision of the lower court or merely dismisses the "pourvoi".

The Execution of the Anti-Suit Injunction

I am grateful to Thomas Raphael, a barrister at 20 Essex Street and the author of a major work on The Anti-Suit Injunction*, to have accepted to comment on the recent* In Zone Brands *decision of the* Cour de cassation.

> **King Duncan:**
> Is execution done on Cawdor? Are not
> Those in commission yet return'd?
>
> **Malcolm:**
> My liege,
> They are not yet come back. But I have spoke
> With one that saw him die; who did report
> That very frankly he confessed his treasons,
> Implor'd your Highness' pardon, and set forth
> A deep repentance. Nothing in his life
> Became him like the leaving it.
>
> *Macbeth Act 1, scene 4, 1–8*

In a judgment of 14 October 2009 (Decision no 1017 of 14 October 2009) the Première Chambre Civile of the Cour de Cassation refused to set aside a decision of the Versailles Court of Appeal which gave "exequatur" to an anti-suit injunction granted by the Superior Court of Georgia to enforce an exclusive jurisdiction clause in favour of the Courts of the State of Georgia (USA). The Georgian anti-suit injunction had restrained litigation before the Tribunal de Commerce of Nanterre, which was apparently civil and commercial litigation.

In loose translation the Première Chambre Civile concluded:

> *But given that the decision [of the Versailles Court of Appeal] records precisely, in the first place, that in the light of the jurisdiction clause freely agreed by the*

parties, no fraud could result from the invocation by the American company of the jurisdiction expressly designated as the competent jurisdiction;

and given that there could not be any deprivation of the right of access to a court, since the aim of the decision taken by the Georgian judge was specifically to rule on his own competence and, for the purposes of finality, to cause the jurisdiction clause undertaken by the parties to be respected;

and given there is no inconsistency between public international law and an anti-suit injunction whose aim, as in the present case, is solely, outside the field of application of the operation of the conventions and community law, to punish the violation of a pre-existing contractual obligation; and given that therefore the decision is legally justified; for these reasons, [the Première Chambre Civile] rejects the appeal."

To understand private international law a strong sense of irony is often helpful, and here there are three ironies I would like to highlight.

First, one of the paradoxical results of the *West Tankers* imbroglio is that the bright light it shone on the anti-suit injunction may have led to a greater degree of understanding, and in some cases sympathy, for this particular English vice among our continental colleagues – just as the European Court of Justice was limbering up to deliver what it may have hoped was a final blow to the remedy. So while "civilian" academic opinion was once (it seems) overwhelmingly hostile, the mood has changed. Recently a number of distinguished civilian voices have supported the use of anti-suit injunction in certain circumstances (see e.g. Kessedjian on West Tankers). And while previous decisions from continental courts, including the Cour de Cassation itself (*Stolzenberg v Daimler Chrysler Canada*, Cour de Cassation, 30 June 2004 [2005] Il Pr 24; see also in Belgium Civ Bruxelles, 18 December 1989, RW 1990-1991), had been opposed to the anti-suit injunction, the Cour de Cassation now seems to find the enforcement of a contractual anti-suit injunction entirely unproblematic. So we can say that, like the Thane of Cawdor, nothing in the anti-suit injunction's life "*became him like the leaving it.*"

Second, execution may have been done in (and on) Cawdor, but reports of

the anti-suit injunction's death are greatly exaggerated; and now execution of it is done in France. There was a degree of crowing in certain quarters after *West Tankers*. But the anti-suit injunction is alive and kicking in respect of litigation outside Europe. Even within Europe the anti-suit injunction is not entirely dead – it is difficult to see how the European Court could prohibit an anti-suit injunction to restrain proceedings in another state where the "targeted" proceedings are themselves outside the scope of the regulation.

And now, rather surprisingly, the Cour de Cassation apparently shows us that *Turner* and *West Tankers* can be circumvented by executing a non-Brussels Lugano state's anti-suit injunction, at least in some states. If right, and if other European national courts take a similar course, this opens up contrasting possibilities. On the one hand, Lord Hoffmann's warnings in *West Tankers* prohibiting the English courts from granting anti-suit injunctions would drive business off-shore may now be given renewed vigour, if you can rely on your American anti-suit injunction by enforcing it in France. On the other hand, the possibility of obtaining anti-suit injunctions from a *third party court* to enforce an *English* arbitration clause (as the Bermuda and Eastern Caribbean Courts have done, although the Singapore High Court thinks that this is a bad idea as you become an "*international busybody*"), suddenly takes on far greater practical utility.

