The ECJ on the binding use of standard forms under the Service Regulation

In a judgment of 16 September 2015, in the case of *Alpha Bank Cyprus Ltd* v. *Dau Si Senh* and others (Case C?519/13), the ECJ clarified the interpretation of Regulation No 1393/2007 on the service of judicial and extrajudicial documents in civil or commercial matters (the Service Regulation).

The judgment originated from a request for a preliminary ruling submitted by the Supreme Court of Cyprus in the framework of proceedings initiated by a Cypriot bank against, *inter alia*, individuals permanently resident in the UK.

The latter claimed that the documents instituting the proceedings had not been duly served. They complained, in particular, that some of the documents they had received (namely the order authorising service abroad) were not accompanied by a translation into English and that the standard form referred to in Article 8(1) of Regulation No 1393/2007 was never served on them.

Pursuant to Article 8 of the Service Regulation, the "receiving agency", *ie* the agency competent for the receipt of judicial or extrajudicial documents from another Member State under the Regulation, must inform the addressee, "using the standard form set out in Annex II", that he has the right to refuse to accept a document if this "is not written in, or accompanied by a translation into, either of the following languages: (a) a language which the addressee understands; or (b) the official language of the Member State addressed".

In its judgment, the ECJ held that the receiving agency "is required, in all circumstances and without it having a margin of discretion in that regard, to inform the addressee of a document of his right to refuse to accept that document", and that this requirements must be fulfilled "by using systematically … the standard form set out in Annex II". The Court also held, however, that, where the receiving agency fails to enclose the standard form in question, this "does not constitute a ground for the procedure to be declared invalid, but an omission which must be rectified in accordance with the provisions set out in that regulation".

The ECJ based this conclusion on the following remarks.

Regarding the binding nature of the standard form, the Court noticed that the wording of Article 8 of the Regulation is not decisive, and that the objectives of the Regulation and the context of Article 8 should rather be considered.

As regards the objectives of the Regulation, the Court stated that the uniform EU rules on the service of documents aim to improve the efficiency and speed of judicial procedures, but stressed that those objectives cannot be attained by undermining in any way the rights of the defence of the addressees, which derive from the right to a fair hearing, enshrined in Article 47 of the Charter of Fundamental Rights of the EU and Article 6(1) of the ECHR.

The Court added, in this regard, that "it is important not only to ensure that the addressee of a document actually receives the document in question, but also that he is able to know and understand effectively and completely the meaning and scope of the action brought against him abroad, so as to be able effectively to assert his rights in the Member State of transmission". It is thus necessary to strike a balance between the interests of the applicant and those of the defendant by reconciling the objectives of efficiency and speed of the service of the procedural documents with the need to ensure that the rights of the defence of the addressee of those documents are adequately protected.

As concerns the system established by the Service Regulation, the ECJ began by noting that the service of documents is, in principle, to be effected between the "transmitting agencies" and the "receiving agencies" designated by the Member States, and that, in accordance with Article 5(1) of the Regulation, it is for the transmitting agency to inform the applicant that the addressee may refuse to accept it if it is not in one of the languages provided for in Article 8, whereas it is for the applicant to decide whether the document at issue must be translated.

For its part, the receiving agency is required to effectively serve the document on the addressee, as provided for by Article 7 of Regulation No 1393/2007. In that context, the receiving agency must, among other things, inform the addressee that it may refuse to accept the document if it is not translated into one of the languages referred to in Article 8(1).

By contrast, the said agencies "are not required to rule on questions of substance, such as those concerning which language(s) the addressee of the document

understands and whether the document must be accompanied by a translation into one of the languages" specified in Article 8(1). Any other interpretation, the ECJ added, "would raise legal problems likely to create legal disputes which would delay or make more difficult the procedure for transmitting documents from one Member State to another".

In the main proceedings, the UK receiving agency considered that the order authorising service of the document abroad should not be translated and deduced from that that it was not required to enclose with the document at issue the relevant standard form.

In reality, according to the ECJ, the Service Regulation "does not confer on the receiving agency any competence to assess whether the conditions, set out in Article 8(1), according to which the addressee of a document may refuse to accept it, are satisfied". Actually, "it is exclusively for the national court before which proceedings are brought in the Member State of origin to rule on questions of that nature, since they oppose the applicant and the defendant".

The latter court "will be required, in each individual case, to ensure that the respective rights of the parties concerned are upheld in a balanced manner, by weighing the objective of efficiency and of rapidity of the service in the interest of the applicant against that of the effective protection of the rights of the defence on the part of the addressee".

Specifically, as regards the use of the standard forms, the ECJ observed, based on the Preamble of the Regulation, that the forms "contribute to simplifying and making more transparent the transmission of documents, thereby guaranteeing both the legibility thereof and the security of their transmission", and are regarded by the Regulation as "instruments by means of which addressees are informed of their ability to refuse to accept the document to be served".

The wording of the Regulation and of the forms themselves makes clear that the ability to refuse to accept a document in accordance with Article 8(1) is "a 'right' of the addressee of that document". In order for that right to usefully produce its effects, the addressee of the document must be informed in writing thereof.

As a matter of fact, Article 8(1) of the Regulation contains two distinct statements. On the one hand, the substantive right of the addressee of the document to refuse to accept it, on the sole ground that it is not drafted in or

accompanied by a translation in a language he is expected to understand. On the other hand, the formal information about the existence of that right brought to his knowledge by the receiving agency. In other words, in the Court's view, "the condition relating to the languages used for the document relates not to the information given to the addressee by the receiving agency, but exclusively to the right to refuse reserved to that addressee".

The ECJ went on to stress that the refusal of service is conditional, in so far as the addressee of the document may validly make use of the right only where the document at issue is not drafted in or accompanied by a translation either in a language he understands or in the official language of the receiving Member State. It is ultimately for the court seised to decide whether that condition is satisfied, by checking whether the refusal by the addressee of the document was justified. The fact remains, however, that the exercise of that right to refuse "presupposes that the addressee of the document has been duly informed, in advance and in writing, of the existence of his right".

This explains why the receiving agency, where it serves or has served a document on its addressee, "is required, in all circumstances, to enclose with the document at issue the standard form set out in Annex II to Regulation No 1393/2007 informing that addressee of his right to refuse to accept that document". This obligation, the Court stressed, should not create particular difficulties for the receiving agency, since "it suffices that that agency enclose with the document to be served the preprinted text as provided for by that regulation in each of the official languages of the European Union".

Moving on to the consequences of a failure to provide information using the standard form, the ECJ noted, at the outset, that it is not apparent from any provision of that regulation that such a failure leads to the invalidity of the procedure for service.

Rather, the Court reminded that, in *Leffler* — a case relating to the interpretation of Regulation No 1348/2000, the predecessor of Regulation No 1393/2007 — it held that the non-observance of the linguistic requirements of service does not imply that the procedure must necessarily be declared invalid, but rather involves the necessity to allow the sender to remedy the lack of the required document by sending the requested translation. The principle is now laid down in Article 8(3) of Regulation No 1393/2007.

According to the ECJ, a similar solution must be followed where the receiving agency has failed to transmit the standard form set out in Annex II to that regulation to the addressee of a document.

In practice, it is for the receiving agency to inform "without delay" the addressees of the document of their right to refuse to accept that document, by sending them, in accordance with Article 8(1), the relevant standard form. In the event that, as a result of that information, the addressees concerned make use of their right to refuse to accept the document at issue, it is for the national court in the Member State of origin to decide whether such a refusal is justified in the light of all the circumstances of the case.

Latest Issue of RabelsZ: Vol. 79 No 2 (2015)

The latest issue of "Rabels Zeitschrift für ausländisches und internationales Privatrecht – The Rabel Journal of Comparative and International Private Law" (RabelsZ) has recently been released. It contains the following articles:

Jürgen Basedow: *Das Zeitelement in der richterlichen Rechtsfortbildung – Einleitung zum Symposium* (The Time Dimension in Judicial Law-Making – Introduction to the Symposium)

> *Wherever the law changes it must be determined which fact situations and disputes are still governed by the old law and which are covered by the new. Legislation often deals with this question in transitional provisions of a new statute which may be very detailed. Where the change in the law is due to new orientations of judicial practice, the answer must be given by the courts. National traditions and the procedural framework may have an impact on the respective answers. The overall question splits into several sub-questions: Will a court confine the effect of its new case law to future cases, excepting the pending case from its judgment? Has the new orientation of the court a retroactive effect on analogous cases? To what extent will courts explain the*

change in jurisprudence by reference to statutes which have been adopted but not yet taken effect? This and the following papers dealing with these questions were presented and discussed at a comparative law conference held at the Institute on 14 June 2014.

Hannes Rösler, *Die Rechtsprechungsänderung im US-amerikanischen Privatrecht – Aufgezeigt anhand des prospective overruling* (Case Law Changes in U.S. Private Law – Prospective Overruling)

The article deals with the practice of prospective overruling, an innovative method of U.S. law whereby a judgment does not have retrospective effect, but – like statutory law – only applies to future events. This doctrine was declared constitutionally unobjectionable in the Sunburst Oil decision of the U.S. Supreme Court in 1923, which explains why state courts continued with the practice of prospective overruling. On the federal level, prospective overruling was used for the first time in the 1954 Brown v. Board of Education case ending school desegregation. The next step was the U.S. Supreme Court's test developed in Chevron Oil in 1971. According to the test, courts have to consider three factors: First, whether the decision to be applied non-retroactively establishes a genuinely new rule, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed; second, whether retrospective application would further or retard the operation of that rule; and third, whether retroactivity could produce substantially inequitable results. Many state courts still apply the Chevron Oil test regarding their own state laws. However, the U.S. Supreme Court abandoned the Chevron Oil test in Harper in 1987. The ambiguities and uncertainties that exist with prospective overruling can be explained by the not entirely clear Leitbild of the judge, who when deciding in favour of a solely future application of law acts like a legislator. The article evaluates these developments in the context of the jurisprudential views on the role of a judge in the U.S. legal system and compares them with German law.

