# Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (3/2009)

Recently, the May/June 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)**:

- ***Peter Kindler***: "Internationales Gesellschaftsrecht 2009: MoMiG, Trabrennbahn, Cartesio und die Folgen" – the English abstract reads as follows:

*The article summarizes, in a European as well as in a German perspective, the recent developments for corporations in private international law in 2008. In German legislation, the law aiming at the modernization of the private company limited by shares ("MoMiG") has abandoned the requirement for German companies of having a real seat in Germany, introducing at the same time stricter disclosure requirements in respect of branches of foreign companies in Germany. The German Federal Court, in a ruling of October 2008 ("Trabrennbahn"), has applied the real seat doctrine to companies incorporated outside the EU – in this case in Switzerland –, thus confirming the traditional approach of German courts since the 19$^{th}$ century. Finally, in a European perspective, the article addresses the judgment of the EJC in case C-210/06 ("Cartesio") referring to the extent of freedom of establishment in case of transfer of a company seat to a EU Member State other than the EU Member State of incorporation. The article concludes with the statement, inter alia, that EU Member States are free to use the real seat as a connecting factor in private international company law.*

- ***Marc-Philippe Weller:*** "Die Rechtsquellendogmatik des Gesellschaftskollisionsrechts" – the English abstract reads as follows:

*This article deals with the International Company Law in the aftermath of the judgments "Cartesio" from the ECJ and "Trabrennbahn" from the German Federal Court of Justice. There are three different sources of International Company Law. The sources have to be applied in the specific order of precedence stated by Art. 3 EGBGB:*

*(1.) The European International Company Law is based on the freedom of establishment according to Art. 43, 48 EC. The freedom of establishment contains a hidden conflict of law rule known as "Incorporation Theory" for companies that relocate their real seat in another EC-member state.*

*(2.) As part of Public International Company Law the "Incorporation Theory" is derived from various international treaties such as the German-US-American-Friendship-Agreement.*

*(3.) The German Autonomous International Company Law follows the "Real Seat Theory" when it is applied in cases with third state companies (e.g. Swiss companies). Therefore, substantive German Company Law is applicable to third state companies with an inland real seat. According to the so called "Wechselbalgtheorie" (Goette), foreign corporations are converted into domestic partnerships.*

*The German jurisdiction is bound to the German Autonomous International Company Law (i.e. the real seat theory) to the extent of which the European and the Public International Company Law is not applicable.*

- ***Alexander Schall:*** "Die neue englische floating charge im Internationalen Privat- und Verfahrensrechts" – the English abstract reads as follows:

*After Inspire Art, thousands of English letter box companies have come to Germany. But may they also bring in their domestic security, the qualified floating charge? The answer depends on the classification of the floating charge under the German conflict laws. Since German law does not acknowledge global securities on undertakings, the traditional approach was to split up the floating charge and to subject its various effects (e.g. security over assets, the right to appoint a receiver/administrator) to the respective conflict rules. That*

*meant in particular that property in Germany could not be covered by a floating charge (lex rei sitae). This treatment seems overly complicated and not up to the needs of an efficient internal market. The better approach is to understand the floating charge as a company law tool, a kind of universal assignment. This allows valid floating charges on the assets of UK companies based in Germany. And while the new right to appoint an administrator under the Enterprise Act 2002 is part of English insolvency law, the article shows that this does not preclude the traditional right to appoint a (contractual or – rather – administrative) receiver for an English company with a CoMI in Germany.*

- ***Stefan Perner:*** "Das internationale Versicherungsvertragsrecht nach Rom I" – the English abstract reads as follows:

*Unlike its predecessor – the Rome Convention –, the recently adopted Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) covers the entire insurance contract law. The following article outlines the new legal framework.*

- ***Jens Rogler:*** "Die Entscheidung des BVerfG vom 24.1.2007 zur Zustellung einer US-amerikanischen Klage auf Strafschadensersatz: – Ist das Ende des transatlantischen Justizkonflikts erreicht?"
  This article deals with the service of actions for punitive damages under the Hague Service Convention. The author refers first to a decision of the Higher Regional Court Koblenz of 27.06.2005: In this case, the German defendant should be ordered to pay treble damages in a class action based on the Sherman Act. Here, the Regional Court held that the Hague Service Convention was not applicable since the case did not constitute a civil or commercial matter in terms of Art. 1 (1) Hague Service Convention. The author, however, argues in favour of an autonomous interpretation of the term "civil or commercial matter" according to which class actions directed at punitive/treble damages can be regarded as civil matters in terms of Art. 1 Hague Service Convention.Further, the author turns to Art. 13 Hague Service Convention according to which the State addressed may refuse to comply with a request for service if it deems that complicance would infringe its sovereignty or security. There

have been several decisions dealing with the applicability of Art. 13 Hague Service Convention with regard to class actions aiming at punitive/treble damages. Those decisions discussed in particular whether Art. 13 corresponds to public policy. In this respect, most courts held that Art. 13 has to be interpreted more narrowly than the public policy clause. In this context, the author refers in particular to a decision of the German Federal Constitutional Court of 24 January 2007 (2 BvR 1133/04): In this decision, the Constitutional Court has held that the mere possibility of an imposition of punitive damages does not violate indispensable constitutional principles. According to the court, the service may be irreconcilable with fundamental principles of a constitutional state in case of punitive damages threatening the economic existence of the defendant or in case of class actions *if* – i.e. only then – those claims deem to be a manifest abuse of right. Thus, as the author shows, the Constitutional Court agrees with a restrictive interpretation of Art. 13 Hague Service Convention.

