First Issue of 2013'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 first issue of 2013 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released. It features two articles and two comments.

In her article *Costanza Honorati*, Professor of European Union Law at the University of Milano-Bicocca, addresses the issue of International Child Abduction and Fundamental Rights ("Sottrazione internazionale dei minori e diritti fondamentali"; in Italian).

> *In several recent decisions on cases concerning the international abduction of minors the European Court of Human Rights set the requirement of an "in-depth examination of the entire family situation" in order to comply with Article 8 ECHR. The present article considers the effects of such principle on the role and on the proceedings of both the court of the State of the child's habitual residence and of the court of the State of his refuge after abduction, especially when acting in the frame of Brussels II Regulation. While the requirement of «in-depth examination» seems overall synergetic to the role of the court of habitual residence, also when such court is judging on the return of the abducted minor pursuant to Article 11(8) Reg. 2201/2003, deeper concerns arise with reference to the role of the court of the State of refuge. When such a court is asked to enforce a decision for the return of the abducted child, the possible violation of the child's fundamental right in the State of origin might raise the question of opposition to recognition and enforcement. The article thus endeavours to find a solution balancing the child's fundamental rights and EU general finality to strengthen the area of freedom, security and justice.*

In their article *Paolo Bertoli* and *Zeno Crespi Reghizzi*, respectively Associate Professor at the University of Insubria and Associate Professor at University of

Milan, provide an assessment of “Regulatory Measures, Standards of Treatment and the Law Applicable to Investment Disputes” (in English).

> *The relationship between State regulatory measures and the international standards of protection for foreign investments has proved to be a critical issue in investor-State arbitration. Normally, two legal systems are involved: the legal order of the State hosting the investment is competent to govern economic activities (including those of foreign investors) carried out on its territory, and the international legal order sets forth the duties of States in respect of foreign investors. After having discussed the basis for, and the law applicable to, investment claims (both in treaty and in contract claims), this article examines the interplay between regulatory measures and the international standards of protection for foreign investments, i.e., indirect expropriation and fair and equitable treatment. The authors also analyse the influence on the arbitrator’s evaluation of the presence of a stabilization clause in the agreement between the State and the investor.*

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

Fabrizio Vismara (Associate Professor at the University of Insubria), “Assistenza amministrativa tra Stati membri dell’Unione europea e titolo esecutivo in materia fiscale” (Administrative Assistance between EU Member States and Enforcement Order in Fiscal Matters; in Italian)

> *The Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, issued under Articles 113 and 115 of the TFEU, was implemented in Italy by Legislative Decree No 149 of 14 August 2012. The Directive introduces a uniform instrument to be used for enforcement measures to recover claims in another Member State, and realizes a system of implementing decisions in tax matters typically excluded from judicial cooperation on civil matters. Directive 2010/24/EU provides that enforcement in other Member States is permitted by means of a uniform instrument which is automatically valid in the requested Member State. The automatic recognition provided for by Directive 2010/24/EU is different from the abolition of exequatur in the field of judicial cooperation in civil matters provided by, respectively, Regulation No 805/2004, Regulation No 1896/2006, Regulation No 861/2007, and Regulation No 1215/2012. Directive*

2010/24/EU sets out a new instrument, named uniform instrument, which is subject to automatic recognition and it is formally distinct from the initial instrument permitting enforcement issued in the applicant Member State.

Lidia Sandrini (Researcher at the University of Milan), "La compatibilità del regolamento (CE) n. 261/2004 con la convenzione di Montreal del 1999 in una recente pronuncia della Corte di giustizia" (Compatibility of Regulation (EC) No 261/2004 with the 1999 Montreal Convention in a Recent Judgment by the Court of Justice of the European Union; in Italian)

This article addresses Regulation (EC) No 261/2004 in so far as it deals with delay in the carriage of passengers by air, as interpreted by the Court of Justice of the European Union in the joined cases Nelson and TUI Travel. It considers whether this recent judgment is consistent with the Montreal Convention of 1999 reaching the overall conclusion that it is not. This unsatisfactory result is due to purpose of ensuring a level of protection for passenger higher than that provided by the international uniform rules. This aim has been achieved affirming the interpretation of the Regulation provided in the Sturgeon case, in which the Court went far beyond the wording of the Regulation, and in the IATA case, in which the Court advanced an untenable and ambiguous construction of the relationship between the Montreal Convention and Regulation No 261/2004. Conversely, in deciding the joined cases, the Court neglected its duty to interpret according to the proper criteria provided by international law the treaties ratified by the EU, and failed to ensure that the EU respect its duty as contracting party.

