German Constitutional Court on a Judge‘s Duty to Take the European Evidence Regulation and the Hague Evidence Convention into Account

In a recent order of 14 September 2015 – 1 BvR 1321/13, the German Federal Constitutional Court (*Bundesverfassungsgericht*) has held that the right to effective judicial protection (Article 2(1) in conjunction with Article 20(3) of the German constitution) is violated if, in a cross-border case, a court fails to investigate the facts of the case by using possibilities that have good prospects of success, in particular if it does not take into account specific institutionalised facilities and measures of judicial assistance, such as those offered by the European Evidence Regulation, the Hague Evidence Convention and the European Judicial Network in Civil and Commercial Matters. In the case before the Court, a Romanian national had sued a widow of Romanian nationality for a share of the inheritance of her deceased husband based on the assertion that the couple had adopted him. Although it remained controversial whether such an adoption had actually taken place in Romania, the Municipal Court (*Amtsgericht*) did not request the Romanian adoption files for consultation by way of judicial cooperation. According to the Constitutional Court, the Amtsgericht ought to have considered whether the EU Evidence Regulation or the Hague Evidence Convention permit a German court to request the original case files from another Member State. An English abstract of the decision is available here.

Call for Papers: “Recent

Developments in Private International Law" at Moldova State University

The following announcement has been kindly provided by Mihail Buruiana, Senior Lecturer, State University of Moldova.

The Faculty of Law of Moldova State University in Chisinau, Republic of Moldova, will host an international conference dealing with "**Recent Developments in Private International Law**" on Thursday, 20 October, and Friday, 21 October 2016. Prospective speakers are kindly invited to submit abstracts of not more than 500 words (in *Word*) addressing any aspect of the Conference theme. The abstracts should include the name(s) and affiliation(s) of the author(s) and should be submitted before **Saturday, 10 May 2016**. The Programme of the Conference will consist of a mix of plenary sessions and parallel sessions. The topics of the sessions will include, *inter alia*: Theory of Private International Law; Choice of Law and Choice of Law Clauses; Jurisdiction and Forum Clauses; Natural Persons in Private International Law; Legal Persons in Private International Law; Family (Children and Adults); Succession; Contract; Insolvency; Tort; Recognition and Enforcement; Arbitration. The languages at the Conference will be Romanian and English (with simultaneous translation). Further information is available at the Conference website here.

Report on ERA conference on Recent case law of the ECtHRs in Family law matters

Guest post by Asma Alouane, PhD candidate at Panthéon-Assas (Paris II) University on *Private international law to the test of the right to respect for*

private and family life.

On February 11 and 12 2016, the Academy of European law (ERA) hosted in Strasburg a conference on *Recent Case law of the European Court of Human Rights in Family law matters.* The Court's evolutive interpretation of the notion of family life combined with its controversial understanding has created a long series of new challenges in the field of Family law. The conference participants discussed these issues, as well as the difficulties that States may face in complying with their obligations under the Convention.

The purpose of this post is to give a succinct overview of the presentations, which were of interest from a conflicts-of-law perspective.

1. **Evgueni Boev, Setting the scene: Private and family life under the Convention**

Setting the scene of the conference, Evgueni Boev's presentation provided an answer to the question of *What is a family according to Court Cases?* Whereas the term *family* is mentioned in several provisions (art 8, art 12, art 5 of Protocol 7…), most of the cases are examined under the concept of family life of art 8. Article 12 and Protocol 7's article 5 appear as the *lex specialis* regarding marriage and equality within a married couple. Thus, article 8 is the pillar of the case law of the Court regarding family matters.

From the broad perspective of the ECtHR cases, Boev demonstrated that the concept has expanded in two different directions: in a horizontal way between partners and in a vertical way between parent and child. In both directions, only the substantive reality matters. For instance, in the relationship between partners, family life exists regardless of whether there is legal recognition of the situation (e.g. *Abdulaziz, Cabales and Balkandali v. the United Kingdom*). The extension of the concept of family life to same-sex *de facto* couples in the *Schalk and Kopf v. Austria* case is another illustration of the broad scope of the family life. In the other direction, between parent and child, what matters most is not the biological link and in these cases too the Court emphasises the substantive relationship (e.g. *Nazarenko v. Russia).*

Thus, only the substantive situation is relevant. However, the recognition of

family life does not necessarily lead to a right to respect such family life. The questions of whether there is an interference with or a failure to comply with art 8 obligations are linked to the particular circumstances of the case, especially through the proportionality test.