- ***Christian Heinze*:** "Der europäische Deliktsgerichtsstand bei Lauterkeitsverstößen"
  The article examines the impact of the new choice of law rule on unfair competition and acts restricting free competition (Art. 6 Rome II Regulation) on Art. 5 No. 3 Brussels I Regulation: The author argues that it should be adhered to the principle of ubiquity according to which the claimant has a choice between the courts at the place where the damage occurred and the courts of the place of the event giving rise to it. In view of Art. 6 Rome II Regulation he suggests, however, to locate the place where the damage occurred with regard to Art. 5 No. 3 Brussels I Regulation in case of obligations arising out of an act of unfair competition at the place where the competitive relations are impaired or where the collective interests of consumers are affected – if the respective measure had intended effects there. In case an act of unfair competition affects exclusively the interests of a specific competitor, the place should be determined where the damaging effects occur, which is usually the place where the affected establishment has its seat. With regard to the determination of the place of the event giving rise to the damage, the author suggests to apply a centralised concept according to which the place of the event giving rise to the damage is, as a rule, the place where

the infringing party has its seat.

- ***Peter Mankowski:*** "Neues zum 'Ausrichten' unternehmerischer Tätigkeit unter Art. 15 Abs. 1 lit. c EuGVVO" – the English abstract reads as follows:

*"Targeted activity" in Art. 15 (1) lit. c Brussels I Regulation and in Art. 6 (1) lit. b Rome I Regulation aims at extending consumer protection. Accordingly, it at least comprises the ground which was already covered by "advertising" under Arts. 13 (1) pt. 3 lit. a Brussels Convention; 5 (2) 1st indent Rome Convention. "Targeted activity" is a technologically neutral criterion. Any distinction between active of passive websites has to be opposed for the purposes of international consumer protection since it would fit ill with the paramount importance of the commercial goal pursued by the marketer's activities. Any kind of more or less unreflected import of concepts from the United States should be denied in particular. Any switch in the mode of communication does not play a significant role, either.*

*Activities by other persons ought to be deemed to be the marketer's activities insofar as he has ordered or enticed such activities. In principle, registration in lists for mere communication purposes do not fall within this category. If only part of the overall programme of an enterprise is advertised "targeted activity" does not exclude contracts for other parts of that programme if and insofar as such advertising has prompted the consumer to get into contact with the professional.*

- ***Dirk Looschelders:*** "Begrenzung des ordre public durch den Willen des Erblassers" – the English abstract reads as follows:

*When applying the Islamic law of succession, in many cases conflicts occur with the fundamental principles of German law, especially with the German fundamental rights. In particular problems arise in view of the Islamic rule that the right of succession is excluded when the potential heir and the deceased belong to different religions. The Higher Regional Court of Berlin ascertains that such a rule is basically inconsistent with the German "ordre public", regulated in Article 6 EGBGB. In this particular case, however, the court refused the recourse to Article 6 EGBGB, because the consequence of the application of the Egypt law and the will of the deceased – the exclusion of the*

*illegitimate son of Christian faith from the succession – comply with each other. In the present case, this conclusion is strengthened by the fact that the deceased has manifested his will in a holographic will, which is effective under German law. Nevertheless, with regard to the testamentary freedom (Art. 14 Abs. 1 S. 1 GG), the same conclusion would be necessary, if a corresponding will of the deceased could be discovered in any other way. Insofar, the "ordre public" is limited by the will of the deceased.*

- ***Boris Kasolowsky/Magdalene Steup:*** "Ordre-public-Widrigkeit kartellrechtlicher Schiedssprüche – der flagrante, effective et concrète -Test der französischen Cour de cassation" – the English abstract reads as follows:

*The Cour de Cassation decision in SNF v. Cytec is the first case in which a final appeal court of an EU Member State dealt with the enforcement of an arbitration award allegedly in breach of EC competition law. On the basis of the breach of EC competition law, one of the parties argued that the enforcement of the award would – pursuant to Eco Swiss – be contrary to public policy within the meaning of Article V. 2 (b) of the New York Convention.*

*The Cour de Cassation considered in particular the intensity of the courts' review when dealing with a party resisting enforcement of an award for being contrary to competition law and public policy. In its decision it reconfirmed the view of the Cour d'appel that the review out to be rather limited.*

*The article suggests by reference to the Cour de Cassation in SNF v Cytec, but also to the decisions rendered in other jurisdictions, that (i) a rather limited standard level of review of arbitration awards for breach of EC competition law giving rise to a breach of public policy is being developed and (ii) only the most obvious breaches may result in a challenge succeeding or enforcement being refused. Consequently, there should (increasingly) be a level playing field within Europe. Further, given the rather limited review – which is now becoming accepted – there should in most cases also be no significant additional risks in enforcing arbitration awards in EU Member State jurisdictions rather than in non-EU Member State jurisdictions.*

- ***Sebastian Mock:*** "Spruchverfahren im europäischen Zivilverfahrensrecht" – the English abstract reads as follows:

*Austrian and German corporate law provide a special proceeding for minority shareholders to review the*

*appraisal granted by the majority shareholder on certain occasions (Spruchverfahren). This proceeding stands separate from other proceedings regarding the squeeze out of the minority shareholders and does not legally affect the validity of the decision. In contrast to Austrian and German civil procedure law the application of the Brussels regulation does not generally lead to jurisdiction of the court of the state where the seat of the company is located. Neither the rule on exclusive jurisdiction of Art. 22 no. 2 Brussels regulation nor the rules on special jurisdiction of Art. 5 no. 5 Brussels regulation apply for the Spruchverfahren. As the consequence the international jurisdiction under the Brussels regulation is only determined by the domicile respectively the seat of the defendant in the procedure (Art. 2 Brussels regulation). However, a corporation can ensure the concentration of all proceedings in the Member state of their seat by implementing a prorogation of jurisdiction according to Art. 23 Brussels regulation in their corporate charter.*

- ***Arno Wohlgemuth**:* "Internationales Erbrecht Turkmenistans" – the English abstract reads as follows:

*The law governing intestate and testamentary succession in Turkmenistan is dispersed in different bodies of law such as the Turkmenistan Civil Code of 1998, the rules surviving as ratio scripta of the abrogated Civil Code of the Turkmen SSR of 1963, the Law on Public Notary of 1999, and the Minsk CIS Convention on legal assistance and legal relations in civil, family and criminal matters of 1993, as amended. Whereas in principle movables are distributed as provided by the law in force at the place where the decedent was domiciled at the time of his death, immovable property will pass in accordance with the law prevailing at the place where it is located.*

