Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2015: Abstracts

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

Jochen Hoffmann, **"Button-click" Confirmation and Cross Border Contract Conclusion**
Section 312j paragraph 3 and 4 of the German Civil Code (BGB) addresses and secures effective consumer protection with regard to the issue of internet-related "cost traps". Cost traps are websites that are designed to lead to the conclusion of contracts without the consumer's awareness of an obligation to pay. At the same time this regulation transposes Art. 8 par. 3 of the Consumer Rights Directive into German law. In effect, this provision ensures that an e-commerce contract between a trader and a consumer cannot be concluded if the trader does not ensure that the consumer is made aware, prior to placing his order, that he is assuming an obligation to pay, in connection with internet contracts specifically by using an unambiguously labelled button. Since this regulation is applicable to all e-commerce contracts it not only applies to "cost traps", but also to legitimate internet trading. This article addresses the problems arising from the new provision for cross border contracts in the light of the applicable conflict of laws rules.

Jan von Hein, **Authorization Requirements for a Guardian's Transaction Concerning a Vulnerable Adult's Immovable Property – Jurisdiction and Conflict of Laws**
The Court of Justice excluded, in Case C-386/12 – Siegfried Janós Schneider, the applicability of the Brussels I-Regulation to a court's authorization that an adult's guardian required for a transaction concerning immovable property belonging to the adult (Article 1(2)(a) of the Regulation). In his case note, von Hein agrees with the Court's ruling because the authorization requirement was the main object of the proceedings. If the necessity to obtain an authorization arises merely as an incidental question in litigation related to property, however, the Regulation, including the forum rei sitae, remains applicable. Moreover, the author analyses

which court is competent to rule on granting an authorization to an adult's guardian for the sale of immovable property and which law is applicable to this question. He looks at this problem both from the point of view of autonomous German PIL and of the Hague Convention on the International Protection of Adults. The article shows that autonomous PIL and the Hague conflicts rules differ considerably and that in the Hague Convention's framework, authorization requirements are treated in a very differentiated manner.

Astrid Stadler, **A uniform concept of consumer contracts in European civil law and civil procedure law? – About the limits of a comprehensive approach**

In "Vapenik", the ECJ had to decide whether Article 6 para 1 lit. d of Regulation 805/2004 prevents the confirmation of a judgment by default as a European enforcement order if the judgment was based on a c2c-relation and the plaintiff had not sued the defendant in the Member State where he was domiciled but in the courts where the contractual obligation had to be fulfilled. The question raised was whether Article 6 para 1 lit. d applied only to b2c situations or also to cases in which both parties were consumers. The ECJ denied the application of the provision based on the reasoning that the defendant was not a "weaker party". This interpretation of the EEO Regulation was deduced from the rationale of "consumer contracts" in the Brussels I Regulation, the Rom I Regulation and Directive 93/13. The ECJ, however, provided only a very cursory comparison of the underlying policies of consumer protection. Particularly the idea of granting consumers a preferential treatment with respect to international jurisdiction differs from the purpose of consumer protection in substantive law and conflict of laws. With respect to Regulation 805/2004 the ECJ's decision does not adequately balance the interests of the two consumers involved and unnecessarily privileges the plaintiff. It increases the defendant's risk to suffer from a deficient cross-border service of documents without the chance of objecting to the enforcement of the judgment by raising grounds for non-recognition.