Third, perhaps most ironically of all, the Cour de Cassation has apparently gone further than the English courts ever would – which may explain why English lawyers had not thought of this particular dodge before. It is a basic principle of common law enforcement that only money judgments are enforceable at common law; and therefore anti-suit injunctions, like other injunctions, are not enforceable at common law.

A good example of this is the *Airbus v Patel* litigation, which concerned the crash of an airliner made by Airbus at Bangalore airport. An action had initially been commenced against Airbus in India, but the victim's families later started duplicative claims in Texas. The dispute had no connection with Texas, but Texas at that time had no doctrine of *forum non conveniens*. The Indian courts granted an anti-suit injunction to restrain litigation in Texas, on the grounds that the Texas litigation was vexatious and oppressive. But the Indian anti-suit injunction had insufficient teeth in practice, and so an attempt was made to replicate it in England. Colman J held that the Indian injunction could not be enforced in

England either under the common law or the English enforcement legislation, and that it did not create a right to an English anti-suit injunction either: *Airbus v Patel* [1996] ILPr 465. The only question was whether he could and should independently grant an anti-suit injunction to protect the Indian proceedings. He said no. The Court of Appeal disagreed: *Airbus v Patel* [1997] 2 Lloyds Rep 8; but then the House of Lords agreed with Colman J, holding in effect that the English courts should not act as the world's policemen where a non-contractual anti-suit injunction was sought, as this would be contrary to the principle of comity: *Airbus v Patel* [1999] 1 AC 119. (Lord Goff took care to make clear that he was not necessarily prohibiting a contractual injunction to protect the contractual jurisdiction of another state, a loophole the Bermuda and Caribbean case law mentioned above has exploited.)

So the Georgian injunction would not have been enforceable as a judgment in England, yet it is enforceable in France. A prophet is not without honour save in his own country (Matthew, 13:57).

But will the Cour de Cassation's new decision stand? I can't comment on what it means as a matter of French law, so it will be for others to say whether the Cour de Cassation has, in Shakespeare's words, "*set forth a deep repentance*" of its earlier comment in *Stolzenberg v Daimler Chrysler Canada*, Cour de Cassation, 30 June 2004 [2005] Il Pr 24 that a Mareva injunction is acceptable because it "*does not prejudice any of the debtor's fundamental rights or (even indirectly) foreign sovereignty*" because it "*unlike the so-called "anti-suit" injunctions, does not affect the jurisdiction of the State in which enforcement is sought*."

I do suspect, however, that there will be some, at least in Luxembourg, who will consider the Cour de Cassation's new decision a form of "*treason*" for which pardon should be asked.

As a matter of formality there is probably nothing directly inconsistent between it and *West Tankers*. It is a matter for the French legal system to decide what third state judgments it will enforce and its exequatur decision will not directly render the Georgian judgment enforceable in other member states under the Brussels-Lugano regime.

But there is no doubt that as a matter of principle the two decisions are very uncomfortable bedfellows. The Cour de Cassation is telling us that there is

nothing wrong with a foreign court ordering someone not to litigate before the French courts, at least where this is done to enforce an exclusive jurisdiction clause in favour of the foreign court. Apparently, this does not interfere with the French court's judicial sovereignty. What matters is "*to punish the violation of a pre-existing contractual obligation.*" So the French court is content for the Georgian court to assess, and directly interfere with, the French court's jurisdiction. And this is so even though the jurisdiction of the Tribunal de Commerce of Nanterre over the substantive proceedings in France which the Georgian injunction restrained would have been a jurisdiction under the Brussels-Lugano regime. All this is completely alien to the mode of thought in Luxembourg, under which it is wholly unacceptable for the English courts, even when acting *outside* the scope of the regulation, to assess, and indirectly interfere with, the Brussels-Lugano jurisdiction of other member or contracting state courts; and the importance of enforcing contractual obligations binding the parties to litigate in a particular forum is simply irrelevant.

Indeed, it might even be argued that the Cour de Cassation's decision is inconsistent with implied principles of the Brussels-Lugano regime, as it "*necessarily amounts to stripping [the Nanterre Tribunal de Commerce] of the power to rule on its own jurisdiction under Regulation 44/2001*" (contrary to *West Tankers*, §28). The Cour de Cassation did not make a reference, and there is no obvious reason why the Courts of other member states would be interested, so it is difficult to see how the point would get to Luxembourg. But perhaps one final irony awaits.

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)

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 iniciativa 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.*