Issue 2014.1 Nederlands Internationaal Privaatrecht

The first issue of 2014 of the Dutch journal on Private International Law *Nederlands Internationaal Privaatrecht* includes an analysis of the Brussels I Recast and the influence on Dutch legal practice, an article on Child abduction and the ECHR, and two case notes; one on the Impacto Azul case and one on the Povse case.

- Marek Zilinsky, 'De herschikte EEX-Verordening: een overzicht en de gevolgen voor de Nederlandse rechtspraktijk', p. 3-11. The English abstract reads:

From 10 January 2015 onwards the Brussels I Recast (Regulation No. 1215/2012) shall apply. Under the new regulation which replaces the Brussels I Regulation (Regulation No. 44/2001), the exequatur is abolished and some changes are also made to provisions on jurisdiction and lis pendens. This article gives an overview of the changes effected by the Brussels I Recast compared to the proposed changes in the Proposal for a new Brussels I Regulation (COM(2010) 748 final). The consequences of the new regulation for Dutch practice are also dealt with briefly.

- Paul Vlaardingerbroek, 'Internationale kinderontvoering en het EHRM', p. 12-19. The English abstract reads:

With the Neulinger/Shuruk decision in 2009, the European Court of Human Rights caused a great deal of misunderstanding and confusion among judges and academics, because in this case the ECHR seemed to protect the abductors of children and to allow them to benefit from their misconduct. After the Neulinger case some further ECHR decisions followed that seemed to compete with the fundamental purposes of the Hague Convention on child abduction, but in this paper I will try to show that in more recent cases the European Court has mitigated the hard consequences of the Neulinger/Shuruk decision and has given a new direction in how to proceed and decide when the two conventions seem to compete.

- Stephan Rammeloo, 'Multinationaal concern – Aansprakelijkheid van moedervennootschap voor schulden van dochtervennootschap: nationaal IPR ('*scope rule*') getoetst aan Europees recht (artikel 49 VWEU)', p. 20-26. Case notes European Court of Justice 20-06-2013, Case C-186/12 (*Impacto Azul*), The English abstract reads:

In June 2013 the CJEU delivered a preliminary ruling under Article 49 TfEU with regard

to the exclusion, under national law, of an EU Member State from the joint and several liability of parent companies vis-à-vis the creditors of their subsidiaries in a crossborder context. Article 49 TfEU does not prohibit any such exclusion resulting from a self-restricting unilateral scope rule under the national Private International Law of an individual EU Member State. The interpretative ruling of the Court does not, however, affect cross-border parental liability for company group members under Private International Law having regard to contractual or non-contractual (cf. tort, insolvency) liability.

- Monique Hazelhorst, 'The ECtHR's decision in *Povse*: guidance for the future of the abolition of exequatur for civil judgments in the European Union', p. 27-33. Case notes European Court of Human Rights 18 June 2013, decision on admissibility, Appl. no. 3890/11 (*Povse* v. *Austria*). The abstract reads:

The European Court of Human Rights' decision on admissibility in Povse is worthy of analysis because it sheds light on the preconditions for the abolition of exequatur for judgments in civil matters within the European Union. The abolition of this control mechanism is intended to facilitate the free movement of judgments among Member States on the basis of the principle of mutual recognition. Concerns have however been expressed about the consequences this development may have for the protection of fundamental rights. The Human Rights Court's Povse decision provides welcome guidance on the limits imposed by the European Convention on Human Rights on the abolition of exequatur. This case note analyses the preconditions that may be inferred from the decision. It concludes that the Human Rights Court's approach leaves a gap in the protection of fundamental rights which the accession of the EU to the Convention intends to fill.

ERA / MPI Conference on Arbitration and EU Law

The Academy of European Law (ERA) and the Max Planck Institute Luxembourg will co-organize a conference on Arbitration and EU Law in Trier, Germany, on March 10 and 11, 2014.

Monday, 10 March 2014

I. AFTER THE RECAST OF BRUSSELS I

Moderator: *Stefania Bariatti*

09:30 Consequences and interpretation of the arbitration exception

10:00 *West Tankers,* antisuit injunctions and beyond: recent developments and latest case law
Alexander Layton

10:30-11:00 Discussion

11:30 Brussels I and the New York Convention: recognition and enforcement of judgments and awards
Catherine Kessedjian

12:00 Discussion

Moderator: *Catherine Kessedjian*

12:15-13:00 Panel discussion: How to ensure the effective coordination of judicial and arbitration proceedings?
• *Massimo Benedettelli*
• *Alexander Layton*

II. THE CROSS-OVER BETWEEN INSOLVENCY AND ARBITRATION

Moderator: Burkhard Hess

14:00 Effects of insolvency in arbitral proceedings taking into account the Insolvency Regulation and the proposals for its review
Stefania Bariatti

14:30 Effects of foreign insolvency on arbitration seated in Switzerland
Martin Bernet

15:00-15:30 Discussion

III. PROCEDURE, MINIMUM STANDARDS AND HUMAN RIGHTS

16:00 Innovative systems for dispute resolution in sport – and in other areas?
Dirk-Reiner Martens

16:30 Procedural minimum standards and the applicability of Article 6 ECHR in

arbitration
Massimo Benedettelli

17:00-17:30 Discussion

Tuesday, 11 March 2014

IV. INVESTMENT ARBITRATION
Moderator: *Alexander Layton*

09:30 Compatibility of bilateral investment treaties (BITs) with EU law
Luca Radicati di Brozolo

10:00 Investment arbitration under extra-EU BITs
Patricia Nacimiento

10:30-11:00 Discussion

Moderator: *Luca Radicati di Brozolo*

11:30 Recent developments in investment arbitration
Maxi Scherer

12:00 Discussion

12:15 Panel discussion: Challenges and opportunities for investment arbitration
• *Patricia Nacimiento*
• *Maxi Scherer*

13:00 Lunch and end of the conference

ECtHR Rules on Return of a Child

to Her Country of Origin under the Hague Abduction Convention

On 26 November 2013, the Grand Chamber of the European Court of Human Rights (ECtHR) delivered its judgment in the case of X v. Latvia (application no. 27853/09).

The case concerned the procedure for the return of a child to Australia, her country of origin, which she had left with her mother at the age of three years and five months, in application of the Hague Convention on the Civil Aspects of International Child Abduction, and the mother's complaint that the Latvian courts' decision ordering that return had breached her right to respect for her family life within the meaning of Article 8 of the European Convention on Human Rights (ECHR).

The Court considered that the ECHR and the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 had to be applied in a combined and harmonious manner, and that the best interests of the child had to be the primary consideration. In the present case, it considered that the Latvian courts had not complied with the procedural requirements of Article 8, in that they had refused to take into consideration an arguable allegation of a "serious risk" to the child in the event of her return to Australia.

It may be worth noting that since the case concerned the relationship between Australia (as requesting State) and Latvia (as requested State), the special regime applying between member States of the EU bound by the Brussels IIbis Regulation was inapplicable. This explains that the obligations that Article 8 of the ECHR implies for the requesting State applied in this case, contrary to what was the case in Povse v Austria, where the incidence of the Brussels IIbis Regulation was at stake.

H/T: Patrick Kinsch

Latest issue Nederlands Internationaal Privaatrecht (2013/3)

The third issue of 2013 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht*, includes the usual overview of important Dutch and European case law, as well as three articles on the following topics: The functioning of the European Small Claims Procedure in the Netherlands; the EU Regulation on Succession and Wills; and Child Protection Measures against the background of Article 8 ECHR.