- ***Christian Kohler*** on the meeting of the European Group for Private International Law (EGPIL) in Bergen on 19-21 September 2008: "Erstreckung der europäischen Zuständigkeitsordnung auf drittstaatsverknüpfte Streitigkeiten – Tagung der Europäischen Gruppe für Internationales Privatrecht in Bergen"

  The consultation's focus was on the proposed amendments of Regulation 44/2001 in order to apply it to external situations. The introduction of this proposal – which can be found (besides in this issue of the IPRax) also at the EGPIL's website – reads as follows:

*At its meeting in Bergen, on 19-21 September 2008, the European Group for*

*Private International Law, giving effect to the conclusions of its meeting in Hamburg in 2007, which took into account the growth of the external powers of the Union in civil and commercial matters, considered the question of enlarging the scope of Regulation 44/2001 ("Brussels I") to cover cases having links to third countries, cases to which the common rules on jurisdiction do not apply. On this basis, it proposes, as its initial suggestion, and as one possibility among others, the amendment of the Regulation for the purpose of applying its rules of jurisdiction to all external situations. These proposals are without prejudice to the examination of other possible solutions – in particular, conventions adopted by the Hague Conference on Private International Law – or a similar analysis of other instruments, such as Regulation 2201/2003 ("Brussels II bis") or the new Lugano Convention of 30 October 2007. Other questions still remain to be considered – in particular the adaptation of Article 6 of Brussels I and the extension of Brussels I to cover the recognition and enforcement of judgments given in a third country.*

- ***Erik Jayme/Michael Nehmer*** on a symposium hosted by the Law Faculty of the University of Salerno on the international aspects of intellectual property: "Urheberrecht und Kulturgüterschutz im Internationalen Privat- und Verfahrensrecht – Studientag an der Universität Salerno"

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# West Tankers and Indian Courts

What is the territorial scope of *West Tankers*? It certainly applies within the European Union, but does it prevent English Courts from enjoining parties to litigate outside of Europe?

In a judgment published yesterday (*Shashou & Ors v Sharma* ([2009] EWHC 957 (Comm)), Cook J. ruled that *West Tankers* is irrelevant when the injunction

enjoins the parties from litigating in India in contravention with an agreement providing for ICC arbitration in London.

> *Since India has not acceded to the EU (and is not, so far as I am aware, expected ever to do so), why was West Tankers even mentioned ?*

The case was about a shareholders agreement for a venture in India between Indian parties. It provided for the substantive law of the contract to be Indian Law.

Cook J. held:

> *23 It is common ground between the parties that the basis for this court's grant of an anti-suit injunction of the kind sought depends upon the seat of the arbitration. The significance of this has been explored in a number of authorities including in particular ABB Lummus Global v Keppel Fels Ltd [1999] 2 LLR 24, C v D [2007] EWHC 1541 (at first instance) and [2007] EWCA CIV 1282 (in the Court of Appeal), Dubai Islamic Bank PJSC v Paymentech [2001] 1 LLR 65 and Braes of Doune v Alfred McAlpine [2008] EWHC 426. The effect of my decision at paragraphs 23-29 in C v D, relying on earlier authorities and confirmed by the judgment of the Court of Appeal at paragraph 16 and 17 is that an agreement as to the seat of an arbitration brings in the law of that country as the curial law and is analogous to an exclusive jurisdiction clause. Not only is there agreement to the curial law of the seat, but also to the courts of the seat having supervisory jurisdiction over the arbitration, so that, by agreeing to the seat, the parties agree that any challenge to an interim or final award is to be made only in the courts of the place designated as the seat of the arbitration. Subject to the Front Comor argument which I consider later in this judgment, the Court of Appeal's decision in C v D is to be taken as correctly stating the law.*
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> *...*
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> *35 Mr Timothy Charlton QC on behalf of the defendant submitted that the landscape of anti-suit injunctions had now been changed from the position set out by the Court of Appeal in C v D by the decision of the European Court of Justice in the Front Comor – Case C185/07 ECJ [2009] 1 AER 435. There, an English anti-suit injunction to restrain an Italian action on the grounds that the dispute in those actions had to be arbitrated in London was found to be incompatible with Regulation 44/2001. Although it was conceded that the decision specifically related to countries which were subject to Community law, it was submitted that the reasoning of both the Advocate General and the court should apply to countries which were parties to a convention such as the New York Convention. Reliance was placed on paragraph 33 of the European Court's judgment where, having found that an anti-suit injunction preventing proceedings being pursued in the court of a Member State was not compatible with Regulation No 44/2001, the court went onto say that the finding*

*was supported by Article II(3) of the New York Convention, according to which it is the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an arbitration agreement, that will at the request of one of the parties refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. The Advocate General, in her Opinion said "incidentally, it is consistent with the New York Convention for a court which has jurisdiction over the subject matter of the proceedings under Regulation No 44/2001 to examine the preliminary issue of the existence and scope of the arbitration clause itself*

*36. It is plain from the way in which the matter is put both by the European Court of Justice and the Advocate General, that their concern was to show that there was no incompatibility or inconsistency between the position as they stated it to be, as a matter of European Law, and the New York Convention. This does not however mean that the rationale for that decision, which is binding in Member States, applies to the position between England on the one hand and a country which is not a Member State, whether or not that State is a party to the New York Convention. An examination of the reasoning of the European Court, and the Advocate General reveals that the basis of the decision is the uniform application of the Regulation across the Member States and the mutual trust and confidence that each state should repose in the courts of the other states which are to be granted full autonomy to decide their own jurisdiction and to apply the provisions of the Regulation themselves. Articles 27 and 28 provide a code for dealing with issues of jurisdiction and the courts of one Member State must not interfere with the decisions of the court of another Member State in its application of those provisions. Thus, although the House of Lords was able to find that anti-suit injunctions were permitted because of the exception in Article 1(2)(d) of the Regulation which excludes arbitration from the scope of it, the European Court held that, even though the English proceedings did not come within the scope of the Regulation, the anti-suit injunction granted by the English court had the effect of undermining the effectiveness of the Regulation by preventing the attainment of the objects of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters, because it had the effect of preventing a court of another member state from exercising the jurisdiction conferred on it by the Regulation (paragraph 24).*