Indexes and archives of the RDIPP since its establishment (1965) are available on the website of the Department of Italian and Supranational Public Law of the University of Milan.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (3/2013)

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

- ***Christopher Selke***: "Die Anknüpfung der rechtsgeschäftlichen Vertragsübernahme" – the English abstract reads as follows:

More than fifty years after Konrad Zweigert's essay on the applicable law to the assignment of contracts, some issues are still unsettled. The following article gives an overview of previous comments and focuses on the scope of application. It further emphasizes the crucial question, how to determine the applicable law in the case of a cross-border assignment of a contract. In this connection, the role of the principle of party autonomy shall be challenged more carefully than it has been in the past – which does not inevitably mean that it has to be completely dismissed. There just has to exist a subsidiary objective international private law rule in the case that the parties' choice of law leads to difficulties. Therefore, this article concludes with a proposal for such a rule.

- ***Wulf-Henning Roth:*** "Jurisdiction and Applicable Law in Cross-Border Defamation and Breach of Personality Rights"

The article discusses the judgment of 25 October 2011, C-509/09 and C-161/10, eDate Advertising, in which the European Court of Justice clarifies two important issues of European private international law concerning cross-border injunctions and damages claims with regard to defamation and breach of personality rights on the internet. The first issue concerns the interpretation of Article 5 no. 3 of the Brussels I Regulation 44/2001/EC which establishes a special concurrent jurisdiction of the courts of the Member States in matters of tort liability. According to the Court, an applicant may bring an action before the court where the publisher is domiciled or before the courts of all Member States where the internet information is accessible, however restricted to the

infringement of the personality rights in the relevant territory ("mosaic principle"). Alternatively, the applicant may also bring an action for an injunction or for all damages, incurred worldwide, before the court where he or she has his or her centre of interests. As for the applicable law concerning tort liability, the Court clarifies the intensely discussed meaning of Article 3 (1) and (2) of the e-commerce Directive 2000/31/EC. The Court holds that both provisions do not contain conflict of law rules. Rather, Article 3 (1) contains an obligation of the Member State where the internet provider has its seat of business to ensure that the internet provider complies with the national provisions applicable in that Member State. And Article 3 (2) allows that the Member States where the internet information is accessed may apply their own substantive law applicable to the infringement of personality rights, but not in such a way that the interstate provision of internet services is restricted.

- ***Karl-Nikolaus Peifer:*** *"*International Jurisdiction and Applicable Law in Trademark Infringment Cases"

The German Federal Court had to deal with questions of international jurisdiction and applicable law in a trademark infringement case based upon the broadcasting of an Italian game show which was available in Germany. The Court found that German courts had jurisdiction upon the case and might apply national trademark law because trademark interests were affected in Germany. The result is arguable. However, it demonstrates that even codified rules in IP-Law leave substantial insecurities with regard to international harmony as long as IP-laws have territorial reach only.

- ***Oliver L. Knöfel***: "The European Evidence Regulation: First Resort or Last?"