X.E. Kramer & E.A. Ontanu, The functioning of the European Small Claims Procedure in the Netherlands: normative and empirical reflections, p. 319-328. The abstract reads:

The European small claims procedure was the first uniform adversarial procedure in the EU, introduced to increase the efficiency and to reduce the costs of cross-border small claims litigation in the Member States. The European Commission regards this procedure as an important potential contribution to access to justice in order to resolve small claims disputes. However, there are clear signs that this procedure is seldom used and the Commission seeks to improve its attractiveness. This paper focuses on the implementation and application of this European procedure in the Netherlands. Normative and empirical research has been conducted to assess how this procedure is embedded in the Dutch legal order and how it actually functions in practice and is perceived by the judiciary. The question is whether, from the Dutch perspective, this procedure meets the objectives of providing a simple, fast and low-cost alternative to existing national procedures, while respecting the right to a fair trial. The paper concludes with several recommendations for improvement.

P. Lokin, De Erfrechtverordening, p. 329-337. The English abstract reads:

This article focuses on (EU) Regulation No. 650/2012 dealing with the jurisdiction, applicable law, recognition and enforcement of decisions and the acceptance and enforcement of authentic instruments in matters of succession and the creation of a European Certificate of Succession. Is this Regulation, which

shall be applicable to the succession of persons dying on or after 17 August 2015, a step forward for the Netherlands? In light of its application in the near future, the article gives a first introduction into the new rules and concentrates on some aspects of the Regulation which require more attention, such as the determination of one's last habitual residence and the transitional provisions when the deceased has made a choice for the applicable law prior to 17 August 2015.

R. Blauwhoff, Kinderbeschermingsmaatregelen in de Nederlandse IPR-rechtspraak in het licht van artikel 8 EVRM, p. 338-345. The English abstract reads:

Both private international law and human rights instruments may affect parental and children's rights in cross-border situations, yet reference to both types of instrument is seldom made in Dutch legal decisions regarding parental responsibilities. Accordingly, the aim of this article is foremost to explore the relationship between both types of instruments in cases other than child abduction cases on the basis of an analysis of (Dutch) case-law, since the entry into force of the 1996 Convention on the International Protection of Children (1st of May 2011) and under reference to developments in case-law of the European Court of Human Rights (ECtHR) with regard to Article 8 ECHR. It is ventured that courts should have greater regard for the human rights dimension underpinning private international law decisions, especially in cases where tension arises between the law of the state of the child's present and former habitual residence. At the same time, the classic focus of the ECtHR on the accountability of national states sometimes falls short of taking into account the progress made in the field of cross-border co-operation in the ambit of the 1996 Hague Convention, especially in the area of cross-border contact arrangements.

Civil Justice in the EU – Growing

and Teething?

This post has been jointly drafted by Gilles Cuniberti, Xandra Kramer, Thalia Kruger and Marta Requejo.

Civil Justice in the EU – Growing and Teething? Questions regarding implementation, practice and the outlook for future policy is the title of the conference held in Uppsala, Sweden, on Thursday and Friday last week, co-organised by the Swedish Network for European Legal Studies in collaboration with the Faculty of Law at Uppsala University and the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law (see Prof. Cuniberti's announcement with the program here). This has been the first conference organized by the Max Planck Institute Luxembourg outside of the Grand Duchy.

After the formal opening of the conference by **Antonina Bakardjieva Engelberkt**, Stockholm University, Chairman of the Swedish Network for European Legal Studies, Prof. **Burkhard Hess**, Executive Director of the MPI Luxembourg, delivered the keynote address, centered on the current situation of a European procedural law which transgresses the mere coordination of the national procedural systems. In the European framework the national systems do not appear any longer to be self-contained and self-standing: in many respects, European law ingresses and transforms the adjudicative systems of the EU-Member States. Today, European lawmaking often triggers far-reaching reforms of the national systems (Consumer ADR being one example). In addition, the ECJ transforms the adjudicative systems of the Member States as more and more areas of private and procedural law are communitarised and are subjected to its (interpretative) competence. On the other hand, the national procedures in the European Judicial Area are still divergent with regard to their efficiency. In this respect, the case-law of the ECHR on the right of a party to get a judgment in reasonable period of time has not helped to assimilate the level of judicial protection in the Member States. Yet, the different efficiencies of the national systems entail a growing competition among the "judicial marketplaces" in Europe which is reinforced by the European procedural instruments on the coordination of these systems.

Against this background, Prof. Hess stressed the importance of the Commissioner

for Justice. Since the entry into force of the Lisbon Treaty, the Commissioner for Justice implements a genuine lawmaking policy, not only with regard to cross-border litigation under Article 81 TFEU, but also with regard to the supervision of the national judicial systems. A new tool is the so-called judicial scoreboard aimed at the evaluation of the adjudicative systems of the EU-Member States. Although this scoreboard does not provide for substantial new information (the data are largely borrowed from the Council of Europe), the political ambition goes further: The Commission understands its mission in a comprehensive way covering all areas of dispute resolution, including the efficiency and the independence of the national court systems.

Prof. Hess went on to say the if the development of the European procedural law is regarded, not from the number of the instruments enacted so far, but from a systematic point of view, the balance would appear less successful. Until now, the law-making of the Union has been mainly sectorial and the choices of legislative activities have not been comprehensive, but rather incidental. At present, there is no master-plan, no roadmap; a comprehensive and systematic approach is lacking. This situation has been criticized by the legal literature and alternatives have been discussed and proposed. All in all, a more systematic approach with a better coordination of the EU-instruments at the horizontal and the vertical level is needed. And it is the task of procedural science to discuss the different regulatory options with regard of their feasibility and efficiency in order to improve and to systemize European law-making in this field. Thus, the Director of the MPI Luxembourg announced that regulatory approaches of the European law of civil procedural are going to become a major research area of the Institute.

The first panel, which was chaired by **Marie Linton** (University of Uppsala), carried the title ***Avoiding Torpedoes and Forum Shopping***. The four speakers focused on two topics. First, **Trevor Hartley** (London School of Economics) and **Gilles Cuniberti** (University of Luxembourg) explored whether the remedy established by the Recast of the Regulation to reinforce choice of court agreements would indeed eliminate torpedoes, whether Italian or not. While agreeing that the new remedy would probably be satisfactory in simple cases, the speakers debated whether problems might still arise in case of conflicting or complex clauses. Then, **Erik Tiberg** (Government offices of Sweden) and **Michael Hellner** (University of Stockholm) discussed the consequences of the new rules of jurisdiction with respect to third states.

The second panel, addressing alternative dispute resolution, was composed of three speakers. In his speech **Jim Davies**, University of Northampton, provided a broad historical background of the recently adopted Directive on ADR for consumers (Directive 3013/11/EU), starting from the 1998 and 2001 European Commission's Recommendations and moving on to the Commission's Proposal and the Directive's final text. Thereafter, **Antonina Bakardjieva Engelbrekt**, Stockholm University, tackled the new rules on ADR with a view to assessing how these new provisions provide a further step toward network governance in EU consumer protection policy, especially highlighting the role of consumer organizations. Finally, **Cristina M. Mariottini**, Max Planck Institute Luxembourg, addressed two ADR systems concerning disputes over top level domains, and namely ICANN's New gTLD program and dispute resolution system and EURid's ADR system for disputes concerning the ".eu" domain, with a view to assessing whether and to what extent the protection of consumers has been kept into consideration within these systems.