As pointed out by Boev, the broad understanding of what is a family gives rise to new trends regarding for instance the recognition of non-traditional forms of family life or the international dimension of family ties, especially as in matters of child care. The following presentations focused on these two broad topics.

2. **Thalia Kruger, International Child Abduction**

Thalia Kruger showed in her presentation how the goals of the international child abduction instruments are disturbed when put to the test of the human rights perspective. Following the assumption that it is in the interest of the child not to be abducted, the 1980 Hague Child Abduction Convention and the Brussels II bis Regulation (No. 2201/2003) aim to facilitate the return of the child to his or her habitual residence. A return order must be issued within a period of six weeks. Only exceptional circumstances allow the State of the retention of the child not to order the return. Moreover, article 11 of Brussels II bis permits a second chance procedure to obtain return. Looking at the situation from the perspective of human rights, the Court considered that national authorities have to look into the particular situation of the child (see *Neulinger v. Switzerland*). Thus, the Court makes the best interests of the child the leading principle. The Court shifts from an *in abstracto* conception of the best interests of the child to an *in concreto* appreciation. Even though the Court explained later that it is possible to read the Hague Convention and the ECHR as aligned (*X. v. Latvia*), Kruger noted that the ECHR cases create sensitive dilemmas for the contracting States, for instance how to comply with the speedy proceeding obligation while taking into account all issues raised with respect to the best interests of the child.

According to Kruger, the Court's interpretation also shows that the Brussels II bis enforcement rules may not be compatible with the best interests of the child.

The *Bosphorus* doctrine assumes compatibility of EU law with the ECHRs, but this applies only when courts have no discretionary power (for instance the abolition of exequatur; see *Povse v. Austria*). The application of the *Bosphorus* doctrine in

the current context is problematic. Kruger concluded by noting that the on-going recast of Brussels II bis and the continuing efforts of the Hague Conference, such as its promotion of mediation, may provide a way to ensure the compatibility of the child abduction goals and the human rights standard.

3. **Marilisa D'Amico and Costanza Nardocci, LGBT rights and the way forward:**

From the perspective of the *Oliari v. Italy* case and the specific Italian experience, Costanza Nardocci presented an overview of the LGBT family rights. The last step in a long series of cases, *Oliari* illustrates the long path of same-sex couples before the ECtHR. A significant step was accomplished in 2010 with *Schalk and Kopf v. Austria*, when the Court recognized that same-sex couples are just as capable of enjoying family life as opposite-sex couples. The Court found that article 12 could be applicable to same-sex couples, but that at this stage the question of whether same-sex couples can marry is left to regulation by national law. However, referring to the large margin of appreciation of contracting States, it considered that there is no positive obligation to introduce same-sex marriage. Then, in 2013, embracing this new interpretation, the Court considered in *Vallianatos and Others v. Greece* that opening civil unions to opposite-sex couples only was a violation of articles 8 and 14. In the *Oliari* case, the Court held that there was a violation of article 8. It considered that Italy had violated its positive obligation to grant legal protection to same-sex couples. Recalling the specific situation of LGBT rights in Italy, Nardocci emphasized the contrast between the lack of legislative activity and the judicial and administrative activism for the recognition of same-sex couples, if only in a symbolic way. Thus, the condemnation of the Italian government in the *Oliari* case was not unexpected considering the previous warnings of by the Constitutional Court, which had urged the legislator to intervene. Although *Oliari* is specific to the Italian situation, it has to be considered an important step for same-sex couples in their pursuit of legal recognition. In other words, since the *Oliari* case the contracting States are now compelled to ensure a core legal protection for same-sex couples in a stable committed relationship.

However, as pointed out by Nardocci, the progress of same-sex couples' right to family life has not gone hand in hand with similar advances for transgender persons. Even though the recognition of a positive obligation to provide legal protection is a huge step forward compared to past cases, the absence of a positive obligation to enact same-sex marriages could adversely affect transgender persons' right to family life. As in *Hämäläinen v/ Finland*, transgender individuals still have to choose between their former marital life and the legal recognition of the new gender. Nardocci considered that a better use of the distinguishing technique between positive and negative obligations could provide more flexibility and lead to better protection of transgender persons.