Helge Dedek, *Rumblings from Olympus: Das Zeitelement in der (Fort-)Bildung des englischen common law*
(Rumblings from Olympus: Adjudication and Time in the English Common Law)

In this article, I endeavour to render an account of various temporal aspects of judicial decision making: the judicial anticipation of future statutory reform, the retrospective effects of judicial decisions, and the possibility of rulings that have exclusively prospective effects (so-called "prospective overruling"). All three aspects are interconnected through their respective links to the same theoretical and constitutional themes – most importantly, the problem of reconciling the function of adjudication first with the constitutional principle of parliamentary sovereignty in a common law system, and second with the theoretical explanation of the decision-making process as the creation of law within the boundaries of precedent and legal principle. Since the days of Bentham's polemics, the specifically temporal implications of these classic problems of common law theory have been discussed. However, unlike some Continental jurisdictions, as Lord Rodger of Earlsferry pointed out, England and Wales never developed a comprehensive discourse on matters concerning the relationship between law and time; instead, temporal aspects have, in a more pointillist and haphazard fashion, been treated in the context of the various discussions surrounding the abovementioned fundamental problems. Different aspects have received different degrees of attention: whereas the anticipation of statutes through judge-made law has been discussed only rarely, a much larger number of judicial and scholarly comments exist with regard to the questions of adjudicatory retrospectivity and the possibility of prospective overruling. While traditionally the retrospective effects of judgements have been accepted and explained as being inherent in the nature of the adjudicative process, only recently, in 2005, did the House of Lords make clear that it lays claim to the constitutional power to issue non-retrospective rulings, and that neither the nature of judicial decision making nor the principle of parliamentary sovereignty would stand in the way of thus employing the technique of prospective overruling.

Felix Maultzsch, *Das Zeitelement in der richterlichen Fortbildung des deutschen Rechts* (The Time Dimension in Judicial Law-Making in Germany)

The anticipated application of legal norms which are not yet in force and the retroactive effect of changes in case law receive increasing attention in recent German legal discourse. Both phenomena pose the question of whether a solution that is considered to be normatively appropriate for the future can be

applied to past facts already. This concern has to be balanced with aspects of legal certainty and the protection of legitimate expectations. Furthermore, the rule of law principle may militate against the anticipated application of legal norms and, reciprocally, in favor of a retroactive effect of changes in case law. Against this background, anticipated application and retroactive effect seem to be defensible, if the respective legal norm or the new line of case law do not, by themselves, change the pertinent normative assessment, but merely trace a factual or normative change that has already taken place in society. In addition, both the problem of anticipated application and of retroactive effect may be approached by identical doctrinal means. A so called substantive law approach (sachrechtliche Lösung) addresses the anticipated application and the protection against retroactive effect within the framework of substantive private law. This approach accords well with the role of the judiciary in the German legal system and is therefore applied rather frequently. In contrast, the so called conflict of laws approach (intertemporalrechtliche Lösung) comprises a self-contained anticipated application of legal norms which are not yet in force or a self-contained protection against retroactive effects of changes in case law. This approach is at odds with the orthodox view of the judiciary in Germany and, therefore, is practiced only cautiously.

Notwithstanding these common principles, the current doctrine of retroactive effect of changes in case law does not seem to be fully convincing. It rests on the assumption that a retroactive effect is typically necessary because the courts do merely articulate the best picture of the law based on arguments and principles. However, private law is deployed to an increasing extent to shape society and the courts assume an active part in this transformative process. In that course, the idea of a mere improved legal judgment is threatened to become a fiction. Therefore, the German Federal Supreme Court should be more attentive to the risks that are inherent to far-reaching changes in case law. This could be achieved, primarily, by a strengthened judicial self-restraint, especially with regard to changes in case law. If this solution is discarded as unrealistic, one should, alternatively, consider a better protection against retroactive effects which could be achieved, inter alia, by the means of prospective overruling.

Susan Emmenegger, *Das Zeitelement in der richterlichen Fortbildung des schweizerischen Rechts* (The Time Dimension in Judicial Law-Making in

Switzerland)

"Law must be stable and yet it cannot stand still."106 In both the common law and the civil law systems courts are faced with the challenge to reconcile the principle of legal certainty, including the reasonable reliance on the existing state of the law, and the principle of legal rightness which requires a correct application of the law in an ever changing world. This article explores two areas of judicial decision-making in which this challenge arises:
(1) The role of new statutes which have not entered into force at the time of the judicial decision, and (2) the effect of a decision to overrule a precedent on pending cases.

The first question regards judicial rulings in cases where a new (statutory) law is in the making but has not yet been formally enacted. Should the judges take these developments into account and if so, under what conditions? The answer of the Swiss Supreme Court and the Swiss scholarly writing is that future law is to be considered in the judicial interpretation and gap-filling if the future law does not contain a fundamental change but rather stays in line with the legislative perspective of the existing law. It is also unanimously held that the principle of legality bars the courts from a direct and formal application of the future law before its formal entry into force.

There is less unanimity between the Swiss Supreme Court and the Swiss doctrine with regard to the second question, namely, the effects of an overruling of judicial precedents. When the Supreme Court overturns a precedent, it will generally apply its new reasoning to the case at hand, thus accepting the retroactive nature of its ruling. The balancing of the principle of legal certainty against the principle of legal rightness is a process which precedes the court's decision regarding the alteration of its current case law. If the principle of legal certainty is considered to be of prevailing weight, the Supreme Court will abstain from an overruling. Instead, it will announce its doubts with regard to the existing case law, thereby proceeding to a sort of informal prospective overruling. A considerable part of the Swiss scholarly writing is critical of the Supreme Court's stance. It proposes a set of intertemporal rules which turn on the reliance of the parties in the stability of the existing case law. Whenever a court reaches a "better understanding" of the law, it should proceed to an overruling. However, the retroactive effect would be mitigated if the reasonable reliance of the parties warrants protection

– which is almost always true for the party in the pending case. As a result, the intertemporal rules lead to a formal prospective overruling, at least concerning the party which is taking part in the proceeding.

Both the judicial and the scholarly model require the balancing of contradictory interests, and in both cases this balancing allows the court to take the intertemporal dimension of judicial decision-making into account. Therefore, the principal challenge is not so much to determine which model should be applied, but rather to ensure that the two interests in question are balanced in an adequate manner. Having said this, one should keep in mind that – just as in the case of a judicial overruling – the model of judicial intertemporal rules proposed by the doctrine would have to be substantially more adequate than the model favoured by the Swiss Supreme Court to address the issue of contradictory interests arising in connection with a judicial overruling.

Bertrand Fages, *Das Zeitelement in der richterlichen Fortbildung des französischen Rechts*
(The Time Dimension in Judicial Law-Making in France)

Under French law, the principle of legal certainty operates both against the anticipated application of legal norms and in favor of the retroactive effect of changes in case law. Although exceptions to these two positions are occurring more frequently, they still remain largely unpredictable.

Imen Gallala-Arndt, *Die Einwirkung der Europäischen Konvention für Menschenrechte auf das Internationale Privatrecht am Beispiel der Rezeption der Kafala in Europa – Besprechung der EGMR-Entscheidung Nr. 43631/09 vom 4.10.2012, Harroudj ./. Frankreich* (The Impact of the European Convention on Human Rights on Private International Law as Illustrated by the Reception of Kafala in Europe – Reflections on ECHR, Harroudj v. France (No. 43631/09, 4 October 2012))

On 4 October 2012, the European Court of Human Rights (ECHR) rendered a decision dealing with Kafala. This Islamic law-based institution is an undertaking of an adult person to support and educate a minor without creating a formal parent-child relationship. Since adoption, as understood in western legal systems, is prohibited in most Muslim jurisdictions, Kafala is employed as

a substitute. The Court considered the French conflicts-of-law rule (Art. 370-3 para. 2 of the Civil Code) prohibiting adoption of foreign children whose national laws prohibit the institution as compatible with Article 8 of the European Convention on Human Rights.

This essay considers the decision of the Court as a positive contribution to the issue of the impact of Human Rights on private international law. After recalling briefly the general terms of the relationship between human rights and private international law, the essay examines the status of Kafala outside and inside the European context. It also deals with the reception of Kafala in France.

The Court considered that a relationship founded on the Kafala may be protected under Article 8 of the Convention if requirements of continuity and stability are met. Nevertheless it recalled that Article 8 contains no right to adoption. This position of the Court is in line with its case-law on similar issues: given relationships should be protected as part of the respect of family life. The court however did not recognize any right of the applicant to convert the relationship in question into a determined legal relationship such as a parent-child-relationship. Two arguments were decisive for the decision of the court: lack of consensus among state-parties concerning the reception or the status of Kafala and recognition of Kafala by the relevant international instruments as a suitable alternative to adoption. As far as the first point is concerned the essay contends that the Court was mistaken in its appraisal of other state-parties regulations on Kafala as only France specifically prohibits the conversion of Kafala to adoption.

La Ley-Unión Europea, April 2015

The latest issue of the Spanish issue *La Ley-Unión Europea* (April 2015), was released last week. Besides the usual sections dealing with case law and current developments within the EU you'll find therein the following contributions – in Spanish, abstract in English:

S. Sánchez Lorenzo, “El nuevo sistema de reconocimiento y ejecución de resoluciones en el Reglamento (UE) 1215/2012 («Bruselas I bis»)”. **Abstract:** The Regulation (EU) 1215/2000 introduces significant modifications related to recognition and enforcement of foreign judgments in Spain. The most important ones deal with automatic recognition of enforceability, whose application often requires specific adaptations in domestic civil procedural law.

J. González Vega, “La «teoría del big bang» o la creciente distancia entre Luxemburgo y Estrasburgo. Comentarios al Dictamen 2/13, del Tribunal de Justicia, de 18 de diciembre de 2014 sobre la adhesión de la Unión Europea al Convenio Europeo de Derechos Humanos” **Abstract:** In its Opinion 2/13 the European Union’s Court of Justice has declared the draft accession agreement of the European Union to the European Convention on Human Rights contrary to the provisions of the Treaties and to Protocol no. 8 of the Treaty of Lisbon. The decision of the Court consistently puts into question the essential points of agreement: Firstly, it points out the specificity of the Union —as a distinctive subject— and it unambiguously states the need to preserve the autonomy of its law and the exclusive jurisdiction of the Court, threatened by the project. In its analysis, mainly laconic and formalistic, sometimes alarmist, it questions the very notion of external control and its jurisdictional monopoly threatened by the «emerging» preliminary ruling to the ECHR, conceived by the Protocol No. 16. Moreover, it rejects the regulation of the status of co-respondent and prior involvement procedure and questions strongly the jurisdictional immunity of CFSP acts. Furthermore, its decision, albeit expected, leaves open the question on the ways to address the negative of the Court, given the imperative proviso on the accession to the ECHR established in the art. 6.2 TEU. Also, inasmuch as it can generate conflicting dynamics with other actors involved in the process of protection of fundamental rights -not only the ECHR but apex national jurisdictions-, the Opinion could have a deep impact in European multilevel system of human rights protection.