Jörg Pirrung, **Brussels IIbis Regulation and Child Abduction: Stones Instead of Bread ? – Urgent preliminary ruling procedure regarding the habitual residence of a child aged between four and six years**

After twelve mostly satisfactory decisions on the interpretation of the Brussels IIbis Regulation with respect to parental responsibility cases, the ECJ has given only conditional answers to the questions referred to it by the Irish Supreme

Court. In this case it was not adequate to use the urgent preliminary ruling procedure instead of an expedited procedure. In substance, the Court interprets Articles 2 (11), 11 of the Regulation as meaning that, where a child was removed in accordance with a judgment later overturned by an appeal judgment fixing the child's residence with the parent living in the Member State of origin, the failure to return the child to that State following the latter judgment is wrongful, if it is held that the child was still habitually resident in that State immediately before the retention, taking into account the (subsequent) appeal and that the judgment authorising the removal was (only) provisionally enforceable. If it is held, conversely, that the child was at that time no longer habitually resident in the Member State of origin, a decision dismissing the application for return based on Article 11 is without prejudice to the application of the rules established in Chapter III of the Regulation relating to the recognition and enforcement of judgments given in a Member State. On the whole, the opinion of Advocate General Szpunar stating expressly that the fact that proceedings relating to the child's custody were still pending in the State of origin is not decisive as habitual residence is a factual concept and not depending on whether or not there are legal proceedings, seems more convincing than the judgment itself.

Marianne Andrae, **First decisions of the ECJ to the Interpretation of Article 12(3) Regulation (EC) No 2201/2003, Comment to Cases C 436/13 and C 656/13**

Article 12 (3) of Council Regulation (EC) No 2201/2003 of 27 November 2003 applies to separated matters of parental responsibility. The ECJ classifies this rule as a prorogation of jurisdiction for the holders of parental responsibility. This paper submits several arguments against this judgment. The jurisdiction of the courts is always justified for the particular application and it does not continue after pending proceedings have been brought to a close. This acceptance must be obtained at the time the matter is seized to the courts including the specific issues of the proceeding. An agreement, after the matter was brought to court, does not justify jurisdiction. The tight time requirements must be transferred to the jurisdiction under Article 8 (1) of that regulation. An interpretation whereupon the requirements of the jurisdiction can be fulfilled after pendancy and which orientates to the best interests of the child remains for an amendment of the regulation.

Tobias Helms, **The independent contestability of interlocutory judgments**

on international jurisdiction in family law cases
The Stuttgart Higher Regional Court correctly held in its judgment of May 6, 2014 that, contrary to the wording of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG), German courts can pass interlocutory judgments on questions of their international jurisdiction in all family law cases. This conclusion can rightly be reached – in light of the statutory history of the FamFG – by way of an analogous application of Sec. 280 of the Code of Civil Procedure (ZPO).

Rainer Hüßtege, **Grenzüberschreitende Wohngeldzahlungen**

Wulf-Henning Roth, **Applicable contract law in German-Danish trade**
Given the opt-out of Denmark from the Area of Freedom, Security and Justice, Danish courts do not apply the conflict rules of the Rome I-Regulation, but still the EC Convention on the Law Applicable to Contractual Obligations of 1980 (Rome Convention). As Germany has not yet given notice of a termination of the Rome Convention, it appears to be not beyond doubt whether in settings relating to Denmark German courts have to apply the conflict rules of the Rome I-Regulation, given its call for universal application (Article 2) and in the light of Article 24 (1), whereby the Rome Convention shall ("in the Member States") be deemed replaced by the Rome I-Regulation. In contrast, the OLG Koblenz, pointing to Article 1 (4), holds Article 24 (1) to be inapplicable in the specific case as Denmark may not be regarded as a "Member State". The Appellate Court applies the Rome Convention despite the fact that the German legislator has explicitly excluded the direct applicability of the Rome Convention.

Malte Kramme, **Conflict law aspects of the successor's responsibility for debts of the acquired business, before and after the Rome-Regulations**
The German Federal Court of Justice deals, in its decision of 23 October 2013, with several current questions in the field of private international law. Firstly, the court adopts a position on the question of which conflict rule applies to the liability claim against the successor to a mercantile business carrying on the business under an identical trade-name (section 25 para. 1 sentence 1 German Commercial Code). Furthermore, the court decided which law applies to forfeit and limitation of claims underlying the United Nations Convention on Contracts for the International Sale of Goods. As the court applied the old legal regime prior to the entry into force of the Rome-Regulations, the article focuses on the question of how the case has to be solved under the new legal regime. This

analysis shows that the Regulations “Rome I” and “Rome II” do not cover the law of obligations in an exhaustive manner. Remaining gaps need to be filled applying nonunified German private international law.