*37. None of this has any application to the position as between England and India. The body of law which establishes that an agreement to the seat of an arbitration is akin to an exclusive jurisdiction clause remains good law. If the defendant is right, C v D would now have to be decided differently. Both the USA (with which C v D was concerned) and India are parties to the New York Convention, but the basis of the Convention, as explained in C v D, as applied in England in accordance with its own principles on the conflict of laws, is that the courts of the seat of arbitration are the only courts where the award can be challenged whilst, of course, under Article V of the Convention there are limited grounds upon which other contracting states can refuse to recognise or enforce the award once made.*

*38. The Regulation provides a detailed framework for determining the jurisdiction of member courts where*

*the New York Convention does not, since it is concerned with recognition and enforcement at a later stage. There are no "Convention rights" of the kind with which the European Court was concerned at issue in the present case. The defendant is not seeking to enforce any such rights but merely to outflank the agreed supervisory jurisdiction of this court. What the defendant is seeking to do in India is to challenge the award (the section 34 IACA Petition) in circumstances where he has failed in a challenge in the courts of the country which is the seat of the arbitration (the ss.68 and 69 Arbitration Act applications). Whilst of course the defendant is entitled to resist enforcement in India on any of the grounds set out in Article V of the New York Convention, what he has done so far is to seek to set aside the Costs Award and to prevent enforcement of the Costs Award in England, in relation to a charging order over a house in England, when the English courts have already decided the matters, which plainly fall within their remit. The defendant is seeking to persuade the Indian courts to interfere with the English courts' enforcement proceedings whilst at the same time arguing that the English courts should not interfere with the Indian courts, which he would like to replace the English courts as the supervisory jurisdiction to which the parties have contractually agreed.*

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*39. In my judgment therefore there is nothing in the European Court decision in Front Comor which impacts upon the law as developed in this country in relation to anti-suit injunctions which prevent parties from pursuing proceedings in the courts of a country which is not a Member State of the European Community, whether on the basis of an exclusive jurisdiction clause, or an agreement to arbitrate (in accordance with the decision in the Angelic Grace [1995] 1 LLR 87) or the agreement of the parties to the supervisory powers of this court by agreeing London as the seat of the arbitration (in accordance with the decision in C v D).*

*Hat tip: Hew Dundas, Jacob van de Velden*

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# BIICL Seminar on West Tankers

The British Institute for International & Comparative Law are hosting a seminar on Tuesday 12th May (17.30-19.30) entitled *Enforcing Arbitration Agreements: West Tankers – Where are we? Where do we go from here?* Here's the synopsis:

> *The February 2009 West Tankers ruling of the European Court of Justice has the unintended consequence of disrupting the flow of arbitrators' powers. The precise extent to which these are affected remains unclear, however. In its ruling, the Court stated:*
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> ***"It is incompatible with Council Regulation (EC) No 44/2001 … for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement."***
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> *Following this ruling essentially two questions arise: "Where are we?" and*

*"Where do we go from here?". The former question involves an assessment of West Tankers' immediate implications. The second turns on an emerging consensus, encompassing comments from at least Germany, France and the United Kingdom, that legislative change is needed to attend to the unsatisfactory state of the law in this context. The Heidelberg Report 2007 on the Brussels I Regulation proposes amendments bringing proceedings ancillary to arbitration within the Regulation's scope, and to confer exclusive jurisdiction on the courts of the state of the arbitration. Should this proposal be supported?*

*The Institute has convened leading practitioners and academics, including one of the authors of the Heidelberg Report, to rise to the challenge of answering these questions. There will be ample occasion for discussion, so those attending are encouraged to share their thoughts and ideas.*

***2 CPD hours may be claimed by both solicitors and barristers through attendance at this event.***

**Chair: The Hon Sir Anthony Colman**, Essex Court Chambers

**Speakers:**
**Alex Layton QC**, 20 Essex Street; Chairman of the Board of Trustees, British Institute of International and Comparative Law
**Professor Adrian Briggs**, Oxford University
**Professor Julian Lew QC**, Head of the School of International Arbitration (Queen Mary), 20 Essex Street
**Professor Thomas Pfeiffer**, Heidelberg University; co-author of the Heidelberg Report 2007
**Adam Johnson**, Herbert Smith
**Professor Jonathan Harris**, Birmingham University and Brick Court Chambers

Details on prices and booking can be found on the BIICL website.

*If you want to do your homework before the event, you might want to visit (or revisit) our West Tankers symposium, not least because four of the speakers at the BIICL seminar were also involved in our symposium.*

# New publication on Israeli PIL

Private International Law in Israel

by Prof Talia Einhorn

Visiting Professor of Law / Indiana University School of Law

Visiting Senior Research Fellow / Tel-Aviv University Faculty of Management

Kluwer Law International

2009

396 pages

ISBN: 9041128670

ISBN-13: 9789041128676

Israel's PIL is not codified, nor is it clearly traceable to any one legal system. Since the style and method of legal development in Israel has primarily followed the tradition of the common law, the author first critically analyzes the case law to draw the pertinent rules. However, the study does not confine itself to the rules already existing in Israeli PIL, but establishes rules in areas where such are missing, guided by the methods and principles which the court and legislature would have adopted had they been confronted with these problems.

Subjects covered in the book include:
– national and international sources of Israeli PIL;
– types of choice-of-law rules;
– characterization of legal matters;
– natural and legal persons;
– contractual and non-contractual obligations;
– property law (movables, immovables, trusts, cultural property)
– intellectual and industrial property rights;

– companies organized under the civil or commercial law of any state;
– insolvency;
– family law and succession;
– scope of international jurisdiction in Israeli courts;
– proof of foreign law;
– judicial assistance;
– recognition and enforcement of foreign judgements;
– international arbitration; and
– the role of literature and legal doctrine.