J. García López, “La Asociación Transatlántica para el Comercio y la Inversión: VIII Ronda de negociaciones”**. Abstract:** The eighth round of negotiations on the Transatlantic Trade and Investment Partnership between the EU and the US was held in Brussels last February, concluding with advances in Regulatory Cooperation and discrepancies in Financial Services.

L.M. Jara Rolle, “Contratos tipo de servicios jurídicos concluidos por un abogado

con una persona física que actúa con un propósito ajeno a su actividad professional". **Abstract**: Unfair terms in consumer contracts extend to standard form contracts for legal services, as contracts concluded by a lawyer with a natural person acting for purposes which are outside his trade, business or profession.

R. Lafuente Sánchez, "Competencia internacional y protección del inversor en acciones por responsabilidad contractual y delictual frente al banco emisor de títulos (a propósito del asunto *Kolassa*)". **Abstract:** This paper aims at analysing the scope of application of the Brussels I Regulation in private law relationships that stem from cross-border marketing of investment services in the European Union. In the light with the recent ECJ case law, the possible attribution of international jurisdiction to the courts of the investor's domicile is examined; either under the applicable forum over consumer contracts, the forum of special jurisdiction in matters relating to a contract, or in matters relating to tort, delict or quasi-delict.

M. Otero Crespo, "Las obligaciones precontractuales de información, explicación adecuada y de comprobación de solvencia en el ámbito de los contratos de préstamo al consumo. Comentario a la STJUE, Sala Cuarta, de 18 de diciembre de 2014, asunto C- 449/13, CA Consumer Finance sa v I. Bakkaus/ Sres. Bonato). **Abstract:** On 18 December 2014, the Court of Justice of the EU delivered its judgment in the case of CA Consumer Finance v I. Bakkaus and Bonato, concerning the pre- contractual obligations of credit providers. according to this decision, creditors must prove that they have fulfilled their pre-contractual obligations to provide information and explanations – so that the borrower can make an informed choice when subscribing a loan- and to check the creditworthiness of borrowers. Further, the Court highlights that the credit provider cannot shift the burden of proof to the consumer through a standard term.

Fourth Issue of 2014's Rivista di diritto internazionale privato e processuale

(I am grateful to Prof. Francesca Villata – University of Milan – for the following presentation of the latest issue of the RDIPP)

The fourth issue of 2014 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features two articles and five comments.

Francesco Salerno, Professor at the University of Ferrara, examines fundamental rights in a private international law – and namely a public policy – perspective in "**I diritti fondamentali della persona straniera nel diritto internazionale privato: una proposta metodologica"** (Fundamental Rights of the Foreigner in Private International Law: A Methodological Proposition; in Italian).

Namely focusing on the role of public policy, this paper examines how personality rights of foreign individuals are ensured under the Italian private international law system. While personality rights are meant to reflect the identity of an individual at a universal level, private international law is aimed at ensuring the continuity of an individual's rights and status across borders. Art. 24 of the Italian Statute on Private International Law (Law No 218/1995) underlies this concern in that it provides, as regards personality rights, for the application of the law of nationality of the individual in question. However, as a result of the fact that personality rights are closely intertwined with human rights, it becomes inevitable to explore the link between the somehow neutral technique traditionally employed by conflict-of-law provisions and the fundamental values shared within the international community, in particular those values safeguarded by international obligations regarding the protection of human rights. As this paper portrays, the tension between personality rights under an individual's national law and fundamental rights is crucial to Art. 24 of the Italian Statute, as shown, in particular, by the process with which rights are characterized as falling within the scope of the provision: where a given right is perceived as fundamental by the *lex fori*, that right should enjoy protection in the forum regardless of its

status according to the law of nationality of the concerned individual (proceedings on sex reassignment provide some significant examples in this respect). This approach embodies a "positive" expression of the notion of public policy: cross-border uniformity is foregone, here, as a means to ensure the primacy of the fundamental policies of the forum. However, as the paper illustrates, the role of public policy in ensuring fundamental rights goes even further: in fact, public policy may also serve as a guide whenever the need arises to adapt the applicable foreign law, should such law fail to provide solutions that are equivalent to those enshrined in the *lex fori*.

Fabrizio Vismara, Associate Professor at the University of Insubria, discusses agreements as to successions and family pacts in **"Patti successori nel regolamento (UE) n. 650/2012 e patti di famiglia: un'interferenza possibile?"** (Agreements as to Succession in Regulation (EU) No 650/2012 and Family Pacts: A Possible Interference?; in Italian).

Law No 55 of 14 February 2006 enacted the regime on family pacts and amended Art 458 of the Italian Civil Code repealing the prohibition against agreements as to succession. This article analyzes the relationship between family agreements and agreements as to succession with reference to the regime enacted by Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. After examining the different solutions with respect to the characterization of family agreements (donation, division, contract), this article highlights how family agreements may be referred to the application of Regulation (EU) No 650/2012 as a form of waiver agreement as to succession. In this respect, family agreements may be governed by Regulation (EU) No 650/2012 and, in particular, by the rules on the determination of the applicable law provided therein.

In addition to the foregoing, the following comments are also featured:

Michele Nino, Researcher at the University of Salerno, examines State interests in labor disputes in "**State Immunity from Civil Jurisdiction in Labor Disputes: Evolution in International and National Law and Practice"** (in English).

This article examines the evolution of the international rule on State immunity from civil jurisdiction in labor disputes. After having shed light on the notion and content of the international rule at issue, this article examines the relevant international legal instruments (such as the 1972 European Convention on State Immunity and the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property), the national practice of civil law and common law States, as well as the case law of the European Court of Human Rights and of the European Court of Justice. In light of this analysis, this papers illustrates that, although an important trend aimed at promoting in labor disputes stable criteria of jurisdiction of the State of the forum (such as the nationality or the residence of the worker and the place of the execution of the employment relationship), the criterion based on the distinction between *acta jure imperii* and *acta jure gestionis* continues to be applied rather permanently in such disputes. As a result, in the conclusions, solutions are put forth so that the application of such criterion be subject to revision, at national and international levels, and that, as a consequence, an effective protection of workers be guaranteed in labor disputes against the need to safeguard State interests.

Giulia Vallar, Fellow at the University of Milan, addresses the topic of intra-EU investment arbitration in "**L'arbitrabilità delle controversie tra un investitore di uno Stato membro ed un altro Stato membro. Alcune considerazioni a margine del caso *Eureko/Achmea v. The Slovak Republic*"** (Arbitrability of Disputes between an Investor from a Member State and another Member State. Some Remarks on *Eureko/Achmea v. The Slovak Republic*; in Italian).

The present paper deals with one of the issues that has recently been considered within the *Eureko/Achmea v. The Slovak Republic* case, namely the arbitrability of the so called intra-EU BITs disputes. In essence, it focuses on whether the investor of an EU member state can rely on the compromissory clause contained in a BIT that its country of origin had signed with another country that, in turn, at a later time, became an EU member State. To such a question arbitral tribunals have answered in the positive, while the EU in the negative, without however adopting a normative act in this sense. Throughout the paper, an analysis is conducted of those aspects of international law and of EU law that come into play in relation to the matter at hand. It is submitted that, in the absence of a definite/hard law solution, the way out should consist, for the time being, in applying soft law principles and, in particular, that of comity; nevertheless, the

EUCJ and the arbitral tribunals do not appear to be very much keen to act in this sense. EU member states, on their part, are more and more frequently opting for the termination of the relevant BITs, allegedly on the basis of a law and economics analysis. This attitude, however, might produce negative effects on the economy of these states, since investors, seeking the protection of a BIT, could be encouraged to move their seats in third countries.

Giovanna Adinolfi, Associate Professor at the University of Milan, tackles the issue of financial instruments and State immunity from adjudication in **"Sovereign Wealth Funds and State Immunity: Overcoming the Contradiction"** (in English).

The increasing number of sovereign wealth funds (SWFs) and the growth in the value of their assets are among the main current trends in the global financial markets. The governments of recipient States have voiced their concerns, contending that SWFs are financial vehicles used by States to pursue general public aims but acting like private economic agents. The question this contribution tackles is whether SWFs, as "sovereign" investment vehicles, come within the scope of international and national rules on sovereign immunity. This topic will be analyzed from three perspectives. As a starting point, the definition of "foreign State" given by immunity legal regimes will be investigated in order to define in which circumstances SWFs meet it. Next, the issue of SWSs' immunity from adjudication will be ascertained. In this regard, the main point is whether SWFs investments are to be understood as actions engaged in within the exercise of sovereign authority, or as mere commercial activities, over which immunity from judgment on the merits is removed. As it may not be excluded that courts render judgments against SWFs, the rules on immunity from pre-judgement and post-judgement measures of constraint are to be considered, so as to identify the property against which jurisdictional rulings may be enforced for the full satisfaction of the legitimate expectations of judgment creditors. The enquiry mainly focuses on the rules established under the UN and the Council of Europe conventions; the content and practice under national regimes is also considered, mainly the US Foreign Sovereign Immunities Act and the UK State Immunity Act. The main result is that there is no univocal answer to the question whether rules on sovereign immunity are helpful in overcoming the contradiction between the different but complementary public and private natures of SWFs. The form through which funds have been established and the content of the specific legal

regime on the basis of which courts have to judge in their regard are the fundamental variables, and their combination in each case may lead to different results in terms of immunity from both the adjudicative process and enforcement measures.

Laura Carpaneto, Researcher at the University of Genoa, examines the interface of the Brussels II-*bis* Regulation and the European Convention of Human Rights in **"In-Depth Consideration of Family Life v. Immediate Return of the Child in Abduction Proceedings within the EU"** (in English).