The third panel, entitled *Simplified procedures and debt collection – much ado about nothing?,* brought together four speakers. **Mikael Berglund** (Swedish Enforcement Authority) noticed that the European enforcement order and the European order for payment procedure are not frequently used in Sweden; on the European small claims procedure there are no reported cases at all. He explained that creditors do not find it worth the time and money because there is no reliable information on the debtor's assets in other Member States; also, that they have problems finding the competent enforcement authority. He presented several practical ideas to cure the enforcement 'Achilles' heel' of EU law. **Carla Crifó,** of the University of Leicester, provided information and several – limitedly available – data on the implementation and enforcement of the European order for payment procedure and the small claims procedure in England and Wales. This shows that little use is made of these European procedures. In this context, Ms Crifò stressed the problem of the use of English in European instruments which does not necessarily correspond to the legal terminology used in the United Kingdom. English courts and practitioners are usually not well-acquainted with these procedures. Against the background of the current "euroscepticism" in England, this situation is not likely to improve. **Xandra Kramer,** of the Erasmus University (Rotterdam)**,** addressed the potential of the uniform European procedures in view of their scope and limitation to cross-border cases. She presented data on the use and appreciation of these procedures in the Netherlands acquired in empirical

research and gave recommendations for improvement. Though particularly the use of the European small claims procedures is disappointing up to date, she stressed that one should not be too pessimistic since the European procedures are very new compared to national procedure and the building of a well-functioning European procedural order will take time and efforts. **Cristian Oro Martinez**, from the MPI Luxembourg, reviewed some of the aspects of the Regulation on the European Small Claims Procedure which, besides the general lack of awareness of the instrument, may account for its relatively small success. These issues include, among others, problems such as the territorial scope of application of the Regulation (narrow definition of cross-border cases), the limitation of the right to an oral hearing with regard to non-consumer cases, or the problems arising out of the interface between the Regulation and other EU instruments (especially the Brussels I Regulation), as well as domestic procedural law

Two other panels took place simultaneously after the coffee break, on Family Law and Collective Redress respectively. The first one was composed of three speakers. **Katharina Boele-Woelki,** of Utrecht University, discussed the issue of partial harmonisation, referring to the example of the Rome III Regulation. As today, only 16 of 28 Member States are participating in the Rome III framework. She indicated the different political reasons underlying Member States' choices whether to participate in the Regulation or not. She also showed that fragmented harmonisation is not only the result of enhanced cooperation, but also, in other instruments, of the particular status that some EU Member States (Denmark, Ireland and the UK) have with respect to civil justice. Thus, the application of enhanced cooperation in the Area of Freedom, Security and Justice is a matter of concern. Thereafter **Thalia Kruger,** of the University of Antwerp, discussed the element of choice in the Rome III Regulation, showing that a rule that looks clear at first sight has many underlying uncertainties. The debate raised the issue of how habitual residence can be ascertained as a preliminary matter for purposes of jurisdiction, without requiring too cumbersome an investigation by the judge (with a waste of time as a result).

The third speaker, **Björn Laukemann** of the Max Planck Institute in Luxembourg, addressed the issue of the new Succession Regulation and the European Certificate of Succession. The debate on the subject pointed out the problem of EU certificates that remain valid for only six months, while some

national certificates, which will co-exist with the EU certificates, are eternally valid. Another question related to this co-existence is the issue of contradictory certificates (EU and national).

The second track of the fourth section addressed some issues relating to collective redress, especially in the light of the Commission's Recommendation of 11 June 2013. **Eva Storskrubb**, from Roschier, assessed the potential impact of the Recommendation highlighting that, although it is non-binding, its rather prescriptive formulation and the Commission's commitment to review its implementation by Member States may entail significant changes in the domestic regulation of collective actions. **Rebecca Money-Kyrle**, from the University of Oxford, addressed some possible consequences of the Recommendations' approach to legal standing. She pointed out that the basic principles set out in the text may force to do away with existing domestic procedures which are efficient. Moreover, they fail to establish satisfactory rules as regards commonality criteria or cross-border cases. **Laura Ervo**, from Örebro University, provided several arguments to support an opt-out approach to collective redress, hence critically assessing the Commission's Recommendation in this respect. She drew from models provided by Scandinavian legislation, especially the Danish authority-driven system, to support the idea that only opt-out can guarantee access to justice for all damaged parties. Finally, **Stefaan Voet**, from Ghent University, dealt with different systems of funding of collective actions. He evaluated their compatibility with the principles laid down in the Recommendation on lawyers' remuneration and third-party funding, critically assessing the latter for being sometimes too strict.

Under the heading *The Quest for Mutual Recognition,* with Dean **Torbjörn Andersson** as chairman, the first panel of Friday morning discussed several issues related to mutual trust and mutual recognition. **Marie Linton**, from the Uppsala University, addressed the balance between efficiency and procedural human rights in civil justice, particularly in the field covered by the Brussels I Regulation and under the future Brussels I bis Regulation. **Marta Requejo Isidro**, MPI Luxembourg, presented the ECtHR decision of 18 June 2013, *Povse*, pointing out questions that remain open after it. As for the most important, i.e., its possible influence on the abolition of exequatur in civil and commercial matters, Prof. Requejo adopted a somewhat skeptical position on a wide reach of the ECtHR decision, both in the light of the features characterising

the Brussels I bis Regulation (although it may still be disputable to what extent there is room for discretion at the requested State), and the reasoning of the Court itself. Finally, **Eva Storskrubb**, Senior Associate, Roschier (Stockholm), dealt with the evolution of mutual recognition as part of a regulatory strategy comparing its Internal Market historical context with the current civil justice context.

The conference ended with a presentation of Future Measures and Challenges by Mr. **Jacek Garstka**, Legislative Officer, DG Justice, European Commission, and **Signe Öhman**, Legal Counsellor, Permanent Representation of Sweden, Brussels. Announcements were made regarding the immediate release of several Commission's Reports – among others, on the Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure; on Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), and on the Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000. Mr. Garstka also referred to future areas of concern for the Commission, such as justice as a means to enhance economic growth, the legal framework of insurance contracts, and the area of insurance law. Ms. Öhman recalled the forthcoming end of the Stockholm program, and ventured an opinion on the follow up. She also pointed out some topics on the Council agenda -data protection, the rights of citizens, judicial networking… This panel was chaired by **Prof. Antonina Bakardjieva-Engelbrekt**, Stockholm University, who pronounced the closing remarks.

Povse v. Austria: Taking Direct

Effect Seriously?

Dr. Rafael Arenas García is Professor of Private International Law at Universitat Autònoma de Barcelona

Perhaps one of the most difficult questions in International Law is the relationship between international conventions. States must comply with the obligations established in the treaties they are bound by. All the parties to the treaty are entitled to require the application of the treaty, which is compulsory for them. A problem arises when a State is bound by more than one treaty, and compliance with of one of them implies the violation of another one. Art. 30 of the Vienna Convention on the Law of the Treaties sets rules to avoid the problems linked to the coexistence of treaties, but these rules do not suffice to solve all the difficulties which may arise. Let's take the case of two conventions to which only a few States are simultaneously parties. According to the Vienna Convention, when the parties to the later treaty do not include all the parties to the earlier one, "as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations". In other words, if State "A" is bound by treaty "1" with State "B", and by treaty "2" with State "C", "A" must apply treaty "1" in its relations with State "B" and treaty "2" in its relations with State "C". However, sometimes this is simply not possible; both treaties apply simultaneously, and compliance with one of them implies the immediate breach of the other.

At first sight, this was the situation in *Povse*. The enforcement in Austria of the Venice Youth Court's return orders allegedly violated art. 8 of the ECHR; at the same time, it had to be granted according the EU Regulation 2201/2003. The conflict between the international obligations arising from EU law and from the European Convention seemed unavoidable; Austria had to decide between two international obligations. It was not possible to correctly apply both the European Convention and the European Union Regulation.

Of course, as the ECtHR decision in *Povse* shows, this is not completely true. The ECtHR has interpreted the Convention on Human Rights in a way that resolves the contradiction between the Convention and EU Law; according to the Court, a Contracting State fulfils its obligations as a member of the Convention when it simply complies with its obligation as member of an international organisation to

which it has transferred a part of its sovereignty, provided that the international organisation "protects fundamental rights (…) in a manner which can be considered at least equivalent (…) to that for which the Convention provides". However, I am still interested in showing how the contradiction between the Convention on Human Rights and EU law works, in order to fully understand the meaning of the case law of the ECtHR.