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# PIL conference at the University of Johannesburg

Comparative private international law conference; University of Johannesburg; 8-11 September 2009

Key-note speakers:
(1) Prof Dr C F Forsyth (University of Cambridge):
Reconciling classic private international law with fidelity to constitutional values

(2) Prof Dr M Martinek (University of Saarland):
The Rome I and Rome II regulations in European private international law –
a critical analysis

*34 participants from 17 countries:*

Cameroon (1); Canada (1); China (4); Croatia (1); Czech Republic (1); Germany (2); Israel (1); Italy (1); Japan (1); Mauritius (1); the Netherlands (2); Poland (1); Portugal (1); South Africa (7); Spain (4); United Kingdom (4); United States of America (1)

*Sections on:*

Private international law of obligations

Private international family law
Commercial private international law
Procedural private international law
Arbitration and private international law
Miscellaneous topics of private international law

Further information: http://www.uj.ac.za/law. Conference organiser: Prof Jan L Neels (jlneels@uj.ac.za). The provisional programme will be available shortly.

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# Yearbook of Private International Law, vol. X (2008)

*I am grateful to Gian Paolo Romano, Production Editor of the Yearbook of Private International Law, for providing this presentation of the new volume of the YPIL.*

**Volume X (2008) of the Yearbook of Private International Law**, edited by *Prof. Andrea Bonomi* and *Prof. Paul Volken*, and published by Sellier European Law Publishers in association with the Swiss Institute of Comparative Law (ISDC) of Lausanne, was put on the market last week.

Volume X, which celebrates the tenth anniversary of the Yearbook, is made up of 35 contributions on the most various subjects authored by scholars and practioners of almost all continents. Its 743 pages make him one of the most considerable collections of PIL essays in English language of recent years. The volume may be ordered via the publisher's website, where the table of contents and an extract are available for download.

The **Doctrine** section includes three contributions concerning the European judicial area: a first on the revised Lugano Convention on jurisdiction and the recognition and enforcement of judgments of 30 October 2007, a second on the European jurisdiction rules applicable to commercial agents and a third on the recent decision of the European Court of Justice in *Grunkin-Paul*, a seminal case that opens new perspectives for the application of the recognition principle as

opposed to classical conflict rules in the field of international family law. Other original contributions concern damages for breach of choice-of-forum agreements, accidental discrimination in conflict of laws and the recent Spanish regulation of arbitration agreements.

Two **Special sections** of this volume are devoted, respectively, to the EC Regulation on the law applicable to contractual obligations (Rome I) and to the new Hague Convention and Protocol on maintenance obligations.

- In addition to several contributions of general nature, the **special section on Rome I** includes detailed analyses of the impact that the Regulation will have on the connection of specific categories of contracts (contracts relating to intellectual and industrial property rights, distribution and franchise contracts, financial market and insurance contracts), as well as some remarks from a Japanese perspective.
- The **special section on maintenance obligations** includes insider commentaries on the two instruments adopted by the Hague Conference on 23 November 2007: the Convention on the International Recovery of Child Support and other Forms of Family Maintenance and the Protocol, which includes rules on the law applicable to maintenance obligations and aims to replace the 1973 Hague Applicable Law Convention.

The **National Reports** section includes the second part of a detailed study on private international law before African courts, a critical analysis of the new Spanish adoption system and of the conflict of laws issues raised by the Panamanian business company, two articles on arbitration (in Israel and Romania), and several contributions concerning recent developments in Eastern European countries (Macedonia, Estonia, Lithuania and Belarus). Africa is also at the centre of the report on UNCITRAL activities for international trade law reform in that continent.

The section on **Court Decisions** includes – together with commentaries on the *Weiss und Partner* and the *Sundelind López* decisions of the ECJ – detailed analyses of a recent interesting ruling of the French *Cour de cassation* on overriding mandatory provisions and of two Croatian judgments on copyright infringements.

The **Forum Section** is devoted to the recognition of trusts and their use in estate

planning, the juridicity of the *lex mercatoria* and the use of nationality as a connecting factor for the capacity to negotiate.

Here is the full list of the contributions:

**Doctrine**

- *Fausto Pocar*, The New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters;
- *Peter Mankowski*, Commercial Agents under European Jurisdiction Rules. The Brussels I Regulation Plus the Procedural Consequences of *Ingmar*;
- *Koji Takahashi*, Damages for Breach of a Choice-of-court Agreement;
- *Carlos Esplugues Mota*, Arbitration Agreements in International Arbitration. The New Spanish Regulation;
- *Gerhard Dannemann*, Accidental Discrimination in the Conflict of Laws: Applying, Considering, and Adjusting Rules from Different Jurisdiction;
- *Matthias Lehmann*, What's in a Name? *Grunkin-Paul* and Beyond;

**Rome I Regulation – Selected Topics**

- *Andrea Bonomi*, The Rome I Regulation on the Law Applicable to Contractual Obligations – Some General Remarks;
- *Eva Lein*, The New Rome I / Rome II / Brussels I Synergy;
- *Pedro A. De Miguel Asensio*, Applicable Law in the Absence of Choice to Contracts Relating to Intellectual or Industrial Property Right;
- *Marie-Elodie Ancel*, The Rome I Regulation and Distribution Contracts;
- *Laura García Gutiérrez*, Franchise Contracts and the Rome I Regulation on the Law Applicable to International Contracts;
- *Francisco J. Garcímartin Alférez*, New Issues in the Rome I Regulation: The Special Provisions on Financial Market Contracts;
- *Helmut Heiss*, Insurance Contracts in Rome I: Another Recent Failure of the European Legislature;
- *Andrea Bonomi*, Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contracts;
- *Yasuhiro Okuda*, A Short Look at Rome I on Contract Conflicts from a Japanese Perspective;

**New Hague Maintenance Convention and Protocol**

- *William Duncan*, The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance. Comments on its Objectives and Some of its Special Features;
- *Andrea Bonomi*, The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations;
- *Philippe Lortie,* The Development of Medium and Technology Neutral International Treaties in Support of Post-Convention Information Technology Systems – The Example of the 2007 Hague Convention and Protocol;