4. **Michael Wells-Greco, Spectrum of Reproductive Rights and the Challenges**

Reproductive rights are one of the most sensitive and challenging topics the Court has had to deal with. The increasing use of medical technology in Europe has led to the emergence of a discussion as to their influence on reproductive choices The spectrum of reproductive rights is wide: it encompasses such issues as abortion (*A.B. C; v. Ireland*), home birth (*Ternovszky v. Hungray; Dubskà and Krejzovà v. Czech Republic*), embryo donation for scientific research (*Parrillo v. Italy*) and surrogacy (*Mennesson and Labassée v. France*; *Paradiso and Campanelli v. Italy*). In the ECHR, reproductive rights fall within the right to respect of private life. Considering the diversity of national policies and the ethical and moral issues these questions may raise, there is no consensus between contracting States. As a result, the Court generally leaves States a wide margin of appreciation.

Surveying each of these topics in turn, Michael Wells-Greco considered the existence of emerging trends. He showed that the Court has made a gradual evolution: an isolated national position regarding one issue does not necessarily come into conflict with the ECHR, as reproductive rights are deeply connected to national identities. However, once a contracting State takes the step to grant more rights in this field, it has to respect certain procedural guaranties (e.g. *A.B.C. v. Ireland*). Wells-Greco criticized this "all or nothing approach" that leaves no room for a potential future consensus and widens even more the divisions

between contracting States. Conversely, it appears that the margin of appreciation is smaller when it comes to cross-border situations (e.g. *Mennesson and Labassée v. France*). How ever, as the PIL response may not take into consideration the human rights response, Wells-Greco advocates resorting to soft law to address the diversity of reproductive rights.

5. **Klaudiuz Ryngielewicz, Contents of an individual application**

Concluding the Conference, Klaudiuz Ryngielewicz explained the correct way to lodge an application (see the video) especially with regards to the new formalistic article 47 of the Rules of the Court (see the Report on the revised rule). The increasing number of applications have forced the Court to set strict criteria. After explaining how to fill in the application form, Ryngielewicz insisted on the fact that only a valid application can interrupt the 6-month time-limit set in article 35 of the Convention.

Out now: Volume on Cross-border Litigation in Europe

In November 2014 scholars from all over Europe met at the University Verona to discuss the impact of the Brussels I Recast on cross-border litigation in Europe (see our previous post). The conference volume, edited by Franco Ferrari (NYU Law School/University of Verona) and Francesca Ragno (University of Verona), has now been published by Wolters Kluwer Italy (Cross-border Litigation in Europe: the Brussels I Recast Regulation as a panacea?).

The table of contents reads as follows:

Sergio M. CARBONE – Chiara E. TUO, Non-EU States and the Brussels I Recast Regulation: New Rules and Some Solutions for Old Problems

Martin GEBAUER, A New Head of Jurisdiction in relation to the Recovery of Cultural Objects

Ruggero CAFARI PANICO, Enhancing Protection for the Weaker Parties: Jurisdiction over Individual Contracts of Employment

Giesela RÜHL, The Consumer's Jurisdictional Privilege: on (Missing) Legislative and (Misguided) Judicial Action

Peter MANKOWSKI, The Role of Party Autonomy in the Allocation of Jurisdiction in Contractual Matters

Francesca C. VILLATA, Choice-of-Courts Agreements and "Third Parties" in light of Refcomp and beyond

Peter Arnt NIELSEN, The End of Torpedo Actions?

Francisco GARCIMARTÍN, The Cross-Border Effectiveness of Inaudita Parte Measures in the Brussels I Recast Regulation: an Appraisal

Thomas PFEIFFER, The Abolition of Exequatur and the Free Circulation of Judgment

Luigi FUMAGALLI, Refusal of Recognition and Enforcement of Decisions under the Brussels I Recast Regulation: where the Free Circulation meets its Limits

Francesca RAGNO, The Brussels I Recast Regulation and the Hague Convention: Convergences and Divergences in relation to the Enforcement of Choice-of-Courts Agreements

Fabrizio MARONGIU BUONAIUTI, The Brussels I Recast Regulation and the Unified Patent Court Agreement: towards an Enhanced Patent Litigation System

EUI releases Comparative Study on the Calculation of Interest on Antitrust Damages

The following announcement has been kindly provided by Vasil Savov, CDC, Brussels.