There are cases in which compliance with European Union law implies a breach of the European Convention. From a pure Public International Law perspective, the breaching State incurs in international responsibility. There is also an internal perspective. International treaties are part of the internal law of the State, and judges, authorities, and the public in general must observe, respect and apply them. How do they deal with the contradiction between different treaties? How do judges, authorities, etc., comply with EU law and with the ECHR in case of a conflict? This is not an easy question. If we only take into consideration the internal law of the States and international law, the answer is that each State decides in which way international law is implemented by its authorities and courts; national courts are bound by the domestic provisions on the internal effect of international law. However, the answer is not exactly the same when it comes to EU Law: at least, if we take the direct effect of EU Law seriously. As the ECJ has already held, EU law confers rights to individuals which the courts of Member States of the European Union must directly recognise and enforce. This means that the courts of the Member States are directly bound by EU law. State law is not needed for the direct application of EU law to be achieved. That is the reason why some academics have held that the courts of the Member States should be seen as Courts *of the European Union* when they apply EU law (see A. Barav, "La plenitude de competénce du juge national en sa qualité de juge communautaire", *L'Europe et le Droit. Mélanges en homage à Jean Boulouis*, Paris, Dalloz, 1991, pp. 93-103, pp. 97-98 and 103; D. Ruiz-Jarabo Colomer, *El juez nacional como juez comunitario*, Madrid, Civitas, 1993).

If Member State courts are to be considered not as national courts, but as EU courts, when they apply Union law, a breach of the ECHR arising out of the application of EU law by a national court should not be attributed to the State, but to the EU itself. It would not be coherent to admit the direct effect of EU Law and, at the same time, to hold that Member States are liable for a breach of the ECHR arising out of the application of EU Law by their national courts.

Of course, the point of view I have just explained is far from being the common understanding of the relationship between EU Law and the ECHR. Nevertheless, maybe the way in which the European Court of Human Rights has dealt with the contradiction between EU law and the European Convention on Human Rights in *Povse* is nothing but a consequence of the impossibility to put the blame on the State for the "mistakes" of EU law. Perhaps when the EU becomes a member of the European Convention on Human Rights this will be more evident – maybe then we will realise that, in cases like *Povse*, the complaint ought to be addressed to the EU and not to the Member States.

Muir Watt on Abolition of Exequatur and Human Rights

Horatia Muir Watt is Professor of Law at Sciences Po Law School

I. Framing the child-return issue. Several recent cases handed down by the two European Courts appear to be opening new vistas for conflicts of laws, in which human rights play a large part. The cases are well-known (ECJ/CJUE *Aguirre v Pelz* 2010*;* ECtHR *Sneersone & Sneersone & Kampanella v. Italy* 2011*, Povse v. Austria* 2013). They concern cross-border child abduction, and, more specifically, "fast-track" orders for the return of the abducted child, made by the (national) court of the child's pre-abduction residence under article 11 (8) of Regulation Brussels II bis. This provision was designed to avoid the effect of delaying tactics by the abducting parent, which were progressively becoming systematic by virtue of article 13(b) of the 1980 Hague Convention (allowing the authorities of the country to which the child has been abducted, to refuse exceptionally to order the return if to do so would be to expose that child to a serious risk of harm). To this end, the fast-track return order is immediately enforceable, notwithstanding the resistance of that local court (hereafter, the court of the "country of refuge"). The difficulty, addressed partially by each of the cases above, concerns potential collision between the "notwithstanding" provision of article 11 (8) and with both procedural (6-1 ECHR, including the right of the

child to be heard; article 24 EU Charter) and substantive (article 8 ECHR) human rights requirements.

This situation is particularly complex because it involves the articulation, in an identical dispute arising out of the same set of facts, of the two European legal orders. While both guarantee fundamental rights on the basis of constitutional provisions (EU Charter and ECHR), among which the rights of the child are accorded the utmost supremacy, they may not share a methodology in the assessment of the existence of a violation, nor give exactly the same weight to the various factors which weigh into the process. This is the context in which the "*Bosphorus* presumption" (ECtHR *Bosphorus v. Ireland* 2005), which allows an overlapping consensus between the two universes, is now brought into the equation (*Povse*). Meanwhile, back down among the national courts, local judges – sometimes "siding" with the parent who is the national or domiciliary of their jurisdiction and who prefers to litigate to the bitter end rather than let the other win on the (theoretically) preliminary issue of where the merits of the custody dispute is to be decided – have to decide this mega-conflict between two supra-national regimes which both purport to promote the interests of the child! The child is often the prime victim of all this. To my mind, the real problem may well lie with the whole design of the cross-border child-return system, which focuses on the restitution of the abducted child before the custody dispute can be decided on the merits. While a highly creative idea at the outset, its undoubted potential to absorb tension when the parents are cooperative is as great as the risk of amplification of conflict it carries with it when they are not. See the sheer length and number of procedural incidents in the *Povse* case (which led to a first preliminary ruling under Brussels II bis by the ECJ before the case was lodged with the ECtHR).

However, although Gilles Cuniberti mentions the *Povse* case in his opening lines to this symposium, the question for debate is framed in more general terms as concerning the abolition of exequatur (within the EU) and human rights. Therefore, beyond child return issues, it can be understood to be about the primacy either of the new, highly efficient, nuclear missile which has emerged progressively in recent EU secondary legislation (direct cross-border enforceability of a court order without intermediary enforcement proceedings), or of the ultimate joker of fundamental rights (which will be invoked in the very forum that has been by-passed by direct cross-border enforcement). So I'll start

with the larger picture, which, in addition to Brussels II bis, extends to Brussels I recast, and various other instruments that have abolished the formality of *exequatur* or enforcement proceedings (alimentary obligations, TEE, small claims…). Thoughts on the circulation of debt may be helpful for reflecting upon the more sensitive issues relating to children.

II. The wider picture. Much of the literature on the abolition of exequatur within the European Union under, or in anticipation of, Brussels I recast, turns on whether or not it implies a significant reduction in the protection due to the fundamental rights (particularly procedural rights, which will therefore be the focus of the remarks below), of defendants. In other words, in re-establishing the balance in favor of the creditors of the internal market, who have traditionally suffered from the partitioning of national spheres of enforcement (including the costs of bringing even informal enforcement proceedings), have the tables turned too far in the opposite direction, in diminishing the guarantees due to henceforth vulnerable defendants? According to many accounts, abolishing the intermediate procedural filter of *exequatur* creates a significant risk of free-wheeling misfit-judgments, of which, when the floodgates are opened in 2015, the defects will be amplified by their cross-border effects.

A first observation is that in assessing this risk, the strength of assertions on either side contrast with the scarcity of empirical findings, as to its extent. We have, for instance, the Commission's own statistics for the (small) number of effective appeals against enforcement orders (under the existing provisions of Brussels I), according to which it made sense to abolish the remaining procedural formalities (article 38 s. Brussels I). On the other hand, we also have an idea of the very large number of cases in which Member States have been called for account for procedural faults, either in Strasbourg, in Luxembourg, or in the shadow of either in domestic cases in national courts. In the specifically transnational sphere, many of the usual suspects are various forms of transnational injunctive relief, which have met with the disapproval of the ECJ itself (*Krombach* 2000*, Gambazzi* 2007…). But such cases can be used to demonstrate either the escalation of vitiated judgments with transnational effects, or the inevitable cultural determination of core standards of fairness. That is not to say that there will not always be (more or less) occasional duds among the number of judicial decisions produced by any legal system; that is precisely indeed why fair process requires allowing an appeal. However, the question here

is specifically whether the risk of being subject to misjudgments from another country is greater with or without exequatur.