In Continental Europe, treaties and other devices of judicial assistance in the obtaining of evidence abroad have traditionally been understood as tools to prevent intrusions into another State's authority and territory. Today, there are diverging views as to whether or not the relevant legal instruments designed for civil and commercial matters, such as the Hague Evidence Convention and the European Evidence Regulation (Council Regulation [EC] No 1206/2001), have the quality of being exclusive, that is, the effect of barring any other means of gathering evidence abroad. The article reviews a judgment of the

European Court of Justice (First Chamber) of 6 September 2012 (C-170/11), dealing with the mandatory or non-mandatory character of the European Evidence Regulation. The question at stake is whether a judge in a Member State must have recourse to the Regulation on each occasion that she wishes to take evidence that is situated in another Member State. The ECJ declared a Member State's court free to summon a witness resident in another Member State to appear before it in accordance with the lex fori processus, that is, without recourse to the Evidence Regulation. The author analyses the relevant comity issues, explores the decision's background in international law and in international procedural law, and discusses its consequences for the relationship to Third States, as well as for the traditional concept of judicial sovereignty.

- ***Gerald Mäsch:*** "The "Equitable Life" 2002 Scheme of Arrangement in the German Federal Court of Justice"

The German Federal Court of Justice's IVth Senate, in its decision of 15 February 2012, took the view that the High Court sanction of the English Insurance Company Equitable Life's 2002 voluntary solvent scheme of arrangement has no binding effect on a dissenting policy holder residing in Germany on the ground that art. 35 (1) and 12 of the Brussels I Regulation prevent its recognition. In this article, the author argues that, based on the European Court of Justice's ruling in "Group Josi Reinsurance", the Brussels I Regulation pro-visions on insurance contracts should instead be interpreted as not applying to collective procedures aiming at the financial redress of an insurance company where the individual policy holder's inferior knowledge of insurance issues is irrelevant. The same interpretation applies – mutatis mutandis – for the consumer contract provisions (art. 35 (1), 15 Brussels I Regulation), whereas the position of the IVth Senate would make the restructuring of any English company by way of voluntary agreements under English law nearly impossible if a significant number of dissenting private investors from Germany is involved. The author calls upon German courts confronted with the issue of recognition of English solvent scheme of arrangements not to follow the IVth Senate but rather to seek a preliminary ruling by the ECJ.

- ***Herbert Roth***: "Problems concerning the certification as a European Enforcement Order under the regulation (EC) No 805/2004"

The reviewed order of the German Federal Supreme Court (BGH) is dealing with the revocation of a German decision fixing costs of an interim prohibition procedure, which was certified as an European Enforcement Order by German authorities. Both the result as well as the legal reasoning must be criticized for the excessive requirements concerning the information on legal remedies and the wrongfully denied cure of non-compliance with minimum standards. On the other hand the order of the local Augsburg trial court (Amtsgericht) is rightfully based on prevailing opinion of scholars and courts demanding only the formal service of the foreign judgement to the debtor in accordance with § 750 German Civil Procedure Code as a prerequisite of the execution of an European Enforcement Order. By contrast the formal service of the certification as an European Enforcement Order itself is no mandatory requirement of the later execution.

- ***Kurt Siehr:*** "Foreign Certificate of Succession for Estate in Germany?"

A Turkish citizen passed away in Turkey. The deceased had a bank account with a German bank in Munich. The plaintiff, a son adopted by the deceased, presented to the bank a Turkish certificate of succession and asked for payment of the account. The certificate of succession mentioned the plaintiff as the only heir. The defendant bank declined to pay and asked for a German certificate of succession (§ 2369 BGB) which may be granted for that part of the estate which is located in Germany. The County Court of Munich gave judgment for the plaintiff. The Turkish certificate of succession has to be recognized under § 17 of the German-Turkish Succession Treaty of 1929 and the defendant is not allowed under principles of good faith to insist on the presentation of a German certificate of succession by the plaintiff.

The County Court decision has to be criticized. Certificates of succession in continental European law are quite different. The most advanced certificate is the German one which also served as a model for the European certificate of succession as adopted by the European Union in Articles 62 et seq. of the Succession Regulation of 2012. The Turkish certificate, as the Swiss one (as the model for the Turkish Civil Code), are not very well regulated and many

questions are left open and have not yet been settled by the courts of these countries. Open is still the question whether a debtor of the estate can validly pay his debt to the person mentioned as heir in the Turkish certificate. This is different according to German law. The German certificate is issued by the probate court after diligent examination of the facts and, if issued, guaranties that the debtor may validly pay his debt to the person mentioned in the German certificate [§ 2367 BGB; similar Article 69 (3) Succession Regulation]. If it is not established without any doubt that a foreign certificate of succession has the same effect of a German one, the debtor in Germany of any claim of the estate of a foreigner may insist that a German limited certificate of succession (§ 2369 BGB) be presented by the collecting heir.