The European University Institute (EUI) Law Department in Florence, Italy, has just released a comparative study on the calculation of interest on damages resulting from antitrust infringements. It is highly topical, as the EU Member States are in the process of implementing Directive 2014/104/EU into their national laws. This "Damages Directive" seeks to facilitate private antitrust enforcement and, in particular, to ensure full compensation for victims. Due to the duration of antitrust infringements, the accrual of interest from the occurrence of the harm is essential to achieve full compensation. This study samples thirteen national laws and assesses how far they are consistent with the requirements to be found in EU law. It has been supported by Cartel Damage Claims (CDC) SCRL, Brussels.

The first part of the study elucidates the principles and requirements of EU Law relevant to interest calculation on damages caused by antitrust infringements. It further contains a high level assessment of the compliance of the surveyed Member States' legal regimes.

It is followed by 13 country reports, written by national experts, all answering standardised questions concerning the subject of the study. The questions cover a range of material and procedural law aspects and include calculations for a hypothetical case.

The present EUI study is an in-depth and comparative treatment of this technical, yet significant, aspect of antitrust damages claims. For claimants and practitioners, the study offers a systematic and practical account of interest rules in a number of jurisdictions, for judges and lawmakers, the study provides analysis and recommendations for the proper application of interest rules and advice on principles that should inform the implementation of the Damages

Directive.
The full text of the study is available here.

Security rights and the European Insolvency Regulation – A conference in Santiago de Compostela

On 15 April 2016, the Faculty of Law of the University of Santiago de Compostela will host a conference on *Security rights and the European Insolvency Regulation: From Conflicts of Laws towards Harmonization*.

Speakers include Paul Beaumont (Univ. of Aberdeen), Francisco Garcimartín Alferez (Autonomous Univ. of Madrid), Anna Gardella (European Banking Authority), Wolf-Georg Ringe (Copenhagen Business School), Françoise Pérochon (Univ. of Montpellier) and Paul Omar (Nottingham Trent University).

The conference is part of the SREIR project, coordinated by Gerard McCormack, Reinhard Bork, Laura Carballo Piñeiro, Marta Carballo Fidalgo, Renato Mangano and Tibor Tajti.

The full programme is available here.

Attendance to the conference is free, but registration prior to 10th April is required. For this, an e-mail with name and ID card must be sent to *marta.carballo@usc.es* or *laura.carballo@usc.es*.

Impact of Brexit on English Choice of Law and Jurisdiction Clauses

Karen Birch and Sarah Garvey from Allen & Overy have published two papers dealing with the likely/possible effects of the UK leaving the European Union on choice of law clauses in favor of English law and jurisdiction clauses in favor of English courts. The authors essentially argue that Brexit would not make a big difference and that commercial parties could (and should) continue to include English choice of law and jurisdiction clauses in their contracts: English courts (as well as other Member States' courts) would continue to recognize and enforce such clauses. And English judgments would continue to be enforced in EU Member States (even though the procedure might be more complex in some cases).

In essence, the authors thus argue that giving up the current unified European regime for choice of law, jurisdiction, recognition and enforcement of foreign judgments, service of process, taking of evidence would not matter too much for commercial parties. I am not convinced.

The papers are available here and here.

University of Missouri and Marquette University Student Writing Competition

The University of Missouri and Marquette University announce a student writing competition in associated with the University of Missouri's upcoming symposium "Moving Negotiation Theory from the Tower of Babel: Toward a World of Mutual Understanding." The competition offers a $500 first prize and $250 second prize.

Submissions must relate to one or more problems with negotiation theory, broadly defined, and should suggest a solution to the problem(s). Students are encouraged to consider sources in the symposium reading list, though they are not required to discuss or cite any of these sources.

The competition is open to all persons enrolled during calendar year 2016 in a program of higher education leading to any degree in law or a graduate degree (including but not limited to the J.D., LL.B., LL.M., S.J.D., M.A. or Ph.D.). Applicants may be of any nationality and may be affiliated with a degree-providing institutions located in any country.