The paper focuses on the EU regime on child abduction provided by Regulation No 2201/2003 and, in particular, on its Art. 11(8) expressly providing for the replacement of a Hague non return order by a subsequent judgment (the so called "trumping order") imposing the return of the child made by the courts of the State where the child was habitually resident prior to the wrongful removal or retention. Starting from the analysis of some recent decisions of the European Court of Human Rights, stating that some return orders held by domestic courts in applying the 1980 Hague Convention (*Neulinger and Shuruk v. Switzerland and X v. Latvia*) as well as the Brussels II-*bis* Regulation (*Sneersone and Kampanella v. Italy*) were not in compliance with Art. 8 of ECHR, the paper is aimed at demonstrating the that a too strict "Art. 8 ECHR's test" is capable of undermining the functioning of the Brussels II-*bis* trumping order and that a specific human rights' test for intra-EU child abduction should be carried out. In this light, the paper firstly highlights the added value of the Brussels II-*bis* regime on child abduction compared to the 1980 Hague Convention; it goes on to critically analyze the recent decisions of the European Court of Human Rights on the return orders in child abduction cases, and it finally proposes a possible human rights test capable of protecting the "effet utile" of the EU regime on child abduction.

Matteo Gargantini, Senior Research Fellow at the Max Planck Institute Luxembourg, examines and shares some considerations on the AG's Opinion in *Kolassa* in "**Jurisdictional Issues in the Circulation and Holding of (Intermediated) Securities: The Advocate General's Opinion in *Kolassa v. Barclays*"** (in English).

This article addresses the Advocate General's Opinion in *Kolassa v. Barclays* (released on September 3, 2014, in the case C-375/13) from the perspective of

financial markets law. The case raises some issues on the establishment of jurisdiction in disputes concerning securities offerings. The article suggests that a restrictive interpretation should be given of the Opinion (as well as of the CJEU decision on the case, which substantially follows the Opinion). On the one hand, the interpretation affirmed by the Advocate general may in fact, if read extensively, rule out the possibility that investors enjoy the protective regime of Brussels I Regulation *vis-à-vis* the issuer if they purchase securities on the secondary market, as it denies the possibility of establishing jurisdiction on the basis of Articles 15 and 16 of the Brussels I Regulation where a consumer has purchased a security not from the issuer but from a third party that has in turn obtained it from the issuer. On the other hand, the Opinion may expose offering companies to the risk of being sued by professional investors in multiple jurisdictions on the basis of tortious liability, even in cases where a prospectus was not published and, therefore, such companies did not intend to conduct any activity in other countries, on the basis that no contractual relationship can be identified in *Kolassa* between the issuer of the certificate and the final investor. Tortious liability, which is admitted by the Opinion, may therefore sometimes be an imperfect substitute for contractual liability. Hence, the article proposes that the Advocate General's (and the CJEU's) reasoning should be narrowly interpreted so as to confine its purview to the issues raised by the holding of certificates through trusts and other similar devices. On the contrary, further reflections are needed before a conclusive position is taken on the effects of circulation of securities under the Brussels I Regulation.

Indexes and archives of RDIPP since its establishment (1965) are available on the website of the Rivista di diritto internazionale privato e processuale. This issue is available for download on the publisher's website.

German Federal Court of Justice

on Surrogacy and German Public Policy

By Dina Reis, Albert-Ludwigs-University Freiburg (Germany)

In its ruling of 10 December 2014 (Case XII ZB 463/13), the German Federal Court of Justice (Bundesgerichtshof – BGH) had to decide whether, despite the domestic prohibition of surrogacy, a foreign judgment granting legal parenthood to the intended parents of a child born as a result of a surrogacy arrangement should be recognized.

The appellants, a same-sex couple habitually resident in Berlin, are German citizens and live in a registered partnership. In August 2010, they concluded a surrogacy contract with a woman in California. The surrogate mother, a citizen of the United States, is habitually resident in California and was not married during the surrogacy process. In accordance with the contract, the child was conceived by way of assisted reproduction technology using appellant no. 1's sperm and an anonymously donated egg. Prior to the child's birth, appellant no. 1 acknowledged paternity at the German Consulate General in San Francisco with the surrogate mother's consent, and by judgment of the Superior Court of the State of California, County of Placer, legal parenthood was assigned exclusively to the appellants. In May 2011, the surrogate mother gave birth in California; thereafter, the appellants travelled with the child to Berlin where they have been living since. After the civil registry office had refused to record the appellants as the joint legal parents of their child, they brought proceedings for an order requiring the civil registry office to do so, which was denied by the lower courts.

The BGH held that recognition of the Californian judgment could not be refused on the grounds of violation of public policy and ordered the civil registry office to register the child's birth and state the appellants as the joint legal parents. The Court found that German public policy was not violated by the mere fact that legal parenthood in a case of surrogacy treatment was assigned to the intended parents, if one intended parent was also the child's biological father while the surrogate mother had no genetic relation to the child.

Public policy exception within the scope of 'procedural' recognition

First, the Court outlined that, contrary to a mere registration or certification, the Californian judgment could be subject to a 'procedural' recognition laid down in §§ 108,109 of the German Act on the Procedure in Family Matters and Matters of Non-contentious Jurisdiction (FamFG), which enumerate limited grounds for denying recognition. The Court noted that the Californian decision was based on a substantive examination of the validity of the surrogacy agreement and the resulting status issues, which was not to be reviewed (prohibiton of '*révision au fond*'). According to § 109(1) No. 4 FamFG, recognition of a judgment will be refused where it leads to a result which is manifestly incompatible with essential principles of German law, notably fundamental rights (public policy exception). The Court stated that, in order to achieve an international harmony of decisions and to avoid limping status relationships, the public policy exception was to be interpreted restrictively. For this reason, a mere difference of legislation did not imply a violation of domestic public policy; the contradiction between the fundamental values of domestic law and the result of the application of foreign law in the case at hand had to be intolerable.

Paternity of one intended parent

With regard to the legal parenthood status of appellant no. 1, the Court pointed out that no violation of public policy could be found because the application of German law would produce the same result as the decision of the Superior Court of the State of California: Due to the fact that the surrogate mother was not married at the time of the child's birth and appellant no. 1 had acknowledged paternity with her prior consent, German substantial law (§§ 1592 No. 2, 1594(2) German Civil Code) would also regard appellant no. 1 as the legal father of the child.

Assigning legal parenthood to the registered partner of the biological father not contrary to public policy

With regard to the legal parenthood status of appellant no. 2, the Court argued that the outcome of the Californian judgment in fact deviated from the domestic determination of parenthood. However, this divergence would not violate public policy if one of the intended parents, unlike the surrogate mother, was genetically related to the child.

Deviation from German substantive law

Commercial as well as altruistic surrogacy are prohibited under § 1(1) No. 7 German Embryo Protection Act and § 14b Adoption Placement Act, which penalize the undertaking of surrogacy and commercial activities promoting surrogacy such as placement of surrogate mothers. However, the surrogate mother and the intended parents are not punished. The scope of the provisions is limited to acts committed within German territory (§ 7 German Criminal Code).

In addition to the penal aspects, § 1591 German Civil Code defines the woman who gives birth as the mother of a child and excludes the motherhood of another woman even if the latter is the child's genetic mother. The provision respects the social and biological bond between child and birth mother and aims at avoiding 'split' motherhood resulting from surrogacy treatment, including cases where the latter is performed abroad. The BGH outlined that German law provided neither for joint legal parenthood of two men acknowledging paternity nor for assigning legal parenthood to the registered partner of a parent by operation of law; same-sex partners could establish joint legal parenthood solely by means of adoption.

Then the Court held, first, that assigning joint legal parenthood to same-sex partners did, in itself, not violate public policy because, according to the ruling of the German Federal Constitutional Court on so-called 'successive adoption' – a practice granting a person the right to adopt a child already adopted by their registered partner -, married couples and couples living in a registered partnership were considered as equally suited to provide conditions beneficial to the child's upbringing [German Federal Constitutional Court 19.02.2013, Case 1 BvL 1/11 and 1 BvR 3247/09, para 80 with further references = FamRZ 2013, 521, 527].

Secondly, the Court pointed out that the general preventive aims underlying the provisions mentioned above needed to be distinguished from the situation where surrogacy had been nevertheless – lawfully – carried out abroad, because now the welfare of the child as a legal subject with independent rights had to be taken into account. A child, however, could not be held responsible for the circumstances of his or her conception. And while on the one hand a violation of the fundamental rights of the surrogate mother or the child could imply a public policy infringement, the Court stressed that, on the other hand, fundamental rights could also argue for a recognition of the foreign judgment.

Birth mother's human dignity not *per se* violated by surrogacy: drawing a

parallel to adoption

With regard to the surrogate mother, the Court argued that the mere fact that surrogacy had been undertaken was, in itself, not sufficient to ascertain an infringement of human dignity. That applied, *a fortiori*, in respect of the child who owed his or her existence to the surrogacy process. The Court emphasized that the surrogate mother's human dignity could be violated if it was subject to doubt whether her decision to carry the child and hand it over to the intended parents after birth had been made on a voluntary basis. However, the Court found that if the law applied by the foreign court imposed requirements to ensure a voluntary participation of the surrogate mother and the surrogacy agreement as well as the circumstances under which the surrogacy treatment was performed had been examined in proceedings that complied with the standards of the rule of law, then, in the absence of any contrary indications, the foreign judgment provided reasonable assurance of the surrogate mother's voluntary participation. According to the surrogate mother's declaration before the Superior Court of the State of California, she was not willing to assume parental responsibilities for the child. The Court held that in this case, the surrogate mother's situation after childbirth was comparable to that of a mother giving her child up for adoption.

Focus on the best interests of the child

Given those findings, the Court concluded that the decision whether to grant recognition to the foreign judgment should be guided primarily by the best interests of the child. For this purpose, the Court referred to the guarantee of parental care laid down in Art. 2(1) in conjunction with Art. 6(2) first sentence of the German Constitution, which grants the child a right to be assigned two legal parents [cf. German Federal Constitutional Court 19.02.2013, Case 1 BvL 1/11 and 1 BvR 3247/09, paras 44, 73 = FamRZ 2013, 521, 523, 526], and the case-law of the European Court of Human Rights on Art. 8(1) ECHR concerning the child's right to respect for his or her private life: The European Court of Human Rights had ruled that the latter encompassed the right of the child to establish a legal parent-child-relationship which was regarded as part of the child's identity within domestic society [ECtHR of 26.06.2014, No. 65192/11 – Mennesson v. France, para 96].