- ***Götz Schulze/Henry Stieglmeier***: "The State's Right to succeed in shares of the inheritance – Qualification, Subrogation and ordre public"

The State's Right to succeed to shares of the inheritance asserted by the KG in the context of Russo-German relations has already been the subject of comment by Dörner (see: IPRax 2012, 235–238). As an additional point of analysis, in question here is the qualification of an undivided joint-inheritance of co-heirs (Miterbgemeinschaft) of an estate. It is our opinion that the portion of the estate subject to co-inheritance should share the conflict-of-law judgement applied to the whole estate. In the case of sale, this also applies to the subrogation of revenues accruing on the estate. Otherwise, the choice-of-law decision depends upon chance factors such as the number of heirs or the date of alienation of the estate. The portion of the estate subject to co-inheritance is therefore to be considered immovable property, which in the case of the KG would have led to a partial renvoi to German law. Furthermore, the KG's judgement leads to the strange outcome that the USSR's legal successor can exercise a State's Right to succeed that it would not enjoy in either of the present-day jurisdictions. A nephew's subjective right of inheritance, as that of an heir of the third order, is eliminated by an intertemporal referral to an earlier and then already controversial legal situation in the USSR. Ordre public can be set against an entrenchment of outdated judgements and ensure application of laws governing relatives' inheritance rights in line with all the legal jurisdictions involved at the time of judgement.

- ***Arkadiusz Wudarski/Michael Stürner***: "Unconstitutional EU Secondary Legislation?"

For the first time the Polish Constitutional Court had to decide whether it is competent to hear a complaint based on the alleged unconstitutionality of a provision of European secondary legislation. The claimant had contested as unconstitutional the procedure of exequatur in which a Polish court had declared enforceable a Belgian judgment in ex parte proceedings pursuant to Article 41 Brussels I Regulation. The Constitutional Court admitted the request in principle, but held that in the present case there was no violation of the relevant provisions of the Polish Constitution. The article explores whether there are other examples where EU secondary legislation in the field of international civil procedure might conflict with national constitutional law.

- ***Brigitta Lurger:*** "The Austrian choice of law rules in cases of surrogate motherhood abroad – the best interest of the child between recognition, European human rights and the Autrian pro-hibition of surrogate motherhood"

In the first decision reviewed in this article the Austrian Constitutional Court (VfGH) held that a child born by a surrogate mother in Georgia/USA after the implantation of the ovum and sperm (embryo) of the intentional parents, an Austro-Italian couple living in Vienna, was the legal child of the intentional parents and not of the surrogate mother. The same result was achieved by the second VfGH decision reviewed here, in the case of a surrogate motherhood in the Ukraine. The intentional and genetic parents of the twins born by the Ukrainian surrogate mother were Austrians living in Austria.

This outcome is surprising, considering the Austrian legal provisions which forbid surrogate motherhood and determine that the legal mother is always the woman who gives birth to the child. In the first decision, the reasoning of the court focusses on the supposedly limited competence/scope of the Austrian rules which could not apply to "foreign" artificial procreation cases, the internationally mandatory character of the laws of Georgia and on the best interest of the child. In the second case, the court recognizes the Ukrainian birth certificate of the twins which was purportedly based on Ukrainian family law and argues that the application of Austrian substantive law to this case

would violate Art. 8 ECHR and the principle of protection of the best interest of the child. In both cases, the Austrian Constitutional Court unjustifiedly avoids addressing the issue of non-conformity of the Austrian substantive rules on motherhood with Art. 8 ECHR.