The political terms of the debate are also complex. For instance, while France has produced its highly predictable strain of critique against any European Union initiative, which though probably accurate in some instances would be more credible if it were not so frequently histrionic or indeed couched in the language of fantasized or quaint accounts of parliamentary democracy, the detractors of Brussels I are now calling for *more human rights protection*, which of course leads them from Scylla to Charybdis, to the extent that the latter are usually denounced, in private international law and beyond, as a worse methodological sin than the former. Interestingly, the focus of the new ire is no longer a defense of the idiosyncratic play of national public policy, but the safeguard of the due process requirements of the ECHR. *Allez savoir!*

Moreover, many of the historical and contextual arguments voiced in this context can be unhelpful. The main theoretical support for exequatur appears to be that free movement of judgments assumes their interchangeability, as does a market for non-judicial products; in a world composed of legal systems of very variable quality or content, producing equally heterogeneous judgments, exequatur thus fulfills the leveling function of a lock. However, such a function was constructed at a time when there was no supervisory device ensuring procedural (and indeed substantive) guarantees "from above" (that is, based on the ECHR or, where applicable, the EU Charter), nor indeed any common standard as to their content; a horizontal filter of incoming decisions supplied by exequatur or enforcement proceedings was therefore, naturally, put into place in each national forum, on the basis of highly variable conceptions of procedural and substantive fairness. The origins of the whole Brussels jurisdiction and judgment system are to be found in the supposed costs that this variation created for those supplying credit in the internal market (at a time when Member States also used purely jurisdictional criteria as part of the filter). In retaining *exequatur*, if only as a formality, the existing Brussels I Regulation still adheres to a similar logic.

The shift wrought by the new regime in Brussels I recast is therefore a form of trade-off, made possible by the fact that each domestic court is deemed accountable *within its own legal system* in respect of the content of fair trial resulting from article 6-1° ECHR. Every court of origin, in handing down a judgment, is committed to respect *ex ante* the very same guarantees that can at

present (under the existing Brussels I) be invoked additionally *ex post* in *exequatur* proceedings (or more accurately in appeal therefrom). Thus, the question is: does the reshuffling of the places of control, which under the new regime means that any challenge to the procedural fairness of a judgment or public act is to take place *ex ante* in the country of origin, and not *ex post* in the courts of the place of enforcement, potentially reduce fundamental procedural rights protection?

At this stage it is also worth pointing out that the emergence of a common core of procedural standards under article 6-1° ECHR put an end to the traditionally "attenuated" form of public policy control which had hitherto been associated (as such, or as an expression of *Inlandbeziehung*) with the recognition and enforcement of foreign judgments, at least as far as procedural guarantees are concerned. In other words, the enforcing state is bound by exactly the same standards (of which, however, the open-endedness subtly precludes absolute identity of procedural rules) as the state of origin. These are indeed applicable in full to judgments from third states (see ECJ *Pellegrini* 2001). Within the European Union, the question is once again how far maintaining only one set of controls, *ex ante* in the state of judgment (rather than two sets, of which one in the enforcing state under identical standards), implies a reduction of the level of protection for potential debtor-defendants. In other words, how far is the second control *ex post* actually useful as a human rights safeguard, and to what extent is it parasitical in terms of costs to (both) parties?

The statistics upon which the Commission acted seem to indicate that it is not indeed indispensable, since exequatur orders give rise to appeals infrequently. But the debate continues. Thus, even if the statistics hold true across the board (are they really significant beyond small or uncontested claims?), there may be additional advantages attached to the existence of an intermediary procedure. One of these might be an important element of inter-systemic judicial dialogue which works to boost human rights protection ("outsiders' insights", to use the phrase of Basil Markesinis): look, after all, what it took in *Krombach* to challenge the civil effects of *contumace* in French (criminal) procedure. It may be, on the other hand, that given the large corpus of common standards which have developed since 2000 in the case-law of the ECtHR on the basis of article 6-1° ECHR, such an argument is becoming increasingly irrelevant; after all, lawyers are far more accustomed now to invoking such case-law within domestic settings,

so that the time may have come to dispense with an external source of challenge and concentrate on efficiency.

But what if (exceptionally?), nevertheless, a vitiated judgment slips though the net? Part of the answer lies with the power of the court at the place of enforcement to refuse to give it effect. In the case of Brussels I recast, articles 46 et seq allow both preventive and remedial opposition to mis-judged foreign judgments, thereby transferring to the enforcing judge the control exercised until now in the course of (on appeal from) *exequatur* proceedings. The grounds for opposition (article 45) are indeed the same and allow for refusal of enforcement for both (exceptional) substantive (a) and procedural (b) reasons. What was the point of so much ado over the "recast", then, one might ask? Certainly, in the end, the burden of initiating the unforceability proceedings shifts to the defendant. Nevertheless, under the existing system, it is also the defendant who shoulders the (lesser?) weight and cost of the appeal against the *exequatur*. The result is probably similar, therefore, no better no worse, than within the previous framework.

However, *whether or not in the latter context*, there is always a possibility (arguably – though not necessarily convincingly – amplified by this shift), that the requirements of article 6-1° may not be satisfied nevertheless, following an unsuccessful attempt to oppose such enforcement before the local court. At first glance this might give rise to a risk of the type encountered in the child abduction case *Sneersone & Kampanella* cited above, where insufficient regard to the fundamental rights of the abducting parent or child by the original pre-abduction home court, ordering an immediately enforceable return, created not only a cause of refusal but also a jurisdictional-procedural incident unprovided-for by Brussels II bis' fast-track procedure. However, the analogy may not be as clear-cut as it might seem at first glance since, in the latter context, the *whole point* of the fast-track is that it is intended to eliminate all obstacles to the enforcement of the initial cross-border return order along the way, in the name of the superior interests of the child. Whereas, in the context of Brussels I recast (as far I can see), the local enforcement procedure would appear to make all the difference, by providing an opportunity to resist a foreign judgment on fundamental rights grounds (at least those covered by article 45), as a last resort. Much, therefore, turns on this local enforcement procedure; the cases in which no such procedure exists (alimentary obligations, TEE..) may be more dicey. Be that as it may, in the

context of Brussels I recast, I'm not convinced that in terms of loss of protection of defendants' fundamental rights, the change is as big a deal as is sometimes made out (although of course – no sooner said than done – practice will probably come up with a morally inacceptable cross-border small claims case…).

III. Now for the real difficulty. By contrast, article 11 (8) Brussels II bis provides for a return order by the pre-abduction home court, *notwithstanding* a judgment of non-return by the court at the place of enforcement; in other words, the fast-track is designed to by-pass resistance in the country of refuge, where the abducting parent seeks to keep the child (by virtue of article 13b 1980 Hague Convention). This provision takes the speediness of return to be of the essence, in the name of the best interests of the child, whatever the risk invoked under article 13b. The stakes are (merely) jurisdictional here: ultimately, it is for the court of the child's pre-abduction home to decide, where appropriate, on the substantive custody issue. However, the need for speed, and the (merely) restitutionary nature of the return, are no apology for sloppy process. Because the nuclear weapon inscribed in article 11(8) suffers no further procedural delay before the child is effectively returned home, it is counterbalanced by the particular duty of the home court under article 42 Brussels IIbis to ensure, before ordering the child's return notwithstanding the refusal of the court of the country of refuge, that the reasons for such refusal have been properly considered (at stake in *Sneersone & Kampanella*) and the child heard, unless inappropriate (at stake in *Aguirre*). If the home court does not do so, or does so unsatisfactorily, it is open to the applicant to challenge the order – including through an individual application to the ECtHR (as indicated in *Povse*).

But can the human rights joker still be played, as a last resort, *at the place of enforcement* (in the country of refuge)? Or is such a possibility, which has obvious implications for the allocation of jurisdiction, excluded by the very architecture of the fast-track, in the name of the child's own best interests? The answer, taking account of the positions of both European courts, is a bit of both, in a subtle dosage of which national courts will now have to take account. What is particularly complex is that the human rights complaint (typically for violation of article 8 ECHR) may involve an issue of access to relief *in the country of refuge*, that is, a question of international jurisdiction, which is one and the same as that of the procedural (or indeed substantive) guarantees due to the child and/or the abducting parent.