Here, the Court stressed that not only was the surrogate mother not willing to assume parental responsibilities, but she was, in fact, also not available as a

parent on a legal basis: An assignment of legal motherhood to the surrogate mother, which could only be established under German law, would have no effect in the surrogate mother's home state because of the opposing foreign judgment.

Under those circumstances, the Court found that depriving the child of a legal parent-child-relationship with the second intended parent who – unlike the surrogate mother – was willing to assume parental responsibilies for the child, violated the child's right laid down in Art. 8(1) ECHR. According to the Court's view, the limping status relationship between the surrogate mother and the child failed to fulfill the requirements laid down in Art. 2(1) in conjunction with Art. 6(2) of the German Constitution and Art. 8(1) ECHR.

The Court agreed with the opinion of the previous instance that adoption would be an appropriate instrument in the case at hand because, unlike a judgment based on the foreign legislature's general assessment of surrogacy cases, the adoption procedure included an individual examination of the child's best interests. However, the Court pointed out that in cases of stepchild adoption, the outcome of this individual evaluation would usually be favourable and thus coincide with the Californian decision, leading to legal parenthood of the biological parent's registered partner. The consistent results clearly argued against a violation of public policy. Moreover, the Court observed that adoption would not only encounter practical difficulties in the child's country of birth, where the appellants were already considered the legal parents, it would also pose additional risks for the child: It would be left to the discretion of the intended parents whether they assumed parental responsibilities for the child or changed their minds and refrained from adoption; for example, if the child was born with a disability.

Conclusion

The Court's decision has been received with approval within German academia and legal practice [see the notes by *Helms*, FamRZ 2015, 245; *Heiderhoff* NJW 2015, 485; *Mayer*, StAZ 2015, 33; *Schwonberg*, FamRB 2/2015, 55; *Zwißler*, NZFam 2015, 118]. Before this judgment, lower courts had shown a tendency to regard public policy as violated by the mere fact that surrogacy had been performed [cf. Higher Regional Court Berlin 01.08.2013, Case 1 W 413/12, paras 26 *et seqq.* = IPRax 2014, 72, 74 *et seq.*; Administrative Court of Berlin 05.09.2012, Case 23 L 283.12, paras 10 *et seq.* = IPRax 2014, 80 *et seq.*]. In

recent years, however, some scholars had advocated a more cautious and methodical handling of the public policy exception [see especially *Heiderhoff*, NJW 2014, 2673, 2674 and *Dethloff*, JZ 2014, 922, 926 *et seq.* with further references]. Instead of resorting to a diffuse disapproval of surrogacy as a whole, the ruling of the BGH is essentially based on an accurate analysis of the concrete alternatives at hand and a critical evaluation of the possible outcomes in the present case.

However, it has rightly been pointed out that, within the complex field of surrogacy, the situation in the case at hand was fairly straightforward: The surrogate mother was not married so that the biological father could acknowledge paternity without complications, there was no conflict between the intended parents and the surrogate mother because the latter did not want to keep the child, and the legal parenthood of the intended parents had been established in a judicial procedure where the rights of the child and the surrogate mother, especially her voluntary participation, had been subject to review [cf. *Heiderhoff*, NJW 2015, 485].

The BGH expressly left open whether a different finding would have been appropriate if neither of the intended parents had been the child's biological parent or if the surrogate mother had been also the genetic mother [para 53]. Neither did the court discuss the issue of 'recognition' of civil status situations and documents. Furthermore, surrogacy arrangements that are undertaken in countries with poor human rights standards and a lower degree of trust in the administration of justice may not fulfill the requirements for a recognition established by the BGH. Insofar, the judgment could have a deterrent effect as regards seeking surrogacy treatment in countries that do not meet the required standards [*Heiderhoff*, NJW 2015, 485].

Praxis des Internationalen Privat-

und Verfahrensrechts (IPRax) 1/2015: Abstracts

The latest issue of the *"Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)"* features the following articles:

Heinz-Peter Mansel/Karsten Thorn/Rolf Wagner, ***European conflict of laws 2014: The year of upheaval***
The article provides an overview of developments in Brussels in the field of judicial cooperation in civil and commercial matters from December 2013 until November 2014. It summarizes current projects and new instruments that are presently making their way through the EU legislative process. It also refers to the laws enacted at the national level in Germany as a result of new European instruments. Furthermore, the authors look at areas of law where the EU has made use of its external competence. They discuss both important decisions and pending cases before the ECJ as well as important decisions from German courts pertaining to the subject matter of the article. In addition, the article also looks at current projects and the latest developments at the Hague Conference of Private International Law.

Anatol Dutta, ***The European Succession Regulation: Ten issues in miniature***
Since its adoption in July 2012, the European Succession Regulation has generated a great volume of scholarly writing, although being applicable only from summer 2015 onwards. The following paper shall retrace ten selected issues which have been subject to debate during those first three years, namely (1) the delimitation between the applicable succession law and matrimonial property law, in particular regarding the German lump sum approach as to the participation of the surviving spouse in the gain obtained during marriage, (2) the role of legacies or other attributions which directly transfer ownership in certain objects of the estate from the testator to the legatee or other beneficiaries, in particular in case of a so-called legatum per vindicationem, (3) the localization of joint wills of spouses or registered partners, (4) the scope of the special jurisdictional rules in case of a choice of law, (5) the admissibility of certain types of testamentary dispositions, (6) the problem of incidental questions in the applicable succession law, (7) the binding effects of a choice of law, (8) the role of national certificates of inheritance under the Regulation, (9) the scope of the duty to accept foreign

authentic instruments, and (10) the impact of previous overriding succession-related conventions of the Member States on the European Certificate of Succession.

Peter Mankowski, ***The Deceased's Habitual Residence in Art. 21 (1) Successions Regulation***

Art. 21 (1) Successions Regulation hails the deceased's habitual residence as the dominant connecting factor for objectively determining the applicable law. The European legislator intends to nurture integration and personal mobility within the Internal Market. Habitual residence as connecting factor raises quite some questions, though. Recitals (23) and (24) are only helpful up to a certain extent in this regard. To place particular reliance on the deceased's intentions would be misconceived. To rely on such intentions would generate a bevy of consequential issues, for instance concerning the deceased's mental sanity or other persons' influence. Moving cross-border ordinarily is a deep cut in everybody's personal life and should be a clear warning of possibly ensuing consequences. To assume an alternating habitual residence provides a solution for the tricky cases that someone is living in different places consecutively each year. With regard to cross-border commuters the place where they habitually carry out their work is only relevant for employment purposes but does not determine their habitual residence.

Burkhard Hess/Katharina Raffelsieper, ***The European Account Preservation Order: A long-overdue reform to carry out cross-border enforcement in the European Area of Justice***

This article describes the key elements of Regulation (EC) 655/2014 establishing a European Account Preservation Order adopted in May 2014 and explains its practical implications. This new instrument will facilitate direct cross-border enforcement of monetary claims by allowing creditors to block bank accounts in other EU Member States (with the exception of the UK and Denmark). The Regulation shall be available as an additional alternative to existing national provisional relief. However, it implements the so-called surprise effect in cross-border cases: the blocking effect takes place without any prior notification to the debtor.

At the same time, appropriate safeguards to protect the debtor's rights are in place, such as the obligation of the creditor to compensate the damage caused to the debtor by the seizure if the order is subsequently set aside. The debtor's right

to be heard will be safeguarded by a hearing in the Member State of enforcement taking place after the blocking of the account. Finally the livelihood of the debtor is assured by the application of the respective national laws of the Member State of enforcement governing non-attachable amounts. All in all, the European Account Preservation Order can be qualified a major achievement which will considerably improve cross-border enforcement in the EU. It fills the gap in creditor protection left open by the Brussels I Recast which has unnecessarily abolished the surprise effect of provisional measures in the cross-border context.

Christian Kohler, ***A Farewell to the Autonomous Interpretation of the Concept of 'Civil and Commercial Matters' in Article 1 of Regulation Brussels I?***

In Case C-49/12, Sunico, the ECJ held that the concept of "civil and commercial matters" within the meaning of Article 1 of Regulation Brussels I covers an action whereby a public authority of one Member State claims, as against persons resident in another Member State, damages for loss caused by a tortious conspiracy to commit value added tax fraud in the first Member State. The author argues that the judgment is not in line with the ECJ's earlier caselaw on the autonomous interpretation of that concept. As the defendants in Sunico were the real beneficiaries of the sums obtained by means of tax evasion and the damages claimed corresponded to the amount of the VAT not paid, the action was brought in the exercise of the authority's powers and concerned a "revenue matter" within the meaning of Article 1(1) of the Regulation. The author observes a tendency in the ECJ's recent case-law to give too much weight to the law of the Member State of the proceedings when interpreting the concept of "civil and commercial matters". However, a shift towards a "national" rather than an autonomous interpretation of that concept would be detrimental to the uniform application of the Regulation. Although a wide interpretation of the concept is to be approved, the rationale behind the exclusion of matters of public law from the scope of the Regulation remains valid.

Michael Grünberger, ***The Place of an Alleged Infringement of Copyright under the Brussels I-Regulation***

The CJEU held in Pinckney v KDG Mediatech AG that a court has international jurisdiction for a copyright infringement claim according to Art. 5 No. 3 Brussels I regulation, if the member state in which that court is situated protects the copyrights relied on by the plaintiff and the harmful event alleged may occur

within the jurisdiction of the court seised. First, the court reaffirmed that jurisdiction in intellectual property rights claims can be allotted based on both, the place where the damage occurred and the place of the event giving rise to it. Second, the CJEU developed a specific approach for non-registered IP rights, merging the classical Shevill doctrine with its solution to IP rights in Wintersteiger. Third, the CJEU rebuffed any attempt to apply any further localization criteria to limit a national court's international jurisdiction in multistate infringements. Fourth, the approach enables the plaintiff to sue one of several supposed perpetrators of the damage in the place where the final damage has occurred even though he or she did not act within the jurisdiction of the court seised.

Christoph Thole, ***Jurisdiction for injuncture relief and contractual penalties***
The judgment in question was linked to two significant problems within the law of international jurisdiction. It concerned a legal action taken by an association and the question of jurisdiction for injuncture relief in cases without adherence to a specific locality. Although the court reaches – in spite of overlooking several aspects – the correct result, the judgment still reveals yet unresolved questions of how to treat agreements on contractual penalties and negative covenants with respect to the place of performance under art. 5 no. 1 Brussels I-Reg. (= art. 7 no. 1 Reg. 1215/2012).