***National Reports***

- *Richard Frimpong Oppong*, A Decade of Private International Law in African Courts 1997-2007 (Part II);
- *Santiago Álvarez González*, The New International Adoption System in Spain;
- *Daphna Kapeliuk*, International Commercial Arbitration. The Israeli Perspective;
- *Toni Deskoski*, The New Macedonian Private International Law Act of 2007;
- *Karin Sein*, The Development of Private International Law in Estonia;
- *Radu Bogdan Bobei*, Current Status of International Arbitration in Romania;
- *Marijus Krasnickas*, Recognition and Enforcement of Foreign Judicial Decisions in the Republic of Lithuania;
- *Daria Solenik*, Attempting a 'Judicial Restatement' of Private International Law in Belarus;
- *Gilberto Boutin*, The Panamanian Business Company and the Conflict of Laws;

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- *Pietro Franzina*, Translation Requirements under the EC Service Regulation: The *Weiss und Partner* Decision of the ECJ;

- *Marta Requejo Isidro*, Regulation (EC) 2201/03 and its Personal Scope: ECJ, November 29, 2007, Case C-68/07, *Sundelind López*;
- *Paola Piroddi*, The French Plumber, Subcontracting, and the Internal Market;
- *Ivana Kunda*, Two Recent Croatian Decisions on Copyright Infringement: Conflict of Laws and More;

***Forum***

- *Julien Perrin*, The Recognition of Trusts and Their Use in Estate Planning under Continental Laws;
- *Thomas Schultz*, Some Critical Comments on the Juridicity of *Lex Mercatoria*;
- *Benedetta Ubertazzi*, The Inapplicability of the Connecting Factor of Nationality to the Negotiating Capacity in International Commerce.

*(See also our previous posts on the 2006 and 2007 volumes of the YPIL)*

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# Articles on Rome II and Hague Convention on Choice of Court Agreements

The current issue (Vol. 73, No. 1, January 2009) of the Rabels Zeitschrift contains inter alia two interesting articles on the Rome II Regulation and the Hague Convention on Choice of Court Agreements:

***Thomas Kadner Graziano***: "The Law Applicable to Non-Contractual Obligations (Rome II Regulation)" – the English abstract reads as follows:

> *As of 11 January 2009, Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) will be applicable in twenty-six European Union Member States. The Rome II Regulation applies to events giving rise to*

*damage which occur after its entry into force on 19 August 2007 in proceedings commenced after 11 January 2009. This Regulation provides conflict of law rules for tort and delict, unjust enrichment and restitution, negotiorum gestio and culpa in contrahendo. It has a wide scope covering almost all issues raised in cases of extra-contractual liability.*

*The majority of the rules in the Rome II Regulation are inspired by existing rules from European countries. Others are pioneering, innovative new rules. Compared to many of the national systems of private international law of non-contractual obligations, Rome II will bring significant changes and several new solutions. The Rome II Regulation introduces precise, modern and well-targeted rules on the applicable law that are well adapted to the needs of European actors. It provides, in particular, specific rules governing a certain number of specific torts (e.g. product liability, unfair competition and acts restricting free competition, environmental damage, infringement of intellectual property rights, and industrial action). The provisions of the Regulation will considerably increase legal certainty on the European scale, while at the same time giving courts the freedom necessary to deal with new or exceptional situations. This contribution presents the rules designating the applicable law set out in the Rome II Regulation. The raisons d'êtres behind these rules are explored and ways in which to interpret the Regulation's provisions are suggested. Particular attention is given to the interplay between Rome II and the two Hague Conventions relating to non-contractual obligations. Finally, gaps and deficiencies in the Regulation are exposed, in particular gaps relating to the law applicable to violations of privacy and personality rights and traffic accidents and product liability continuing to be governed by the Hague Conventions in a number of countries, and proposals are made for filling them.*

***Rolf Wagner***: "The Hague Convention of 30 June 2005 on Choice of Court Agreements" – the English abstract reads as follows:

*In 1992 the United States of America proposed that the Hague Conference for Private International Law should devise a worldwide Convention on Enforcement of Judgments in Civil and Commercial Matters. The member states of the European Community saw in the US proposal an opportunity to harmonize the bases of jurisdiction and also had in mind the far-reaching bases of jurisdiction in some countries outside of Europe as well as the dual approach*

*of the Brussels Convention which combines recognition and enforcement of judgments with harmonization of bases of jurisdiction (double convention). Despite great efforts, the Hague Conference did not succeed in devising a convention that laid down common rules of jurisdiction in civil and commercial matters. After long negotiations the Conference was only able to agree on the lowest common denominator and accordingly concluded the Convention of 30 June 2005 on Choice of Court Agreements (Choice of Court Convention). This Convention aims to do for choice of court agreements what the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards has done for arbitration agreements.*

*The article provides an overview of the negotiations and explains in detail the content of the Choice of Court Convention. In principle the Convention applies only to exclusive choice of court agreements. However an opt-in provision allows contracting states to extend the rules on recognition and enforcement to non-exclusive choice of court agreements as well. The Convention is based on three principles. According to the first principle the chosen court in a contracting state must hear the case when proceedings are brought before it and may not stay or dismiss the case on the basis of forum non conveniens. Secondly, any court in another contracting state before which proceedings are brought must refuse to hear the case. Thirdly, a judgment given by the chosen court must be recognized and enforced in principle in all contracting states. The European instruments like the Brussels I Regulation and the Lugano Convention will continue to apply in appropriate cases albeit with a somewhat reduced scope. The article further elaborates on the advantages and disadvantages of the Choice of Court Convention and comes to the conclusion that the advantages outweigh the disadvantages. The European Community has exclusive competence to sign and ratify the Convention. The author welcomes the proposal by the European Commission that the EC should sign the Convention. Last but not least the article raises the question what has to be done in Germany to implement the Convention if the EC decides to ratify the Convention.*

# Discovery in Aid of Litigation Post-"Intel": The Continuing Split

Law.com just posted a good article on the follow-on litigation after the Supreme Court's decision in Intel *Corp. v. Advanced Micro Systems, Inc.*, 542 U.S. 241 (2004). That decision, in short, held that 28 U.S.C. 1782–which empowers federal district courts to compel discovery "for use in a proceeding in a foreign or international tribunal"–could be utilized in aid of the EC Directorate-General for competition. That body was a "foreign or international tribunal" in the eyes of the Court. The next logicial question, though, is "what about private arbitral tribunals?" Is that a "foreign or international tribunal" within the meaning of Section 1782?