In *Aguirre (*as indeed in its own preliminary ruling in *Povse)*, the ECJ/CJUE allows no exception to the concentration of jurisdiction at the child's pre-abduction home – including for the purposes of human rights protection, deemed explicitly to be effective here (§69) by reason of locally available remedies despite the fact that the child and abducting parent are precisely elsewhere. On the other hand, in *Sneersone & Kampanella*, the ECtHR allows the human rights joker (article 8 ECHR) to be raised at the place of enforcement (country of refuge). Then, however, in *Povse*, the *Bosphorus* presumption of "equivalent protection" weighs into the equation. This presumption is conceded by the ECtHR in the name of inter-judicial comity "so as to reduce the intensity of its supervisory role" and avoid putting national courts in the distressful situation of having to choose between competing international obligations. In *Povse*, it was held that nothing justified a rebuttal of the presumption in the case of the applicants' claim (article 8 ECHR) within the framework of Brussels II bis. How does all this fit together? It is probably clearer if one distinguishes two different, successive, issues.

(1) The first is whether the lack of recourse *per se* (abolition of exequatur), as a structural feature of the fast-track procedure, deprives the child of adequate protection (as claimed for instance by the applicant in *Povse*).

– In *Aguirre (*as in the *Povse* preliminary ruling), the ECJ judges that the fact that challenges to the return order are all to be raised exclusively in the country of origin does not run counter to article 24 of the Charter, in the light of which article 42 Brussels II bis has to be read.

– While the ECtHR endorses this result (in *Povse*), it is by virtue of a line of reasoning in two steps.

(i) Firstly, the "*Bosphorus* presumption" is applicable because under article 11(8) Brussels IIbis, the court of the country of refuge, having no choice but to order the return of the child, exercises no discretion (see ECtHR *MSS* 2011). Moreover, the ECJ/CJEU had already considered (as would have to be the case under ECtHR *Michaud v France* 2012, §114 et s.) the *specific* issue of the compatibility between article 11 (8) Brussels II bis and the article 8 Convention right to a family relationship (it having judged in its own preliminary ruling in the *Povse* case that the availability of an appeal on the basis of article 8 before the courts of the pre-abduction home country was sufficient protection: see on the CJUE's position, ECtHR *Povse,* §85). Given these two factors (no discretion and prior decision of

the CJUE), the protection accorded to the right claimed under the ECHR is deemed by the ECtHR to be equivalent, under the *Bosphorus* presumption, to the protection afforded by Brussels II bis; the jurisdiction of the home court remains exclusive.

(ii) Secondly, there is no showing here, in the specific context of the *Povse* case, that the presumption should be rebutted. The decisive reason seems to be that the applicants did not even attempt to avail themselves here of the opportunity of challenging the order in the court of origin (ultimately, if necessary, by lodging an application with the ECtHR if such an attempt were to fail). This circumstance is clearly salient precisely because the availability of an appeal on the basis of article 8 ECHR in the home country is taken to be the reason for which the *Michaud* requirement (relating to the CJEU's own confirmation of adequate protection in respect of the right invoked) is fulfilled here (see above). Implicitly, according to the *Bosphorus* line of reasoning, there is an exhaustion-of-local-remedies condition, that does not – of course – preclude a challenge to the return order at the place of enforcement, *if all else fails*.

(2) Considering, then, that the presumption is rebuttable (even if not rebutted in *Povse*), would it still be possible to raise a human rights joker before the courts of the country of refuge (as in *Sneersone & Kampanella,* decided before *Bosphorus* was brought into the equation) if, in a particular case, the (pre-abduction home) court ordering the return did not deal, or dealt inadequately, with the human rights challenge? Under *Bosphorus*, the rebuttal of the presumption of equivalent protection would have to meet a particularly rigorous standard of proof of the violation (§156 *:* a "manifest deficiency" of protection) in a particular case in order to justify that the constitutional values of the ECHR prevail over the interests of international cooperation. In principle, however, if it could be shown that despite exhaustion of all available remedies in the pre-abduction home country, the protection of child's (or a parent's) right has nevertheless been severely hampered, this would then still seem to imply, as in *Sneersone & Kampanella*, that there would be a right of access to the court of the place of refuge, and grounds for a refusal of enforcement of the notwithstanding order by such court. However, since the exhaustion of remedies in the home country would include (again, as indicated in *Povse*) an application to the ECtHR itself, it would only be if for some reason the access to such remedy proved to be impossible that the access argument could be made effectively in the courts of the country of

refuge. Of course, it also appears from *Sneersone & Kampanella* and *Povse* combined, that in most (all?) cases, had the return order been effectively challenged locally and had the courts of the pre-abduction home country (on appeal) carried out their obligations under article 42 Brussels II bis (and the Charter), there would be no need – and indeed, by the same token, no right – to call for help from the courts of the country of refuge under the ECHR.

In the meantime, the policy problem is whether the current child-return system, designed to ensure against (assumedly) opportunistic forum shopping by the abducting parent, really works to further the best interests of the child. It may be that the current litigation inflation is transitional and that, once stabilized, the system will work more satisfactorily, with less collateral damage. Arguably, however, the multi-level jurisdictional scheme may have become too unwieldy, and whether or not it now weighs too heavily in favor of the non-abducting or stay-at-home parent (see *Kampanella*), such violent and probably costly legal battles can only be detrimental to the child. While on the one hand Brussels II bis supports speedy return in the name of the child's interest *in abstracto*, on the other, the circumstances of particular children in individual cases, to which the ECtHR directs its attention, often point in a different direction. These two opposite viewpoints, which also correspond to two competing epistemological schemes in the two European courts' patterns of reasoning, may indeed be at the very heart of the new mega-conflict-of-laws.

Requejo on Povse

Introduction

The accession of the European Union (EU) to the European Convention on Human Rights is proving difficult. PIL has not been spared.

In the field of recognition the biggest concern was not long ago represented by the conflict between the ECtHR decision in *Pellegrini*, and the European will to eliminate the intermediate procedure to declare the enforceability of foreign judgments – replacing the conditions usually required at the State where

enforcement is sought by some controls operated in the Member State of origin. If *Pellegrin*i was to be followed, the unconditional system of recognition set in Art. 42 of the Brussels II bis Regulation would be incompatible with the ECHR. That the ECtHR decision in *Pellegrini* has been put forward as an argument against the abolition of the exequatur in the Commission proposal to recast Council Regulation (EC) no 44/2001 does therefore not come as a surprise; nor do the efforts by Member States designed to limit the effects of *Pellegrini* case (for instance by way of considering the decision of the ECtHR limited to cases where the State of origin is not a contracting State of the ECHR).

At first sight, the ECtHR decision to the application nº 3890/11, *Povse v. Austria*, based on the *Bosphorus test*, is the bridge to reconcile the positions.

Bosphorus test as applied to Povse

The so called *Bosphorus* test is based on the following premise: contracting States transferring sovereign powers to an international organization retain responsibility for the acts of their organs, "regardless whether the act or omission was a consequence of domestic law or of the necessity to comply with international obligations". However, in as far as the international organization "is considered to protect fundamental rights (…) in a manner which can be considered at least equivalent to that for which the Convention provides", a presumption that the contracting State has complied with the ECHR enters into play, if he lacked discretion in relation to the obligations derived from his membership to the international organization. Therefore, a three-step exam in needed in order to determine whether there is equivalence between the protection offered by the Convention and the international organization at stake (step 1), and the degree of freedom of the concerned State (step 2); finally, the arguments against the presumption of equivalence in the specific case must be discarded (step 3).

Step1 in Povse: *Whether the relevant organization is considered to protect fundamental rights*. In the *Povse* decision this point is dealt with exclusively in par. 77, in such a manner that it is not only superficial, but inexistent (see the *Bosphorus* decision, num. 159-165, remitting to 73-81). This is not only striking, but disappointing. First, because as of today, i.e. at the relevant time of the analysis, the existence of truly "substantive guarantees" offered by the EU as a unit (instead of as a bunch of diverse systems striving for coherence), is not self-

evident. Second, because the real issue at stake is precisely that of the compatibility between the ECHR and the guarantee's system provided by the EU in Regulation Brussels II bis: a system where the protection of the fundamental rights rests exclusively on the Member State of origin. By considering the ECJ as single key element of the control mechanism, the ECtHR avoids the issue; at the same time, it narrows the reach of its pronouncement. The ECtHR's approach may be explained in different ways, starting with the actual submission of the applicants: they contested the "equivalent protection" only by reference to the role of the ECJ in the present case. It should be added that the *Bosphorus* test has been used by the ECtHR on several occasions, in a way that may be considered consistent but not necessarily uniform, precisely because the different degrees of depth of the ECtHR's exam in order to affirm or to deny the equivalence of the protection offered by the international organization under review.