Papers that have been published or accepted for publication are not eligible for the writing competition.

Submission Requirements

Submissions must be in English and between fifteen (15) and twenty-five (25) pages in length, including footnotes. The text of the paper must be typed and double spaced pages in 12 point Times New Roman font (or similarly readable typeface) with 1-inch margins on all sides. Footnotes should preferably appear in Bluebook form, although papers using other established systems of legal citation will be accepted.

The title of the paper must appear on every page of the submission. The author's name must not appear anywhere on the submission itself.

A separate document should be provided including (1) the author's full name, address, telephone number and email address; (2) the degree-granting institution where the author is or was enrolled in 2016, as well as the degree sought and the (anticipated) year of graduation; (3) the title of the submission; and (4) the date of the submission.

Failure to adhere to these requirements may lead to disqualification of the submission.

Papers must be electronically submitted to: Laura Coleman, University of Missouri School of Law, colemanl@missouri.edu

Submissions must be received no later than 11:59 p.m., Central time, on Monday, October 17, 2016.

Criteria

Submissions will be judged based on the following factors:

· Quality, thoroughness, and persuasiveness of analysis

· Value to scholars, faculty, students, and/or practitioners

· Contribution to the scholarship in the field.

Submissions may be considered for publication in the Journal of Dispute Resolution. The sponsors reserve the right not to name a winner if a suitable submission is not entered into the competition.

Questions should be directed to Professor John Lande at landej@missouri.edu. More information is available here.

UNIDROIT celebrates the 90th anniversary of its foundation

The International Institute for the Unification of Private Law (UNIDROIT) has recently announced the celebration of the 90th anniversary of its foundation. Established in 1926 as an auxiliary organ of the League of Nations, and re-established in 1940 on the basis of a multilateral agreement, UNIDROIT has made significant contributions to the modernisation and harmonisation of substantive private, notably commercial, law, but also to the conflict of laws and international civil procedure. In all these years, UNIDROIT has collaborated and maintained close ties of cooperation and friendship with numerous partner organisations and entities. To celebrate this momentous occasion, UNIDROIT will hold a series of celebratory events in Rome from 15 to 20 April 2016 which are devoted to the role and place of private law in supporting the implementation of the international community's broader cooperation and development objectives. *Please note that all events are accessible upon invitation only.* Further information is available here.

ICC and OAS Survey on Arbitration in the Americas

As you may (or may not) already know, a team of researchers recently concluded a study for the European Parliament on arbitration across the European Union and Switzerland. As part of this study the researchers undertook a large-scale survey of arbitration practitioners across Europe, including 871 respondents from every country in the European Union and Switzerland. The results of this survey have allowed the research team to produce far more information on the practice of arbitration in Europe than has previously been available. (see, e.g. this discussion of arbitration in six southern European countries)

A new team of researchers (Tony Cole, Paolo Vargiu, Masood Ahmed at the University of Leicester; S.I. Strong at the University of Missouri, Manuel Gomez at Florida International University, Daniel Levy at Escola de Direito da Fundação Getúlio Vargas – São Paulo, and Pietro Ortolani at the Max Planck Institute Luxembourg) is now working in collaboration with the ICC International Court of Arbitration and the the Organisation of American States to deliver a survey that will generate similar information on the practice of arbitration in the Americas. Letters of support have been received from both the ICC and the OAS. Results from the survey will be used to draft articles on arbitration in the Americas, written by the members of the research team.

The survey consists almost entirely of multiple-choice questions, and only takes approximately half an hour to complete. Moreover, it need not be completed in a single sitting, and if respondents return to the survey on the same computer and with the same browser, they can resume where they left off. The survey team will keep responses confidential and will not divulge any respondent's identity at any time without his or her explicit consent.

All response data from the survey will be stored securely under password on SurveyMonkey. All research records will be retained for a period of 7 years following the completion of the study. Responses by an individual can, however,

be deleted at any time upon request of that individual. Responding to the survey will be taken as consenting to the use of the information provided, for the purposes of drafting the articles deriving from this project.

The survey will remain open until July 11, 2016. The survey is available here.