The article tries to show that the result achieved by both decisions is correct, albeit the reasoning is flawed in many respects. It analyzes the conflict of laws problems arising in cases of Austrian intentional parents causing foreign surrogate motherhood on a general basis, and discusses the implications of European primary law (Art. 21 TFEU) and European human rights (Art. 8 ECHR). Even though present Austrian choice of law rules lead in most cases to the application of the Austrian "birth-motherhood rule", the constitutional protection of private and family life by Art. 8 ECHR requires Austrian authorities to somehow "recognize" the legal family status acquired by a child and its intentional Austrian parents under the law of Georgia or the Ukraine where surrogate motherhood is legally permissible. The conformity of the birth-motherhood rule in domestic cases of surrogate motherhood (or in international cases where no "real" conflict of laws is present) with Art. 8 ECHR is questionable and should be re-viewed thoroughly by national courts and the ECHR.

- ***Yuko Nishitani:*** "International Jurisdiction of Japanese Courts in Civil and Commercial Matters"

This paper examines the 2011 reform of the Japanese Code of Civil Procedure (CCP), which introduced new provisions on international adjudicatory jurisdiction. After considering the salient features of major jurisdiction rules in the CCP, the author analyzes the regulation of international parallel litigations. The relevant rules of the Brussels I Regulation (Recast) are taken into consideration from a comparative perspective. In conclusion, the author points out that the basic structure of Japanese jurisdiction rules is in line with that of the Brussels I Regulation (Recast), whereas some important jurisdictional grounds clearly deviate from the latter.

- ***Erik Jayme***: "Glückwünsche für Fritz Schwind – Der Schöpfer des österreichischen Internationalen Privatrechts wird 100 Jahre alt"

- ***Simon Laimer***: “Richterliche Eingriffe in den Vertrag/L’intervention du juge dans le contrat”

French Supreme Court Upholds Argentina’s Immunity despite Waiver

Last week, the French Supreme Court for private and criminal matters (*Cour de cassation*) set aside three series of enforcement measures carried out by NML Capital Ltd against the Republic of Argentina in three judgments dated 28 March 2013 (see here, here and here).

Readers will recall that NML Capital Ltd was the beneficial owner of bonds issued by Argentina in year 2000. As the relevant financial contracts contained a clause granting jurisdiction to New York courts, the creditor sued Argentina before a U.S. federal court, and obtained in 2006 a judgment for USD 284 million. In the summer 2009, NML Capital initiated enforcement proceedings in Europe.

The contracts also contained a waiver of immunity from enforcement. NML Capital first attached assets covered by diplomatic immunity. In a judgment of 28 September 2011, the *Cour de cassation* ruled that the waiver did not cover diplomatic assets. This was because, the Court explained, diplomatic immunity is governed by special rules which require a waiver to be both express and specific, i.e. provide specifically that it covers diplomatic assets. As the Court was aware that the 1961 Vienna Convention only provides that waiver of diplomatic immunity should be express, the Court ruled that the special rules governing diplomatic immunity were to be found in customary international law.

This time, NML Capital focused on non diplomatic assets. It attached monies owed by French companies to Argentina through their local branches (and could

thus be attached from France). The assets were public, however: they were tax and social security claims. But, at first sight, they fell within the scope of the waiver. Indeed, I understand that the Republic of Argentina had waived immunity "for the Republic, or any of its revenues, assets or property".

Requirements for Waiving Sovereign Immunity

International law is changing really fast in Paris, however. The *Cour de cassation* decided to extend its new doctrine that waiver of immunity of enforcement should be both express and specific to public assets. The new rule is that waivers should specifically mention the assets or categories of assets to which they apply. As a consequence, as the waiver did not specifically mention, the Court found, tax and social revenues, it did not apply to them.

The judgments also explain that the new rule originates from customary public international law, as reflected in the 2004 UN Convention on Jurisdictional Immunities of States and Their Property. This is clearly the most creative part of the judgments.

Article 19 of the 2004 Convention reads:

> *Article 19*
> *State immunity from post-judgment measures of constraint*
> *No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:*
> *(a) the State has expressly consented to the taking of such measures as indicated:*
> *(i) by international agreement;*
> *(ii) by an arbitration agreement or in a written contract; or*

I am not sure where the requirement that the waiver be asset specific appears.