Dieter Henrich, **Children of Surrogate Mothers: Whose Children?**
The legal parentage of children, born by surrogate mothers and handed over to the intended parents, is a highly debated question. Strictly forbidden in Germany, surrogacy is allowed in other countries. In a case of children born by a surrogate mother in California the German intended fathers (a same sex couple) applied for recognition of the decision of the California court, which established a parent-child relationship between the child and the couple. While the lower courts in Germany denied the application because of incompatibility with German public policy (cf KG IPRax 2014, 72) the Bundesgerichtshof (the Federal Court of Justice) decided in favour of the applicants, but restrained explicitly the recognition on cases of foreign court decisions and to cases, where at least one of the intended parents is the biological parent of the child. So the recognition of foreign birth certificates (e.g. from the Ukraine) is still an open question as well as the recognition of parentage decisions, if neither of the intended parents is a biological parent.

Susanne Lilian Gössl, **Constitutional Protection of ‚Limping‘ Marriages and the ‚Principle of Approximation‘**
The Court decides how to treat a “limping” marriage which is not valid under German law but nevertheless falls in the scope of and is therefore protected by the concept of “marriage” of the German Constitution (Art. 6 para. 1 Basic Law). The article examines how the German status registration law over the last four decades has subsequently been adapted to the needs of cross-border status questions.

Susanne Lilian Gössl, **Adaptation of Status Registration Rules in Cases of ‚Limping‘ Status**
The subject of this article is how to handle the birth registration of a child born by a surrogate mother according to German and Swiss law. Both legal systems are absolutely opposed to surrogacy but also under the obligation to protect the child’s right to know his/her decent. The Swiss Court found a possibility to resolve the resulting legal tension. The author shows that the court’s resolution, an adaptation of the national civil status registry law, is a mechanism which has already been frequently used by German courts in other situations of “limping”

status. She proposes to extend that existing jurisprudence to cases of cross-border surrogacy.

Alexander R. Markus, **Jurisdiction in Matters Relating to a Contract Under the Brussels/Lugano Regime: Agreements on the Place of Performance of the Obligation in Question and the Principle of Centralisation of Jurisdiction**
According to the Swiss Federal Supreme Court, parties can by agreement only specify the place of performance of the characteristic obligation under article 5(1)(b) of the 2007 Lugano Convention; contractual specifications of the place of performance of non-characteristic obligations are irrelevant in terms of jurisdiction.

Jörn Griebel, **Investment Arbitration Awards in Setting Aside Proceedings in the US – Questions Regarding the Review of Local Remedies Clauses Within Investment Treaties**
National setting aside proceedings are more and more often concerned with investment arbitration awards. This is due to a constant rise of investment arbitration proceedings. Although two thirds of all investment disputes are adjudicated according to the ICSID rules, which provide for a special review mechanism, the remaining awards may be subject to review before national courts. The US Supreme Court decision had to decide on the degree of review in a dispute concerning local remedies clauses within an investment treaty and the possible impact of such clauses on the consent to arbitrate. The Court held that it had no competence to review the award in respect of such clauses.

Conference on Jurisdiction & Dispute Resolution in the Internet Era

The conference titled Jurisdiction & Dispute Resolution in the Internet Era:

Governance and Good Practices, organised by the University of Geneva, the Faculty of Law, and two other institutions, is scheduled for 17 and 18 June 2015 in Geneva. Each conference day is divided into two sessions:

> *Session 1: Conflict of laws/private international law in the Internet era: which courts shall decide Internet-related disputes?*
> *Session 2: What alternative resolution systems for Internet-related disputes today and tomorrow?*
> *Session 3: What mechanisms for solving disputes in the ICT industries? The case of the licensing of Standard Essential Patents (SEP) under Fair, Reasonable and Non-Discriminatory (FRAND) terms*
> *Session 4: How shall jurisdictional immunity and inviolability apply in the Internet Era?*

More information is available at the conference website.