Despite the broad guidance given by the Court in *Intel*, the lower courts remain split: two district courts in three seperate districts have held that private arbitral tribunals are not included in the statute, while three others have held that they are. The authors of this article provide a good summary of the post-*Intel* case law, up to and including the most recent decision denying discovery in aid of private arbitration by the Southern District of Texas.

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# An Early 2009 Round-Up: Significant Federal Cases Over the Past Two Months

In this round-up of significant U.S. decisions during the first two months of 2009, we'll focus on two areas of law that generate a lot of jurisprudence at the appellate level.

**A. Jurisdiction for Acts Occurring Abroad**

Two federal statutory schemes—the first a response to the events of September 11, the second a 200 year old response to piracy on the high seas—are generating a lot of jurisdictional quandaries of late. The Intelligence Reform and Terrorism Prevention Act of 2004 criminalizes the provision of material support to foreign terrorist organizations, and provides for "extraterritorial Federal jurisdiction" to punish those acts. It also provides a civil remedy for those injured in his "person, property or business" by such criminal acts. In *Federal Ins. Co. v. Kingdom of Saudi Arabia*, 538 F.3d 71 (2d Cir. 2008), pet'n for cert. filed, No. 08-640 (Nov. 12, 2008), the Second Circuit held that the Constitution permits the assertion of personal jurisdiction under these statutes only over foreign actors who "directed" or "commanded" terrorist attacks on U.S. soil, but bars such jurisdiction over persons who merely "fores[aw] that recipients of their donations would attack targets in the United States." According to the court, even those foreign entities who knowingly funded al Quada and Osama bin Laden were "far too attenuated" to fall within the jurisdiction of U.S. courts. This decision fostered a split with decisions in the D.C., Ninth and Seventh Circuits, and (along with other facets of the opinion on scope of the FSIA) is now pending on a Writ of Certiorari before the United States Supreme Court. This week, the Court requested the views of the Solicitor General on whether to grant the Petition. This case could become a very significant decision on the constitutional scope of personal jurisdiction over foreign parties if it is granted.

The Second Circuit returned a few months later in *Abdullahi v. Pfizer, Inc.*, No. 05-4863, 2009 U.S. App. LEXIS 1768 (2d Cir., January 30, 2009), to assert subject matter jurisdiction over a cause of action under the Alien Tort Statute of 1789 for defendant's alleged drug tests on unwitting Nigerian children. The court—in a 2-1 decision—held that the prohibition on non-consensual medical experimentation is a specific and universal norm of "the law of nations," which satisfies the jurisdictional predicate of the ATS. Because defendant acted in concert with the Nigerian government, the court held that the claim could proceed past the pleading stage. The Court also reversed the district court's decision on choice of law—which held that Nigerian law would have applied to these claims—and remanded the case with instructions to the court to more carefully and thoroughly weigh the factors of the "most significant relationship test" which could—the Court suggested—eventually lead to the application of Connecticut law.

**B. Forum Selection Clauses**

In a topic that is of practical import for both litigators and transaction attorneys alike, the federal courts of appeals have been active in the past two months concerning the scope, validity and enforceability of forum selection clauses. Most recently, in *Answers in Genesis of Kentucky, Inc. v. Creation Ministries Int'l, Ltd*., Nos. 08-6014/6032, 2009 U.S. App. LEXIS 2743 (6th Cir., February 13, 2009), the parties disputed the meaning of a contract that contained a "non-exclusive" choice of court clause vesting jurisdiction in the courts of Australia, alongside a provision that allowed either party to request arbitration of their disputes. One party compelled arbitration in the United States, and the other sought to enjoin such arbitration in favor of litigation it previously filed in Australia. The Sixth Circuit held that the choice of court clause did not preclude arbitration, because reading the contract "as a whole . . . unambiguously provides that the courts of [Australia] are only one possible forum" for the claims in this dispute. The court then moved onto thornier issues of international comity abstention and anti-suit injunctions, both of which were "issues of first impression for [the Sixth] Circuit." Surveying the case law on the "complex interaction of federal jurisdictional and comity concerns," as well as the dictates of "international law" expressed in treaties expressing the judicial preference for allowing arbitration, the court held that "abstention is inappropriate in this case." Interestingly, the court seemed to suggest that in any case falling within Article II(3) of the New York Convention, a court in a signatory country has no authority to abstain from compelling arbitration on comity grounds. With the Australian proceedings voluntarily stayed by the parties pending this appeal, the court declined to review the district court's denial of an anti-suit injunction, but left open the possibility that such an injunction could issue if that litigation were to be reopened and thereby threaten the "important public policy" of the Convention and the United States.

Finally, an interesting recent decision by the Ninth Circuit illustrates the differential treatment a forum selection clause will get in U.S. courts, depending upon what substantive federal statute governs the cause of action. *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd*., No. 06-56831, 2009 U.S. Dist. LEXIS 2111 (9th Cir., February 4, 2009) was, as the Ninth Circuit put it, a "maritime case about a train wreck." There, the parties contracted for the carriage of goods from China to the United States by sea, and then inland by rail to various points in the American Midwest through a single bill of lading. The train derailed in Oklahoma, the American buyer sued in California, but the contract contained a choice of forum clause in favor of Tokyo. The Japanese Defendants moved to dismiss the

action on the basis of that clause. If the federal Carriage of Goods by Sea Act (COGSA) were to apply to the entire journey, the choice of forum clause would be liberally respected, and the defendants' motion to dismiss likely granted. If the federal Carmack Amendment—which generally covers inland rail transportation—were to apply to the inland portion of the trip, the deference to choice of courts is much more narrow. In the end, the Ninth Circuit held that the Carmack Amendment applied to the claims, and remanded the case to determine whether that statute's narrow allowance of a foreign forum selection clauses were satisfied. How it got to that conclusion, however, is much more interesting.