Furthermore, when Germany argued that Article 19 reflected customary international law in the *Jurisdictional Immunities of the State* case, the International Court of Justice responded:

> *117. When the United Nations Convention was being drafted, these provisions gave rise to long and difficult discussions. The Court considers that it is*

> *unnecessary for purposes of the present case for it to decide whether all aspects of Article 19 reflect current customary international law.*

Human Rights

Interestingly enough, the *Cour de cassation* also refers to several judgments of the European Court of Human Rights which held that rules on sovereign immunities necessarily comply with the ECHR as long as they reflect international law.

In other words, the French court recognizes that should it grant a wider immunity to foreign states than the one recognized by international law, it might infringe the European Convention. The ECHR also considers that the 2004 UN Convention reflects customary international law, but would it read Article 19 as liberally as the *Cour de cassation*?

Excessive English Costs Orders and Greek Public Policy

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Two recent Court of Appeal rulings in Greece have demonstrated the significance of the public policy clause in international litigation and arbitration. Both judgments are dealing with the problem of recognition and enforcement of ”excessive” costs awarded by English courts and arbitration panels. The issue has been brought several times before Greek courts within the last decade. What follows, is a brief presentation of the findings, and some concluding remarks of the author.

I.a. In the first case, the Corfu CoA refused to grant enforceability to a costs order and a default costs certificate of the York County Court on the grounds that Greek

courts wouldn’t have imposed such an excessive amount as costs of the proceedings for a similar case in Greece. In particular, the court found that, granting costs of more than £ 80,000 for a case, where the amount in dispute was £ 17,000, contravenes Greek public policy perceptions. Thus, the amount of £ 45,000 + 38,251.47 was considered as manifestly disproportionate and excessive for the case at hand. Consequently, the CoA granted exequatur for the remaining sums, and refused recognition for the above costs, which could not be tolerated by a court of law in Greece.

I.b. In the second case, the Piraeus CoA recognized an English arbitral award despite allegations made by the appellant, that the award’s order for costs contravened public policy. In this case the amount in dispute was in the altitude of nearly $ 3 million, whereas the costs granted did not exceed £ 100,000. The court applied the same rule as in the previous case, and found that the costs were not disproportionate to the case at stake.

II. As already mentioned above, those decisions are the last part on a sequence of judgments since 2005. Free circulation of English judgments is generally guaranteed in Greece; the problem starts when English creditors seek to enforce the pertinent costs orders. For Greek legal views, it is sheer impossible that costs exceed the actual amount in dispute in the main proceedings. This was reason enough for the Supreme Court (Areios Pagos = AP) to establish the doctrine of public policy violation, on the occasion of an appeal against a judgment of the Athens CoA back in 2006 [AP 1829/2006, Private Law Chronicles 2007, p. 635 et seq.]. The Supreme Court held, that granting enforceability to similar orders would violate the principle of proportionality, which is embedded both in the Greek Constitution and the ECHR. At the same time, it emphasized that the excessive character of costs impedes access to Justice for Greek citizens, invoking again provisions from the Greek Constitution (Art. 20.1) and the Human Rights Convention (Art. 6.1). The reasoning of the Supreme Court is followed by later case law: In an earlier judgment of the Corfu CoA [Nr. 193/2007, Legal Tribunal 2009, p. 557 et seq.] the court reiterated the line of argumentation stated by the Supreme Court, and refused to grant exequatur (again) to an English order for costs. Two years later, the Larissa CoA [Nr. 484/2011, unreported], followed the opposite direction, based on the fact that costs were far lower than the amount in dispute.

In regards to foreign arbitral awards, mention needs to be made to two earlier

Supreme Court judgments, both of which granted enforceability and at the same time rejected the opposite grounds for refusal on the basis of Art. V 2 b NYC. In the first case [AP 1066/2007, unreported], the Supreme Court found no violation of public policy by recognizing an English award, which awarded costs equivalent to half of the subject matter. A later ruling [AP 2273/2009, Civil Law Review 2010, p. 1273 et seq.] reached the same result, by making reference to the previous exchange of bill of costs particulars, for which none of the parties expressed any complaints during the hearing of the case before the Panel.