The Much Expected Ruling on Case C-536/13

The Grand Chamber says:

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as not precluding a court of a Member State from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State, since that regulation does not govern the recognition and enforcement, in a Member State, of an arbitral award issued by an arbitral tribunal in another Member State.

Click here to access the decision.

Many thanks to Prof. B. Hess for the alert.

Agnieszka Frackowiak-Adamska on Time for a European ‘full faith and credit clause’ (article)

Dr Agnieszka Frackowiak-Adamska, Chair of International and European Law at the Faculty of Law, Administration and Economics,University of Wroclaw, Poland, has just published an article analysing the possibility of introducing one European general mutual recognition clause for judgments in civil and commercial matters, to replace the today’s plurality of recognition clauses provided by at least 10 different Regulations. In the author’s words, the contribution discusses briefly the acts providing for mutual recognition of judgments in civil and commercial matters. It aims to compare them, to assess if , when and how, they may be replaced by one denominator (part I). Furthermore it explains deficiencies of the current situation, including potential breaches of fundamental rights by some of the acts abolishing the *exequatur* (part II). Finally, a reform proposal is laid down, accompanied by an explanation of potential drawbacks and methods of addressing them.

The paper is published in 2015 Common Market Law Review 52, pp. 191-218.

Professor Ron Brand on

“Understanding Judgments Recognition”

The twenty-first century has seen many developments in judgments recognition law in both the United States and the European Union, while at the same time experiencing significant obstacles to further improvement of the law. This article, just posted here to SSRN, describes two problems of perception that have prevented a complete understanding of the law of judgments recognition on a global basis, particularly from a U.S. perspective. The first is a proximity of place problem that has resulted in a failure to understand that, unlike the United States, many countries allow their own courts to hear cases based on a broad set of bases of jurisdiction, while recognizing judgments from other countries only if they are based on a much narrower set of bases of jurisdiction. This gap between direct and indirect bases of jurisdiction results in a level of discrimination against foreign judgments that does not exist in the United States and some other countries, and makes a harmonized global approach to judgments recognition difficult. The second is a proximity of time problem that has resulted in a failure to remember the full context of Justice Gray’s historic analysis in Hilton v. Guyot, the seminal case in U.S. judgments recognition law. This article seeks to explain the consequences of both problems, and then comments on how a clearer understanding of these two problems of proximity may aid in making further progress in judgments recognition law.

La Ley-Unión Europea, April 2015

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

S. Sánchez Lorenzo, “El nuevo sistema de reconocimiento y ejecución de

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

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

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

L.M. Jara Rolle, "Contratos tipo de servicios jurídicos concluidos por un abogado con una persona física que actúa con un propósito ajeno a su actividad

professional". **Abstract**: Unfair terms in consumer contracts extend to standard form contracts for legal services, as contracts concluded by a lawyer with a natural person acting for purposes which are outside his trade, business or profession.

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

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

Council's Position on the (to be) Insolvency Regulation Recast

The Position (EU) No 7/2015 of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council on insolvency proceedings (recast), Adopted by the Council on 12 March 2015 , as well as the Statement of the Council's reasons: Position (EU) No 7/2015 of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council on insolvency proceedings (recast), were made officially public in yesterdays OJ, C 141.

Johannes Schmidt on Legal Certainty in European Civil Procedure Law

Johannes Schmidt's doctoral thesis on "Legal Certainty in European Civil Procedure Law. An Analysis of ECJ Judgments Regarding the Brussels Convention and the Brussels I Regulation." (*Rechtssicherheit im europäischen Zivilverfahrensrecht – Eine Analyse der Entscheidungen des EuGH zum EuGVÜ und der EuGVVO*; Mohr Siebeck, Tübingen, 2015) has just been published in German. The doctoral dissertation was written under the supervision of Professor Rolf Stürner and was accepted by the University of Freiburg.