Marta Requejo Isidro, ***On Exequatur and the ECHR: Brussels I Regulation before the ECtHR***
Concerns about the relationship between Article 6 ECHR and the international procedural law instruments of European (Community) source has long been a recurring topic in the legal literature. The issue has been reviewed recently by the ECtHR: concrete aspects of the European system of recognition and exequatur of judgments among EU Member States have been assessed by the Court in light of the so called Bosphorus test and the presumption of equivalence in Povse v. Austria, of 18.6.2013, in the domain of family law; and in the decision we comment on here, Avoti?š v. Latvia, rendered on 25.2.2014, where Regulation Brussels I was applied. Avoti?š v. Latvia is remarkable and must be approved for the tolerance shown by the ECtHR towards existing EU law and its application by the Member States at a very sensitive stage of the relations EU/Strasbourg. However, disappointment cannot be hidden as regards its grounds used by the ECtHR: technically the decision is based on unclear, disputable reasoning, as well

as on a rather superficial assessment of the Bosphorus test. It is therefore not surprising that the judgment was adopted by a narrow majority of just four votes against three.

Friedrich Niggemann, ***Foreign precautionary measures to take evidence under the Brussels I-Regulation: New attempts, but still no convincing solution***

The decision of the OLG München of 14.2.2014 is part of the quite heterogeneous case law of the German courts under Art. 31 Regulation 44/2001. Following an expert procedure in France the German party to this procedure started a second procedure with the same object in Munich, which was the agreed place of jurisdiction. The German court refused jurisdiction on the basis of Art. 27 par. 2 Regulation 44/2001. Whereas the result is in line with the decisions of the ECJ, the decision remains nevertheless unconvincing. It considers that the French procedure is not a provisional one under Art. 31, but an ordinary one, which in the court's opinion is apparently necessary to justify the refusal of jurisdiction. However this is contrary to the ECJ's definition of a provisional decision. Moreover the ECJ attributes the consequence of Art. 27 para. 2 Regulation 44/2001 not only to ordinary but as well to provisional decisions.

Sarah Nietner, ***Fragmentation of the law applicable to succession by way of party autonomy: What will be the impact of the Succession Regulation?***

The present case deals with a succession having cross-border implications. The deceased was a Swedish citizen who had her habitual residence in Germany at the time of her death. In her disposition of property upon death, the deceased had chosen German law to govern her succession with regards to her immovable property located in Germany. The deceased had disinherited her niece, who contests the validity of the will due to lack of testamentary capacity. The Higher Regional Court of Hamm found that the question, whether the deceased had been capable of drawing up her will, is governed by German law with respect to the immovable property located in Germany, whereas Swedish law decides on the question of capacity regarding the other assets. The fragmentation of succession results from the possibility to choose the law governing the succession, which is granted by Art. 25 (2) of the Introductory Act to the German Civil Code. This contribution outlines the decision of the court and examines how the situation will change under the European Regulation on Succession and Wills, which aims to avoid contradictory results due to a fragmentation of succession.

Rolf A. Schütze, ***On providing security for costs of proceedings under Austrian law***

Under Austrian Law a foreign plaintiff in civil litigation is obliged to provide security for costs. The foreign plaintiff is released from such obligation if – inter alia – there is a provision in an international treaty on security for cost or if an Austrian decision on costs can be recognized and enforced in the country of the habitual residence of the plaintiff. According to the ruling of the Austrian Supreme Court, however, the release from the cautio iudicatum solvi on the ground of the possibility to execute cost decisions under national law does not apply if there is an international treaty, even if such treaty – as in the instant case – does not release the plaintiff from the obligation to provide security for costs. Therefore the Court did not examine the issue of enforceability of an Austrian cost decision under the laws of the British Virgin Islands.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (6/2014)

The latest issue (November/December) of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (IPRax) contains the following articles:

- ***Rolf Wagner:*** "The new programme in the judicial cooperation in civil matters – a turning point?"

> *Since the entry into force of the Amsterdam Treaty in 1999 the European Union is empowered to act in the area of cooperation in civil and commercial matters. This article describes the fourth programme in this area. It covers the period 2015–2019. The author provides an overview of the history and content of the new programme in so far as the area of civil and commercial law is concerned. Furthermore, he explains how this programme differs in conceptual terms from its predecessors.*

- ***Michael Stürner/Christoph Wendelstein:*** "The law governing arbitral agreements in contractual disputes"

The article deals with the law governing arbitral agreements in contractual disputes. As such agreements are excluded from the material scope of application of Regulation Rome I, a conflict of laws approach has to be found in national law. Under German law, none of the existing black-letter private international law rules apply. Various connecting factors are conceivable (e.g. law of the seat of the arbitration, law governing the arbitration). Given the close connection between the arbitral agreement and the main contract, the article suggests that the law applicable to the latter will also determine the former. That applies, of course, only if the parties did not (explicitly or implicitly) choose the law applicable to the arbitral agreement.

- ***Katharina Hilbig-Lugani***: "Das gemeinschaftliche Testament im deutsch-französischen Rechtsverkehr – Ein Stiefkind der Erbrechtsverordnung" – The English abstract reads as follows:

Mutual wills have troubled German doctrine before a European instrument came along and they continue to do so under the Succession Regulation 650/2012. The Regulation lacks an explicit provision. The focus of the present contribution lies on the discussion whether a mutual will is subject to the conflict of law rule on agreements as to succession (article 25 of Regulation 650/2012) or subject to the general provision on dispositions upon death (article 24 of Regulation 650/2012). The concepts of "mutual will" and "agreement as to succession" on the European level are far from being clear. Though less favorable, the more convincing arguments – including wording, systematics and legislative history – argue in favor of the application of article 24 Regulation 650/2012.

- ***Peter Kindler***: "Corporate Group Liability between Contract and Tort under the Brussels I Regulation"

The judgment of the CJEU of 17 October 2013 (C-519/12 – OTP Bank vs. Hochtief) confirms the consolidated case law on art. 5(1)(a) Brussels I Regulation regarding the contractual nature of the matter. The liability has to derive from "obligations freely assumed" by one party towards another.

According to the Court there is no such freely assumed obligation when the claim is based on a provision of national law imposing a liability on the controlling shareholder of a corporation for the debts of such corporation in case of its failure to disclose the acquisition of control to the commercial register. Astonishingly, the CJEU goes beyond the question referred for the preliminary ruling by the Hungarian Kúria and also gives its views on art. 5(3) Brussels I Regulation. Under this provision, in matters relating to tort, a person domiciled in a Member State may be sued in the courts of the place where the "harmful event" occurred. In this regard, the judgment is incomplete as far as causation is concerned. It remains unclear which could be the defendant's conduct that caused the "harmful event".

- ***Christian Koller:*** "Conflicting Goals in European Insolvency Law: Reorganization vs. Territorial Liquidation"

In the Christianapol-case the ECJ had to resolve the conflict between main insolvency proceedings, aiming at the restructuring of the debtor, and secondary proceedings, which must be winding-up proceedings under the European Insolvency Regulation. The ECJ's solution is mainly based on the interpretation of the provisions of the Insolvency Regulation dealing with the coordination of proceedings. It does not, however, take sufficient account of the effects of restructuring measures approved by the court in the main insolvency proceedings. This contribution, therefore, discusses the effects the recognition of a restructuring plan approved by the court in the main insolvency proceedings might have on the opening of secondary proceedings.

- ***Wulf-Henning Roth***: "IZPR und IPR – terra incognita" – The English abstract reads as follows:

The judgment of the Oberlandesgericht Karlsruhe, in its substance, deals with the much debated issue whether and under what conditions agreements on costs and charges that go along with the conclusion of an insurance contract may be regarded as void. Issues of private international law are given short shrift. In this regard however, the judgment of the renowned Appellate Court

reveals an astonishing ignorance of the fundamentals of European private international law: Instead of applying Regulation No. 44/2001 the Court turns to the German law of jurisdiction; and, with regard to substance (claim based on contract; voidness of the contract; claim based on precontractual misinformation), neither the Rom I- nor the Rom II-Regulation is even mentioned. Instead, the Court bases its judgment on the Rome Contracts Convention of 1980 whose direct applicability has been explicitly excluded by German legislation.

- ***Christoph A. Kern***: "Jurisdiction based on the place of performance according to Art. 5(1) Brussels I 2001/Art. 7(1) Brussels I 2012 when a contract combines the sale of real estate with the seller's obligation to construct business premises and find financially strong tenants"

The Düsseldorf Court of Appeal held that a contract combining the sale of real estate with the seller's obligation to construct business premises on the land and to find financially strong tenants is a contract on the provision of services in the sense of Art. 5(1) lit. b 2nd indent Brussels I 2001 (Art. 7(1) lit. b 2nd indent Brussels I 2012). This holding might have been driven by the court's wish not to apply the traditional rule in Art. 5(1) lit. a Brussels I 2001 (Art. 7(1) lit. a Brussels I 2012), according to which the place of performance must be determined with reference to the primary obligation in question. In the eyes of the commentator, the obligations to construct certain premises and to find solvent tenants normally do not affect the qualification of the contract as a sale of real estate, even more so if these obligations cannot be enforced directly by the buyer but their only sanctions are a condition precedent and a right of withdrawal. The commentator sees a parallel to contracts on the supply of goods to be manufactured according to requirements specified by the buyer, which have been qualified as sales contracts by the ECJ in the case C-381/08 (Car Trim).

- ***Angelika Fuchs****:* "Direct claim and assignment after cross-border traffic accident"

Following the respective judgment of the CJEU (C-347/08), a German court decided that a federal state in Germany, acting as the statutory assignee of the rights of the directly injured party in an international motor accident, may not

bring an action directly in the courts of its Member State against the insurer of the person allegedly responsible for the accident, when that insurer is established in another Member State. The court argues that – other than the injured party itself – the federal state cannot be considered to be a weaker party and can therefore not rely on the combined provisions of Articles 9(1)(b) and 11(2) of the Brussels I Regulation. The following article explains what impact the assignment of rights has on the interpretation of different rules of jurisdiction.