In conclusion, it is obvious that Greek courts are showing reservation towards those foreign costs orders, which are perceived as excessive according to domestic legal standards. This stance is not unique, taking into account pertinent case law reported in France and Argentina [for the former, see Cour de Cassation 1re Chambre civil, 16.3.1999, Clunet 1999, p. 773; for the latter see Kronke / Nacimento / Otto / Port (ed.), Recognition and enforcement of foreign arbitral awards – A global commentary on the New York Convention (2010), p. 397, note 245]. The decisive element in the courts' view is the interrelation between the subject matter and the costs: If the latter is higher than the former, no expectations of recognition and enforcement should be nourished. If however the latter is lower than the former, public policy considerations do not usually prevail.

Final point: As evidenced by the case law above, it is clear that the Greek jurisprudence is applying the same criteria for foreign judgments and arbitral awards alike, irrespective of their country of origin. As far as the latter is concerned, no objections could or should be raised. However, making absolute no distinction between foreign judgments emanating from EU – Member States and non-Member States courts seems to defy the recent vivid discussion that predominated during the Brussels I recast preparation phase (2009-2012). Fact is, that public policy survived in the European context, and will continue playing a significant role in the new era (Regulation 1215/2012). Still, what is missing from Greek case law is an effort to somehow soften the intensity of public policy control in the EU landscape. Whatever the reason might be, a clear conclusion may be reached: Greek case law gives back to public policy a Raison d'être, demonstrating the importance of its existence, even when judicial cooperation and free circulation of judgments are the rules of the game.

Ubertazzi on Kate Provence Pictures

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The publication of topless photographs of Britain's likely future queen Catherine Elizabeth Middleton, the Duchess of Cambridge (hereinafter: Kate Middleton or the Duchess), by certain newspapers in several EU countries – such as France, Italy, Sweden, Denmark and Ireland – demonstrates once more the need to strike a fair balance between the protection of the right to respect for private life guaranteed by Art. 8 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter: ECHR) and the right to freedom of expression granted under Art. 10 of the same Convention.

The Kate Middleton photo case is reminiscent of the very recent and famous judgments of the European Court of Human Rights (hereafter: ECtHR) in the cases von Hannover v. Germany of February the 7th 2012 (Grand Chamber, applications nos. 40660/08 and 60641/08: hereinafter: von Hannover judgment 2) and of June the 24th 2004 respectively (Third Section, application no. 59320/00: hereinafter: von Hannover judgment 1). In both these cases, the elder daughter of the late Prince Rainier III of Monaco, Princess Caroline von Hannover, lodged applications before the ECtHR against the Federal Republic of Germany alleging that the refusal by the German courts to grant injunctions to prevent further publications of different sets of photos of her infringed her right to respect for her private life as guaranteed by Article 8 ECHR.

The ECtHR maintained that under Articles 8 and 10 ECHR States are obliged to balance the protection of the fundamental human right to respect for private life, which comprises the right to control the use of one's image, on the one hand, and the fundamental human right of freedom of expression respectively, which extends to the publication of the relevant photos by the press under a commercial

interest, on the other hand. To strike this balance member States typically insert specific domestic provisions in their copyright acts, prohibiting the dissemination of an image without the express approval of the person concerned, except where this image portrays an aspect of contemporary society, on the condition that its publication does not interfere with a legitimate interest of the person concerned (see Sections 22(1) and 23(1) of the German Copyright Arts Domain under which the German courts refused to grant the injunction required by Princess Caroline). These provisions are interpreted so as to distinguish between private individuals unknown to the public and public or political figures, affording the former a wider right to control the use of their images, whereas the latter a very limited protection of their right to respect for private life: then, public figures have to accept that they "might be photographed at almost any time, systematically, and that the photos are then widely disseminated even if [...] the photos and accompanying articles relate exclusively to details of their private life" [para 74 Hannover I]. However, under this interpretation the balance between the right to respect for private life and the right to freedom of expression struck by the provisions at stake is too much in favour of the latter, but insufficient to effectively protect the private life of public figures, since even where a person is known to the general public he or she may rely on a legitimate expectation of protection of and respect for his/her private life. Thus, these provisions should preferably be understood narrowly, namely as allowing the publication of the pictures not merely when the interested person is a public figure, but rather when the published photos contribute to a debate of general interest.