For starters, the Defendants argued that the Carmack Amendment was categorically inapplicable to them. They are ocean carriers, who only contracted for follow-on rail line transportation at the end of their journey, and the Carmack Amendment literally applies only to persons or companies "providing common carrier railroad transportation for compensation." The Second Circuit, the Florida Supreme Court, and at least one other federal district court, have held that the Carmack Amendment did not apply to ocean carriers who did not perform rail transportation services. The Ninth Circuit disagreed with these decisions, and held that ocean carriers could fall within the Amendment's provisions.

The Defendants next argued that, even though an ocean carrier may fall within the Carmack Amendment, when that carrier provides only one bill of lading covering the entire trip (over-sea and over-land), and thereby elects to contractually extend COGSA to the inland portion of the trip, the Carmack Amendment does not apply. No less than four circuits (the Seventh, Sixth, Fourth and Eleventh) support this view. "Despite this weight of authority," the Ninth Circuit held, "our own precedent expressly forecloses" this argument. The Ninth Circuit, like the Second Circuit, has long held the view that "the language of Carmack encompasses the inland leg of an overseas shipment conducted under a single 'through' bill of lading."

The discord in this area is especially troubling in light of recent Supreme Court jurisprudence. The Court has held—and the Ninth Circuit even acknowledged—that contractual autonomy, efficiency and uniformity of maritime liability rules weigh in favor of extending COGSA inland when a single bill of lading takes goods from overseas to inland destinations. Indeed, "confusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning," and the Supreme Court has suggested that where this is the

case, “the apparent purpose of COGSA” is defeated. *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 29 (2004). Still, in the Ninth Circuit, “the policy of uniformity in maritime shipping, however compelling, must give way to controlling statutes and precedent.”

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# Layton on West Tankers

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Much of what I would have said on this judgment has already been said, more cogently, by others. My comments will therefore be brief.

First, it seems that the ECJ may well have applied one law correctly, namely the law of unintended consequences. In its use of simple – or at least sparse – reasoning to resolve a complex problem is reminiscent of what Alex Tabarrock has written in a different context:

> *The law of unintended consequences is what happens when a simple system tries to regulate a complex system. The political system is simple. It operates with limited information (rational ignorance), short time horizons, low feedback, and poor and misaligned incentives. Society in contrast is a complex, evolving, high-feedback, incentive-driven system. When a simple system tries to regulate a complex system you often get unintended consequences.*

The unintended consequences here are, surely, the disruption which may flow to the exercise of arbitrators’ powers. As Andrew Dickinson and Jonathan Harris have already pointed out, the extent to which these are affected by this decision is unclear.

The Court has held that court proceedings based on the arbitration agreement are outside the scope of the Regulation (paragraph 23) and so its decision that such

proceedings contravene European law is based not on an application of the Regulation, but on that part of the *acquis communautaire* which is based on the doctrine of *effet utile.* (It is striking how thinly reasoned this part of the judgment – paragraph 24 – is; there is no reference to any earlier decision on the point at all). While we may agree that Regulation 44/2001 does not affect the jurisdiction of arbitrators, can the same be said of wider European law? Very possibly not. If you take this decision alongside the *Eco-Swiss* decision, you are left in great doubt whether it is contrary to EU law for arbitrators even to rule on the validity of an arbitration agreement, let alone award damages for its breach. The use of lax language by the Court in paragraph 27 ("it is … exclusively for [the court seised of the underlying dispute] to rule on that objection" – i.e., an objection as to the existence of an arbitration agreement) is particularly regrettable.

An extra layer of confusion arises in respect of arbitrators' powers to award anti-suit injunctions. The basis on which this specific procedural device was outlawed in *Turner*, and which forms a subsidiary basis for outlawing the anti-suit injunction in this case (paragraph 30) is that it is contrary to the doctrine of mutual trust. But, as *Gasser* (paragraph 72, where the doctrine was first identified in the Court's jurisprudence) makes clear, that doctrine is specifically based on the structure and principles underlying the Brussels I Regulation, namely the existence of uniform jurisdictional rules for *courts* and the largely automatic recognition and enforcement which is the corollary of those rules. The uniformity of jurisdictional rules does not apply to arbitrators and such rules for the recognition and enforcement of awards as there may be arise not under European law at all, but under the New York Convention and under the varying domestic laws of Member States. How then can the doctrine of mutual trust apply to preclude arbitrators from granting anti-suit injunctions?

The second and much briefer comment I wish to make is to echo the sense of disappointment that the European Court has again failed to rise to the occasion in grappling with complex issues of private law and procedure. In a Community of 27 Member States, the Court cannot perhaps be expected to provide reasoning which shows sensitivity to the complexities which arise from the panoply of national legal systems and international norms; but it can surely be expected to grapple with the issues which arise from its own previous case law. I have already referred to *Eco-Swiss* as an example. In the present case, it is surprising that the Court founds its decision on the scope of Article 1(2)(d) on paragraph 35 of the

Kerameus and Evrigenis Report, without acknowledging that that paragraph has been the subject of scrutiny and strong adverse comment by Advocate General Darmon in his Opinion in *Marc Rich* (paragraphs 43 to 48).

Thirdly, a comment directed to the future. There appears to be a welcome consensus emerging, encompassing commentators from at least Germany, France and the United Kingdom, that legislative change is needed to grapple with the unsatisfactory state of the law in this context. The suggestion in the Heidelberg Report, to which Professor Hess refers, that Brussels I be amended so as to bring proceedings ancillary to arbitration within it, and to confer exclusive jurisdiction on the courts of the state of the arbitration deserves support (as do similar proposals relating to choice of forum clauses).