- ***Martin Gebauer:*** "The Autocomplete Features of „Google" and the Infringement of Personality Right – Jurisdiction to Adjudicate and Choice of Law"

In its recent "Google"-decision, the German Federal Supreme Court (FSC) ruled that German courts have jurisdiction to adjudicate under Section 32 of the German Code of Civil Procedure in an action brought against Google Inc., a company seated in California, USA, for the infringement of personality rights by means of the autocomplete feature offered by "Google.de". The FSC also held that German law applied. For the first time after the "eDate Advertising" ruling of the European Court of Justice (ECJ), the FSC had the opportunity to synchronize the approach of its own case law, in terms of the German autonomous rules of jurisdiction, with the approach developed by the ECJ. Without picking it out as a central theme, the FSC approach differs from the approach of the ECJ. Whereas the ECJ is looking for the place where the alleged victim has its centre of interests, the FSC requires that the forum state be the place where the diverging interests of both parties collide. This test is applied both to the question of jurisdiction to adjudicate and to the question of choice of law (under autonomous German conflict rules). Mainly for three reasons, the FSC in the long run should bring its case law more in line with the "eDate-doctrine" of the ECJ: First, the centre of interests of a person is more predictable as a ground of jurisdiction than the place of colliding interests. Second, jurisdiction to adjudicate and choice of law fit together in the sense that a court having jurisdiction under the Brussels Regulation for the alleged infringement of personality rights should preferably be empowered to apply the law of the forum. Third, the coordination of parallel proceedings within the EU is closely linked to the scope of the jurisdictional rules in the member states. Coordination works better when these rules resemble each other even in cases

where the defendant is domiciled in a third state.

- ***Andreas Engel:*** "Conflict of Laws in Property Law: Statutory Limitation and Changes in the Applicable Law"

In a lawsuit for the recovery of a classic car which was originally sold in Germany and then went missing after the Second World War, only to later reappear in the U.S. where it was sold at an auction in California and then re-transferred to Germany for an exhibition, the Oberlandesgericht Hamburg had to grapple with diverging national laws. Under Californian law, but not under German law, the pertinent period of limitation is not deemed to accrue until the discovery of the whereabouts of the article, and there is no tacking of previous possessors.

According to German conflict-of-law rules regarding property, German law was applicable for the recovery claim and its limitation. However, even the special provision of art. 43 para. 3 EGBGB does not allow for a retroactive modification of final legal determinations arrived at pursuant to a law formerly applicable. A final legal determination of facts in that sense can also be of a negative nature. In the given case, this meant that German property law had to respect and uphold the Californian decision as to when the period of limitation began to accrue.

- ***Bettina Heiderhoff:*** "Return of the child in case of child's objection under the Hague Child Abduction Convention"

The decisions mainly concern issues of Art. 13(2) Hague Child Abduction Convention. In both cases, the children were relatively old (between 11 and 16 years) and objected to the return.

In the ECHR case, the court order to return the children to their mother in England was not enforced by the French authorities following an unsuccessful mediation meeting between the mother and the children. The ECHR held that France should have tried harder to influence the position of the children (para. 94). The OGH found that even at the age of 15 it was necessary for the courts to assess the individual maturity of the child.

In fact, Art. 13(2) Child Abduction Convention must be interpreted in a narrow

way. Only where a child possesses the necessary maturity, and is objecting in a determined and distinct manner, may the return be refused by the authorities. While it must be deplored that Art. 13(2) is so imprecise, courts should still try to establish a clear line. For children below a certain age (one might consider the age of 10, for instance) the necessary maturity should, generally, be denied. Correspondingly, there might also be an age above which maturity is assumed without further investigation (this might be appropriate for children of 13 years and older).

Only where a child has been unduly influenced by the abducting parent is there reason for an attempt to change the child's opinion.

- ***Hans Jürgen Sonnenberger:*** "Transkription einer von zwei Italienern in den USA – New York – geschlossenen gleichgeschlechtlichen Ehe in das italienische Personenstandsregister" – The English abstract reads as follows:

For the first time in Italy the Tribunale of Grosseto ordered the transcription of an Italian same-sex couple's marriage, who was wedded abroad. This note analyzes the decision, demonstrates the development of Italian and European case law and evaluates it in the light of the reasoning of the Tribunale.

- ***Christa Jessel-Holst:*** "Recodification of the Private International Law of Montenegro"

The contribution analyses the new Montenegrin Act on Private International Law of 23 December, 2013, as the first comprehensive PIL-reform in a Yugoslav successor state. The Act regulates conflict of laws as well as procedural international law in 169 articles. EU-harmonization is a main objective of the reform. Habitual residence is introduced as a connecting factor, for which a legal definition is provided. The scope of party autonomy is considerably expanded. Novelties include inter alia a general escape clause and a provision on overriding mandatory rules. Issues like maintenance, personal name, agency or intellectual property are regulated for the first time, others have been totally reformed. The reciprocity requirement for the recognition of foreign judgments has been abolished. For the recognition of foreign arbitral awards it is referred to the New York UN-Convention of 1958. For Montenegro, the new Act replaces

the Yugoslav codification of 1982.

The French Cour de cassation and the « Thalys babies »

I am glad to post this comment by F. Mailhé, Associate Professor Paris 2, Panthéon-Assas

On September 22, 2014, the French *Cour de Cassation* (Supreme Court for civil and criminal matters) published two prejudicial opinions on the validity, in a same-sex couple, of the adoption by a woman of a child born to her wife thanks to a foreign medically-assisted procreation (Avis n°15010 and 15011, ECLI:FR:CCASS:2014:AV15010 and ECLI:FR:CCASS:2014:AV15011).

Despite its relatively restricted purpose, the French Same-Sex Marriage Act of May 17, 2013, just starts to give its first private international law consequences (On that law and private international law, see e.g. H. Fulchiron, *JDI* 2013. 1055 ; P. Hammje, *RCDIP* 2013. 774 ; S. Godechot and J. Guillaumé, *D.* 2013. 1756).

Indeed, avoiding any fundamental change in French family law, the Act was only meant to enable same-sex couples to get married. As a consequence, same-sex couples are for example still not allowed to get medically-assisted procreation (MAP) techniques by Article 2141-2 of the Public Health Code ("Code de la Santé Publique", CSP), according to which:

"The purpose of [MAP] is to remedy a couple's infertility which pathological character was medically diagnosed or to avoid the transmission of a particularly severe disease to the child or to the other member of the couple".

Some things changed in adoption law, though. Among other provisions, in order for lonely parents getting married to provide the child with a second parent when the other parent was unknown or deceased, the 2013 Act allowed for their husband or wife to adopt the child in those situations.

The adoption procedure has therefore been used by a number of women in situations where the father was not known… because the baby was born from an insemination with anonymous donor, an MAP, abroad, especially in Belgium. Contrary to France, Belgium had authorized MAP for lonely mothers since July 2007. Called "Thalys babies", by the name of the train which connects Paris to Brussels, a certain number of babies were born from such travels in the last years.

In July, almost 300 files for adoption had apparently been enrolled in different courts of first instance in France, and the reaction and interpretation of the law was quite diverging. For most, the interest of the child and the evolution of the law asked for the adoption to be allowed (see e.g. TGI Nanterre, July 8, 2014, *D.* 2014. 1669, note Ph. Reigné). For some others, to the contrary, the situation was a plain fraud, since it was the conclusion of a procedure by which the couple simply tried to bypass different French law prohibitions (MAP by a lonely woman or same-sex couple). After the press echoed the emotion of couples blaming a "two tier justice", two courts (Avignon and Poitiers) decided to use a specific prejudicial procedure to ask the *Cour de cassation* to issue an opinion on the matter.

On Sept. 22, 2014, the *Cour de cassation* answered in its uniquely concise style:

"Having resort to medically-assisted procreation, in the form of artificial insemination with anonymous donor abroad, does not bar the mother's wife from adopting the child born from this procreation, as long as the adoption's legal conditions are fulfilled and that it is in line with the child's interest".

The arguments in defense of the prohibition to adopt were indeed rather weak and it is no surprise that this decision of autumn 2014 was in favor of the adoption.

First, the prohibition of Article 2141-2 CSP is of ambiguous nature. Instead of regulating MAP as a filiation issue, it is regulated as a technical one, and destined to medical professionals, not to parents. Its consequence is therefore not a civil one for the parents, but a sort of disciplinary penalty for the professionals. Designed for purely domestic matters, it is therefore not as assertive as it needs to be in international matters: Does it concern the persons getting an MAP abroad, or is it just organizing French clinics and hospitals' life?

Second, and as a consequence, contrary to the sister question of surrogacy, the international public policy is not at stake. Its foundation in Article 2141-2 CSP is too fragile. Actually, the problem does not seem to come so much from the foreign MAP itself than from the fact that a French mother, with no ties to Belgium, went abroad to get what she could not get in France, i.e. a problem of fraud. This is a much harder question in purely philosophical and political terms. What does "forbidden in France" mean in that context? Should a person be allowed to "internationalize" the situations to bend the law to its will? One of the arguments of counsel for defense in those cases was that freedom of movement within Europe allows for such "legal optimization". If the Court of Justice has approved the reasoning in company law since Centros (Aff. C-212/97), and has peeped into family and personal matters with cases such as Garcia-Avello (Aff. C-148/02), pure choice of law in family matters (and MAPs) does not seem the rule yet, if only because the European private international law regulations in family matters have not provided for such a complete freedom. Unfortunately for the debate, it comes at a time when France was already punished on a neighboring matter where the *Cour de cassation* had used the same rationale, so that, in the eyes of that Court, the door to negotiations seemed closed.

As readers of Conflictoflaws.net have noticed, in *Menesson vs. France* and *Labassée vs. France*, the European Court of Human Rights (ECHR) recently condemned France for refusing to recognize the filiation of the "parents of intent" (here an heterosexual couple) with the children born in the United States from a surrogate mother. The decisions are actually not as assertive as it has been said in the press, the ECHR judging only that the children should each get at least recognition of their filiation with their father (who happened to be both father of intent and biological father). But the ECHR paid scant regard, in both cases, to the argument the *Cour de cassation* has used in more recent ones : fraud.