Step2 in Povse: Discretion. There was no discussion as regards Austria's lack of discretion under Art. 42 of the Brussles II bis Regulation.

Step3: Whether the presumption has been rebutted in the present case. In contrasts to step 1, the analysis here was performed extensively. Two elements seem to be essential: the role of the ECJ defining the applicability and interpretation of the relevant legal provisions (par. 85); and the *status quo* before the court of origin (the opportunity open to the applicants to still rely on their Conventions rights there: par. 86). The importance given to those issues legitimates further questions. To start with, what would happen in the absence of consultation of the ECJ? On the one hand, the stress put by the ECtHR in the ECJ's role suggests that the answer would have been different in the absence of a preliminary ruling (or at least, of a referral by the national court, even if rejected by the ECJ).On the other hand, the ECJ's ruling in the aff. C-211/10, stating that any change in the situation of the abducted child with consequences on the return order must be pleaded before the competent court in the Member State of origin, creates a legal precedent for all member States, therefore exempting them from referring new queries on the same subject.

As for the second element retained by the ECtHR (the *status quo* in Italy), would its decision have been the same had the applicants exhausted their resources before the Italian courts without success? In the light of par. 86, the likely answer is yes. Presumably, this would also be the answer in the case of a complaint addressed, either simultaneously or consecutively, against two respondent States

–the State of origin, and the Stated where enforcement is sought-, even if the ECtHR declares the first one in breach of the Convention when applying Art. 11 (8) the Brussels II bis Regulation (which is not a hypothetical situation: see *Sneersone and Kampanella v. Italy*).

Consequences

An interpretation of *Povse* in the sense that it sanctifies the Regulation mechanism of fundamental rights protection would result in the immunity of the State where enforcement is sought. In return, it places the ECtHR applicants in an uncomfortable situation when formulating their complaints: they must be very be cautious and select the correct respondent State. Special care and legal knowledge, improbable in the average individual applicant (representation before the ECtHR is not compulsory), will be required.

Bosphorus+Povse applied to Regulation 44/01 (and Regulation 1215/2012)

What would be the likely outcome of the *Bosphorus* test if applied to other UE PIL instruments, such as the Regulation 44/01 or the Brussels I recast Regulation? According to both instruments (albeit following different ways) the requested State is allowed to refuse the declaration of enforceability if specific, restricted grounds provided by the Regulations themselves are present; in particular, if such declaration is manifestly contrary to public policy. Thus at first glance, the answer is that these cases are not eligible for the *Bosphorus* presumption (However, it is so to the extent that the States have discretion when implementing the legal obligations steaming from their membership; whether this is the case as regards public policy may be discussed in the light of *Krombach* and *Gambazzi*).

UE accession to ECHR

EU accession to the ECHR means the end of the *Bosphorus* test. Admittedly, the equivalence presumption in favor of the EU itself is no longer justified. However, it is worth considering whether it should not survive in the context of the analysis of a Member State compliance with the Convention, if he had to blindly obey a mandate of the EU; indeed, the presumption of equivalence makes more sense because the UE accession to the ECHR. In this context, provided that no ECtHR's decision has yet been pronounced against the EU, maintaining a rebuttable presumption of equivalence would simplify the applicant's choice of the correct

respondent (see 3).

Online Symposium: Abolition of Exequatur and Human Rights

In June, the European Court of Human Rights ruled in *Povse v. Austria* that the abolition of exequatur was compatible with the European Convention of Human Rights, and that the mechanism introduced by the Brussels IIa Regulation was not dysfunctional from the perspective of the Convention.

In December 2010, the Court of Justice of the European Union had also ruled in *Joseba Andoni Aguirre Zarraga v. Simone Pelz* that the allegation of violation of fundamental rights should not prevent the free circulation of judgments under the Brussels IIa Regulation.

For several years, European scholars debated whether the project of the European Commission to abolish exequatur and to suppress the public policy exception would comport with Member States ECHR obligations. Many thought that it would not. Member States eventually successfully resisted the project which was not adopted in the Brussels I Recast.

From this week-end onwards, *ConflictofLaws.net* will organize an online symposium on Abolition of Exequatur and Human Rights. Scholars from different jurisdictions will share their first reaction on the *Povse* judgment and on its consequence on the evolution of European civil procedure. Readers interested in participating may either contact directly the editors or use the comment section.

- Requejo on *Povse*
- Muir Watt on Abolition of Exequatur and Human Rights
- Arenas Garcia on *Povse*: Taking Direct Effect Seriously?
- Gascon on *Povse*: a Presumption of ECHR Compliance when Applying the European Civil Procedure Rules?
- van Iterson on *Povse*: a Legislative Perspective

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (4/2013)

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

- ***Bettina Heiderhoff***: "Fictitious service of process and free movement of judgments"

When judgments or court orders are to be enforced in other member states, it is an essential prerequisite that the defendant was served with the document which instituted the proceedings in sufficient time (Article 34 Nr. 2 Brussels I Regulation).

When the service was conducted in a fictitious manner, the issue of service "in sufficient time" causes friction. It is acknowledged that the measure for timeliness – or, in such a case, more accurately for rightfulness – is not set by the state of origin, but by the recognising state. However, if the criteria are taken from the autonomous procedural rules of the recognising state, as has occasionally happened, minor differences between national laws can cause unreasonable obstacles to the recognition of titles.

In order to fulfill the aim of the Brussels I Regulation, to improve the free movement of judgments and strengthen mutual trust, the criteria must, therefore, not be taken from the national rules of the recognising state, but ought rather to resemble the standards valid for breaches of public policy. Only such a "mildly Europeanized" standard for fictitious services may avoid a trapping of the claimant who, trusting in the decision of the court of origin, is then surprised by the differing measures of the recognising state.

- ***Haimo Schack***: "What remains of the renvoi?"

The renvoi is one of the main principles of classic private international law. The renvoi doctrine aims for the conformity of decisions in different jurisdictions, which may also facilitate the recognition of the decision abroad. With this goal in mind the following article gives an overview of the acceptance of renvoi in different national jurisdictions. In addition, the article evaluates and criticizes the tendency to push back the doctrine of renvoi in international treaties and in EU private international law. Especially in the former domain of renvoi, i.e. the law of personal status, family and inheritance law, the European conflict rules are dominating more and more and preventing the conformity of decisions in relation to third countries. As a means to achieve this decisional harmony the renvoi remains useful, it shows the cosmopolitan attitude of classic private international law.

- ***Hannes Wais***: "Hospital contracts and Place of Performance Jurisdiction under § 29 ZPO (German Code of Civil Procedure)"

This article comments on a recent decision of the German Federal Supreme Court, in which the court ruled that, for payment claims from a hospital contract, § 29 ZPO conferred jurisdiction upon the courts in the locality of the hospital. The Court decided that, not only for the purposes of § 29 ZPO, the place of performance of the monetary obligation from a hospital contract is the creditor's seat and not that of the debtor (in contrast to what is generally accepted for monetary obligations). This article will discuss the implications of this decision, and will consider the possibility of a conceptual "reversal" of § 29 ZPO.