When interpreting the Brussels Convention and the Brussels I Regulation, the European Court of Justice (CJEU) has regularly employed the concept of legal certainty in various contexts. Johannes Schmidt questions if and to what extent the case law of the CJEU actually contributes to legal certainty. For this purpose, he scrutinizes at first, if the methodical criteria of "adherence to the wording" and "continuity of the case law" make the decisions of the CJEU foreseeable. Secondly, the results reached by the CJEU are analysed with respect to the

principle of legal certainty. This part takes the perspective of the lawyers and courts who have to apply the European civil procedure rules in their interpretation by the CJEU. It investigates the foreseeability of jurisdiction and lis pendens and it raises the question, which price is to be payed for legal certainty.

The study comes to a critical conclusion. The last part suggests changes, mainly with regard to the style of reasoning.

Thanks to Johannes Schmidt for providing the text.

Le Précédent en Droit International (Conference)

The annual conference of the French Society for International Law (Société française pour le droit international), organised in 2015 by the Faculty of Law of Strasbourg University, will take place next 28, 29 and 30 May 2015.

The general subject is "The precedent in International Law"(Le précédent en droit international). The presentations will be in French but questions addressed in English during the debates are possible.

A call for paper is launched for the workshops on the following topics:

Workshop 1 : Precedent in International Law before International and Regional Courts/Tribunals

Workshop 2 : Precedent in International Law before Arbitral Tribunals

Workshop 3 : Precedent in International Law before National Tribunals

Proposals must be sent by 15 March 2015 to sfdi2015@gmail.com, indicating "Proposal for Workshop 1/2/3 and (applicant's name)" as the subject matter of the email. A CV and a list of publications shall be attached. Proposals written and to

be presented in English are welcome, but the author should be able to read and understand French.

For further information (program, registration, etc), please go to www.sfdi2015.unistra.fr

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

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

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

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

Namely focusing on the role of public policy, this paper examines how personality rights of foreign individuals are ensured under the Italian private international law system. While personality rights are meant to reflect the identity of an individual at a universal level, private international law is aimed at ensuring the continuity of an individual's rights and status across borders. Art. 24 of the Italian Statute on Private International Law (Law No 218/1995) underlies this concern in that it provides, as regards personality rights, for the application of the law of nationality of the individual in question. However, as a result of the fact that personality rights are closely intertwined with human rights, it becomes

inevitable to explore the link between the somehow neutral technique traditionally employed by conflict-of-law provisions and the fundamental values shared within the international community, in particular those values safeguarded by international obligations regarding the protection of human rights. As this paper portrays, the tension between personality rights under an individual's national law and fundamental rights is crucial to Art. 24 of the Italian Statute, as shown, in particular, by the process with which rights are characterized as falling within the scope of the provision: where a given right is perceived as fundamental by the *lex fori*, that right should enjoy protection in the forum regardless of its status according to the law of nationality of the concerned individual (proceedings on sex reassignment provide some significant examples in this respect). This approach embodies a "positive" expression of the notion of public policy: cross-border uniformity is foregone, here, as a means to ensure the primacy of the fundamental policies of the forum. However, as the paper illustrates, the role of public policy in ensuring fundamental rights goes even further: in fact, public policy may also serve as a guide whenever the need arises to adapt the applicable foreign law, should such law fail to provide solutions that are equivalent to those enshrined in the *lex fori*.

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

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

and, in particular, by the rules on the determination of the applicable law provided therein.