In 3 decisions of Sept. 13, 2013 and March 19, 2014 on another foreign surrogacy case, the *Cour de cassation* had preferred to argue that the parents of intent could not avoid the French interdiction of gestational surrogacy by going to get one in the United States and then ask recognition of the American decision in France (on those decisions, see e.g. L. Gannagé, *RCDIP* 2013. 587 ; J. Guillaumé, *JDI* 2014. 1 ; J. Heymann, *JCP* 2014. 613 ; H. Fulchiron et Ch. Bidaud-Garon, *D.* 2014. 905). This change of rationale (from international public order to fraud) was understood by some authors as showing a change in the strategy of the *Cour de*

cassation to persuade the ECHR who was already seized of the *Menesson* and *Labassée* cases. But if this was the aim, it failed. Its case-law was condemned nonetheless.

The consequence of the *Menesson* and *Labassée* cases on the issue of the adoption of a child born by artificial insemination with anonymous donor was of course not obvious, but the analogy is strong. In both cases, parents had gone abroad to get a child through a medical procedure they could not get in France. How could the *Cour de cassation* therefore decide otherwise than for its validity, when the value argument (through international public order) was so weak, and when the political argument (fraud) had already been knocked down by the European Court of Human Rights for an analog and much stronger case?

One last word, though. This was just a prejudicial opinion. Opinions by the *Cour de cassation* are not issued by plenary sessions of the Court, and do not bind its judging Chambers. It is therefore possible that (as has been seen in other matters) some Chambers will not follow the Opinion and decide otherwise. But, after the EHCR decision in *Menesson* and *Labassée*, after the refusal of the French government to appeal of those decisions (the government actually seems favorable to it), after this Opinion by some members of the *Cour de cassation*, and if the evolution of the French society keep on the same way in the years to come, years which would be needed before the *Cour de cassation* may be seized in its judging formation of the matter, such a reluctance would certainly go against the tide, if not too late, after the tide.

Second Issue of 2014's Rivista di diritto internazionale privato e processuale

(I am grateful to Prof. Francesca Villata – University of Milan – for the following presentation of the latest issue of the RDIPP)

The second issue of 2014 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features one article and three comments.

Angela Del Vecchio, Professor at LUISS – Guido Carli University, addresses recent cases of conflict of criminal jurisdiction and piracy in **"Il ricorso all'arbitrato obbligatorio UNCLOS nella vicenda dell'*Enrica Lexie*"** (Recourse to UNCLOS Compulsory Arbitration in the *Enrica Lexie* Case)

> *The* Enrica Lexie *incident has given rise to two disputes between Italy and India, one concerning the violation of the United Nations Convention on the Law of the Sea ("UNCLOS") rules on piracy and criminal jurisdiction in the case of an incident of navigation on the high seas, and the other concerning the violation of the international rules on the sovereign functional immunity of military personnel abroad. Regarding the first dispute, there is a difference of opinion between Italy and India as to the interpretation of the UNCLOS provisions that govern the jurisdiction of domestic courts to adjudicate on the merits of the case. This has led to a conflict of jurisdiction between the two States that, as examined in this article, could be resolved by recourse to the compulsory arbitration provided for in Annex VII to UNCLOS. Such arbitration may be commenced even by just one of the parties. By contrast, as concerns the second dispute recourse to compulsory dispute resolution mechanisms would appear quite problematic as a result of the gradual erosion of the principle of sovereign functional immunity of State organs.*

Georgia Koutsoukou, Research Fellow at the Max Planck Institute Luxembourg, and *Nikolaos Askotiris*, Ph.D. Candidate at the International Investment Law Centre Cologne, examine waivers of sovereign immunity in light of the most recent jurisprudence in **"Tightening the Scope of General Waivers of Sovereign Immunity from Execution"** (in English)

> *The establishment, under international law, of the proper interpretive approach to broadly phrased waivers of sovereign immunity from execution is an unsettled issue, which was not addressed in legal theory or practice until recently. However, this issue became practically relevant in the wake of certain hedge funds' strategy to seek the collection of defaulted sovereign debt in any available jurisdiction. Most important in this respect are the recent judgments of the French Court of Cassation in* NML v. Argentine

Republic*, where the Court held, in fact, that, under customary international law, waivers of execution immunity may not extend to a particular category of state assets, unless expressly referred to. The present article examines the accuracy of the Court's proposition in light of the major parameters for the determination of the relevant standards of interpretation: the 2004 UN Convention on Jurisdictional Immunities of States and Their Property as well as the pre-existing state practice,* i.e. *the settled case law regarding the interpretation of general immunity waivers in light of the diplomatic and consular law principle* ne impediatur legatio*, and the submission of execution immunity waivers to certain restrictions under domestic statutes. The Authors take the view that the interpretive criteria of the Vienna Convention on the Law of Treaties are applicable by analogy to immunity waivers inserted in government bonds, leading to the adoption of a rather narrow approach. It is further suggested that, under the well-established principle that the plaintiff bears the burden of proof with respect to any exception to execution immunity, the "asset specificity" requirement may reasonably be seen as the allocation of the risk of ambiguity of immunity waivers to the judgment creditor. Finally, the Authors argue that the restrictive interpretation of general immunity waivers may serve as a functional substitute for lacking clear-cut international law rules on state insolvency, insofar as no international law rule protecting good faith restructuring procedures from the speculative tactics of vulture funds is yet in force.*

Antonio Leandro, Researcher at the University of Bari, addresses the impending reform of EC Regulation No 1346/2000 in **"Amending the European Insolvency Regulation to Strengthen Main Proceedings"** (in English)

EC Regulation No 1346/2000 on insolvency proceedings allows for the coexistence of different proceedings with respect to the same debtor. This engenders certain problems in terms of efficiency of the insolvency administration within the European Judicial Space, thus menacing the "effet utile" of the Regulation. This article focuses on such problems, explaining the shortcomings which affect the Regulation and wondering whether ECJ managed a solution for them. As a matter of principle, preventing the opening of secondary proceedings seems in several cases to be a suitable means for protecting the main proceedings' purposes. However, at the same time, not opening secondary proceedings could hamper the interests of local creditors,

which rely on them to safeguard rights and priorities on the grounds of the local lex concursus*. The Author addresses the main aspects of this tension. The Regulation is under revision as result of the 2012 Proposal of the European Commission, which,* inter alia*, aims to strike a balance between the aforesaid interests at odds. In this paper, the Author carries out a critical appraisal of the envisaged amendments, taking also into account the recent reactions of the other European Institutions, so as to ascertain whether they could really achieve such a balance.*

Arianna Vettorel, Fellow at the University of Padua, discusses the protection of the unity of one's personal name in **"La continuità transnazionale dell'identità personale: riflessioni a margine della sentenza *Henry Kismoun*"** (Pesonal Identity's Continuity across Borders: Remarks on the *Henry Kismoun* Judgment")

This paper focuses on the novelties introduced by the European Court of Human Rights' judgment in Henry Kismoun v. France*, which concerns the issue of transnational continuity of names: in* Henry Kismoun v. France *the Court recognized the need of protecting the unity of a personal name on the basis of Article 8 ECHR, also with regard to the secondary name conferred on a person, in the State of the person's second citizenship. The novelties introduced by this judgment could influence the future jurisprudence of the European Court of Justice which has granted protection to the unity of the name firstly attributed on the basis of the EC Treaty (now TFEU) without referring to fundamental human rights. At the domestic level, fundamental human rights have been used to grant protection to transnational continuity of names of non EU citizens by the Italian courts, first, and by the Minister for Internal Affairs, then. Moreover, Article 8 ECHR constituted the legal basis to grant new Italian citizens the right to maintain the name they were assigned abroad. In addition to introducing new interpretational perspectives about the issue of continuity of name across borders, the above mentioned judgment and the new Italian practice seem to constitute an additional step in the direction of the establishment of the "method of recognition" based on the vested rights theory, and bear a great impact on the issue of continuity of personal status across borders.*

Indexes and archives of RDIPP since its establishment (1965) are available on the website of the Rivista di diritto internazionale privato e processuale. This issue is

available for download on the publisher's website.

Mennesson v. France, ECtHR 26.06.2014

I happened to be in France when I heard the news about the ECtHR finding against France in *Menesson v. France*, on surrogate motherhood. The Court considered established a violation of Art. 8.1 ECHR as regards the twin daughters of the couple. Here is a resumée of the case (together with a similar one, *Labassee v. France*) as presented in the Press release issued by the Registrar of the Court. The judgment itself can be found here, but only in French.

The applicants in the first case are Dominique Mennesson and Sylvie Mennesson, a husband and wife, French nationals who were born in 1955 and 1965 respectively, and Valentina Mennesson and Fiorella Mennesson, American nationals, who were born in 2000. They live in Maisons-Alfort (France). The applicants in the second case are Francis Labassee and Monique Labassee, a husband and wife, French nationals who were born in 1950 and 1951 respectively, and Juliette Labassee, an American national who was born in 2001. They live in Toulouse. The French authorities have refused to recognise the family relationship, legally established in the United States, between, on the one hand, the children Valentina Mennesson and Fiorella Mennesson, and Juliette Labassee, children who were born following surrogate pregnancy agreements, and on the other, the intended parents, the Mennesson and Labassee spouses respectively.

Mr and Mrs Mennesson had recourse to surrogate pregnancy in the United States, in which embryos created from Mr Mennesson's sperm and donated ova were implanted in the uterus of a third woman. Mr and Mrs Labassee also used this procedure. Judgments delivered respectively in California, in the first case, and Minnesota in the second, indicate that Mr and Mrs Mennesson are the parents of Valentina and Fiorella, and that Mr and Mrs Labassee are the parents of Juliette. In France, the applicants requested that the American birth

certificates be entered in the French civil status registers; Mr and Mrs Labassee further applied for a notarial deed to be entered as a marginal note. They were dismissed at final instance by the Court of Cassation on 6 April 2011 on the ground that such entries or marginal notes would give effect to an agreement on surrogate pregnancy, null and void on public-policy grounds under the French Civil Code.

The seven applicants, relying on Article 8 (right to respect for private and family life), complain about the fact that, to the detriment of the best interests of the child, they had been unable to obtain recognition in France of a family relationship legally established abroad. The applicants in the Mennesson case, relying on Article 14 (prohibition of discrimination) taken together with Article 8, allege that, on account of this refusal by the French authorities, they experience a discriminatory legal situation compared to other children in exercising their right to respect for their family lives. Further relying on Article 12 (right to marriage), they allege a violation of their right to found a family and, under Article 6 (right to a fair hearing), complain about the proceedings at the close of which the French courts refused to recognise the effects of the “American” judgment.