- ***Markus Würdinger***: "Der ordre public-Vorbehalt bei Verzugsaufschlägen im niederländischen Arbeitsrecht" – the English abstract reads as follows:

The substantive ordre public rarely plays a role when it comes to recognition and enforcement of foreign legal decisions. This article deals with such a case. It is about the declaration of enforceability of a Dutch court decision in Germany. The judgment in question decided the applicant's claim for unpaid wages plus a statutory increase of 50% as a penalty for late payment in his favour. The Higher Regional Court of Düsseldorf (OLG) rightly interpreted Art. 34 EuGVVO (Regulation (EC) No 44/2001) narrowly and refused to consider this

decision as being comparable to an award of punitive damages.

- ***Urs Peter Gruber***: "Die Vollstreckbarkeit ausländischer Unterhaltstitel – altes und neues Recht" – the English abstract reads as follows:

For a maintenance creditor, the swift and efficient recovery of a maintenance obligation is of paramount importance. In the Brussels I Regulation – which until recently was also applicable with regard to maintenance obligations – and in various conventions there are procedures for the declaration of enforceability of decisions. In these procedures, the courts have to ascertain whether there is a maintenance claim covered by the Regulation or the convention and whether there are reasons to refuse recognition of the foreign decision. In the new Regulation (EC) No 4/2009 on maintenance obligations however, a declaration of enforceability of decisions is no longer required, provided that the decision was given in a Member State bound by the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations. In this case, a decision on maintenance obligations given in a Member State is automatically enforceable in another Member State. The article discusses recent court decisions on the declaration of enforceability in maintenance obligations. It then examines the changes brought about by the Regulation (EC) No 4/2009 on maintenance obligations. Weighing the interests of both the creditor and the debtor, it comes to the conclusion that the abolition of the above-mentioned procedures is fully justified.

- ***Wolf-Georg Ringe***: "Secondary proceedings, forum shopping and the European Insolvency Regulation"

The German Federal Supreme Court held in a recent decision that secondary proceedings according to Article 3(2) of the European Insolvency Regulation cannot be initiated where the debtor only has assets in a particular country. The requirements for an "establishment" go beyond this and require an economic activity with a "minimum of organisation and certain stability". This decision stands in conformity with the leading academic comment and other case-law. Nevertheless, the decision is a good opportunity to stress the importance of secondary proceedings and their function to protect local creditors. This is particularly true where the secondary proceedings are initiated (as here) in the context of a cross-border transfer of the "centre of

main interests" (COMI) of the debtor. The ongoing review of the European Insolvency Regulation should respond to this problem in one of the regulatory options provided.

- ***Moritz Brinkmann***: "Ausländische Insolvenzverfahren und deutscher Grundbuchverkehr" – the English abstract reads as follows:

Art. 16 EIR provides for the automatic recognition of insolvency proceedings which have been commenced in another member state. The recognition of insolvency proceedings pertains not only to the debtor's power with respect to the estate, but also to his procedural position as well as to questions regarding company law or the law of land registries. The decision rendered by the OLG Düsseldorf (March 2, 2012) illustrates that these consequences are easily ignored in the routine of everyday legal life as long as courts and parties have difficulties in accessing reliable information as to the status of foreign proceedings. The existing deficits in terms of access to information regarding foreign insolvency proceedings may thwart the concept of automatic recognition. Hopefully, the coming reform of the EIR will address this issue (see proposed Art. 22 EIR in COM (2012) 744 final).

- ***Kurt Siehr***: "Equal Treatment of Children of Unmarried Parents and the Law of Nationality"

A child of unmarried parents acquires nationality of Malta only if the child is recognized by the Maltese father and legitimized by marriage or court decision. The European Court of Human Rights decided that this provision violates the European Convention of Human Rights, especially Article 8 on the right of family life and Article 14 on non-discrimination. There are doubts whether the decision is correct. A more careful phrasing of Maltese law could avoid the violation of the Convention. Or is the decision of the European Court of Human Rights its step further towards a human right for nationality?

- ***Fritz Sturm***: "Forfeiture of the choice of surname: The European Court of Human Rights compels the Swiss Federal Court to set aside its former judgment"

The Swiss Federal Court, 24 May 2005, did not authorize foreign husbands to have their surname governed by their national law (s. 37 ss. 2 Swiss Private International Law Act) when they have previously chosen to take the wife's surname as the family name, situation which could not have occured if the sexes had been reversed. In fact, in this case the husband's surname would automatically become the family name and the wife could choose to have her surname governed by her national law. For the Court of Strasburg this difference in treatment is discriminatory (violation of art. 14 in conjunction with art. 8 ECHR). The Swiss Federal Court has therefore been compelled to set aside its former judgment.

- ***Dirk Looschelders:*** "Jurisdiction of the Courts for the Place of Accident in case of a Recourse Direct Action by a Social Insurance Institution against the Liability Insurer of the Tortfeasor"

In the present judgement the Austrian High Court (OGH) deals with the question whether a social insurance institution can sue the liability insurer of the tortfeasor in the courts for the place where the harmful event occurred. The OGH comes to the conclusion that such a jurisdiction is granted at least by Article 5 no 3 Brussels I Regulation. The problematic issue whether the priority provision of Article 11 (2) read together with Article 10 s. 1 Brussels I-Regulation applies, is left undecided. In the decision Vorarlberger Gebietskrankenkasse the European Court of Justice has held that the social insurance institution cannot take a recourse direct action against the liability insurer under Article 11 (2) read together with Article 9 (1) (b) Brussels I Regulation. According to the opinion of the author, jurisdiction in such cases shall generally not be determined by Chapter II Section 3 of the Brussels I Regulation. Therefore, Article 11 (2) read together with Article 10 s. 1 Brussels I Regulation is inapplicable, too. In consequence, contrary to the opinion of the OGH, the social insurance institution cannot be regarded as an injured party in terms of Article 11 (2) Brussels I-Regulation.

- ***Michael Wietzorek***: "On the Recognition of German Decisions in Albania"

There is still no established opinion as to whether the reciprocity requirement of § 328 Sec. 1 No. 5 German Civil Procedure Code is fulfilled with regard to

Albania. A decision of the High Court of the Republic of Albania dated 19 February 2009 documents that the Court of Appeals of Durr?s, on 5 December 2005, recognized two default judgments by which the Regional Court of Bamberg had ordered an Albanian company to pay two amounts of money to a German transport insurance company. One single court decision may not be sufficient to substantiate that there is an established judicial practice. Yet the reported decision appears to be the only one available in the publicly accessible database of the High Court dealing with the recognition of such foreign default judgments by which one of the parties was ordered to pay an amount of money.

- ***Chris Thomale***: "Conflicts of Austrian individual labour law and the German law of the works council – intertemporal dimensions of foreign overriding mandatory provisions"

The Austrian Supreme Court (Oberster Gerichtshof) recently held that the cancellation of an individual employment contract between a German employer and an Austrian employee posted in Austria was valid despite the fact that the employer failed to hear his German works council properly beforehand. The case raises prominent issues of intertemporal conflicts of laws, characterization of the mentioned hearing requirement and the applicability of foreign overriding mandatory provisions, which are discussed in this article.

- ***Sabine Corneloup:*** *"*Application of the escape clause to a contract of guarantee"

The French Cour de cassation specifies how to apply the escape clause of Art. 4 n° 5 of the Rome Convention to a contract of guarantee. The ancillary nature of guarantees leads national courts often to the application of the law governing the main contract, on the basis of a tacit choice of law or on the basis of the escape clause. The latter is to be used very restrictively, according to the Cour de cassation. It is necessary to establish first that the ordinary connecting factor, designating the law of the habitual residence of the guarantor, is of no relevance in the examined case. Only after this step, the courts can examine the connections existing with another State. This restrictive interpretation adds a condition to the text that seems neither necessary nor appropriate.

- ***Oliver Heinrich/Erik Pellander***: “Das Berliner Weltraumprotokoll zum Kapstadt-Übereinkommen über Internationale Sicherungsrechte an beweglicher Ausrüstung”
- ***Stefan Leible***: “Hannes Unberath † (23.6.1973–28.1.2013)”