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

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

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

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

The present paper deals with one of the issues that has recently been considered within the *Eureko/Achmea v. The Slovak Republic* case, namely the arbitrability of the so called intra-EU BITs disputes. In essence, it focuses on whether the

investor of an EU member state can rely on the compromissory clause contained in a BIT that its country of origin had signed with another country that, in turn, at a later time, became an EU member State. To such a question arbitral tribunals have answered in the positive, while the EU in the negative, without however adopting a normative act in this sense. Throughout the paper, an analysis is conducted of those aspects of international law and of EU law that come into play in relation to the matter at hand. It is submitted that, in the absence of a definite/hard law solution, the way out should consist, for the time being, in applying soft law principles and, in particular, that of comity; nevertheless, the EUCJ and the arbitral tribunals do not appear to be very much keen to act in this sense. EU member states, on their part, are more and more frequently opting for the termination of the relevant BITs, allegedly on the basis of a law and economics analysis. This attitude, however, might produce negative effects on the economy of these states, since investors, seeking the protection of a BIT, could be encouraged to move their seats in third countries.

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

The increasing number of sovereign wealth funds (SWFs) and the growth in the value of their assets are among the main current trends in the global financial markets. The governments of recipient States have voiced their concerns, contending that SWFs are financial vehicles used by States to pursue general public aims but acting like private economic agents. The question this contribution tackles is whether SWFs, as "sovereign" investment vehicles, come within the scope of international and national rules on sovereign immunity. This topic will be analyzed from three perspectives. As a starting point, the definition of "foreign State" given by immunity legal regimes will be investigated in order to define in which circumstances SWFs meet it. Next, the issue of SWSs' immunity from adjudication will be ascertained. In this regard, the main point is whether SWFs investments are to be understood as actions engaged in within the exercise of sovereign authority, or as mere commercial activities, over which immunity from judgment on the merits is removed. As it may not be excluded that courts render judgments against SWFs, the rules on immunity from pre-judgement and post-judgement measures of constraint are to be considered, so as to identify the

property against which jurisdictional rulings may be enforced for the full satisfaction of the legitimate expectations of judgment creditors. The enquiry mainly focuses on the rules established under the UN and the Council of Europe conventions; the content and practice under national regimes is also considered, mainly the US Foreign Sovereign Immunities Act and the UK State Immunity Act. The main result is that there is no univocal answer to the question whether rules on sovereign immunity are helpful in overcoming the contradiction between the different but complementary public and private natures of SWFs. The form through which funds have been established and the content of the specific legal regime on the basis of which courts have to judge in their regard are the fundamental variables, and their combination in each case may lead to different results in terms of immunity from both the adjudicative process and enforcement measures.

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

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

abduction.

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

This article addresses the Advocate General's Opinion in *Kolassa v. Barclays* (released on September 3, 2014, in the case C-375/13) from the perspective of financial markets law. The case raises some issues on the establishment of jurisdiction in disputes concerning securities offerings. The article suggests that a restrictive interpretation should be given of the Opinion (as well as of the CJEU decision on the case, which substantially follows the Opinion). On the one hand, the interpretation affirmed by the Advocate general may in fact, if read extensively, rule out the possibility that investors enjoy the protective regime of Brussels I Regulation *vis-à-vis* the issuer if they purchase securities on the secondary market, as it denies the possibility of establishing jurisdiction on the basis of Articles 15 and 16 of the Brussels I Regulation where a consumer has purchased a security not from the issuer but from a third party that has in turn obtained it from the issuer. On the other hand, the Opinion may expose offering companies to the risk of being sued by professional investors in multiple jurisdictions on the basis of tortious liability, even in cases where a prospectus was not published and, therefore, such companies did not intend to conduct any activity in other countries, on the basis that no contractual relationship can be identified in *Kolassa* between the issuer of the certificate and the final investor. Tortious liability, which is admitted by the Opinion, may therefore sometimes be an imperfect substitute for contractual liability. Hence, the article proposes that the Advocate General's (and the CJEU's) reasoning should be narrowly interpreted so as to confine its purview to the issues raised by the holding of certificates through trusts and other similar devices. On the contrary, further reflections are needed before a conclusive position is taken on the effects of circulation of securities under the Brussels I Regulation.

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