To establish if the relevant pictures satisfy this last requirement, according to the ECtHR regard must be given to different factors (von Hannover judgment 2, para 109-113): whether the person at stake is not only well known to the public, but also exercises official functions; whether the pictures relate exclusively to details of his/her private life and have the sole scope of satisfying public curiosity in that respect, or rather concern facts capable of contributing to a general debate in a democratic society; whether the pictures have been taken in a secluded and isolated place out of the public eyes or even in a public place but by subterfuge or other illicit means, or rather in a public place in conditions not unfavourable to the interested person; whether the publication of the photos constitutes a serious intrusion with grave consequences for the person concerned, or rather has no such effects; and whether the pictures are disseminated to a broad section of the public around the word, or rather are published in a national and local newspaper

with limited circulation.

Under these conditions, in the von Hannover judgment 1 the ECtHR held that the German courts refusal to grant injunctions against the further publications of certain photos of Princess Caroline von Hannover had infringed her right to respect for private life ex Art. 8 ECHR: in fact, despite the applicant being well known to the public, she exercised no official function within or on behalf of the State of Monaco or any of its institutions, but rather limited herself to represent the Prince's Monaco family as a member of it; furthermore, the photos related exclusively to details of her private life and as such aimed at satisfying a mere public curiosity; finally these photos where shot in isolated places or in public places but by subterfuge. In contrast, in the von Hannover judgment 2 the ECtHR reached the opposite conclusion, namely holding that there had been no violation of Article 8 of the ECHR: in fact, despite Princess Caroline exercising no official functions, she was undeniably well known to the public and could therefore not be considered an ordinary private individual; furthermore, some of the photos at stake supported and illustrated the information on the illness affecting Prince Rainer III that was being conveyed – reporting on how the Prince's children, including Princess Caroline, reconciled their obligation of family solidarity with the legitimate needs of their private life, among which was the desire to go on holiday – and as such were related to an event of contemporary society; moreover, despite the photos having been shot without the applicant's knowledge, they were taken in the middle of a street in St. Moritz in winter not surreptitiously or in conditions unfavourable to the applicant.

In light of these conclusions, if the courts of the EU States where the topless pictures are being published refused to grant injunctions to prevent further publications, at least in their respective territories, Kate Middleton -after having exhausted the internal procedural remedies in the States at stake – could lodge applications against these same States before the ECtHR for the infringement of their positive obligations to protect her private life guaranteed by Article 8 ECHR. In such circumstances, the ECtHR would most probably conclude that there have been violations of this Article by the States involved.

In fact, despite the Duchess exercising official functions by performing senior Royal duties since her first trip to Canada and US in July 2011 (see The Telegraph), the pictures at stake relate exclusively to details of her private life and have the sole scope of satisfying public curiosity in that respect, but do not

concern facts capable of contributing to a general debate over Kate Middleton's official role. Furthermore, the pictures were taken by subterfuge while the couple were on a private property at a luxury holiday chateau owned by the Queen of England's nephew – who promised absolute privacy to the Duchess -, by means of a photographer equipped with a high powered lens from a distance of over half a mile away from the chateau (see The Daily Mail ; P A Clarke). Also, the publication of the photos constitutes a serious intrusion with grave consequences for the couple, evinced by their official statement, according to which "the Royal Highnesses have been hugely saddened to learn that" the publication of the pictures at stake has "invaded their privacy in such a grotesque and totally unjustifiable manner. […] The incident is reminiscent of the worst excesses of the press and paparazzi during the life of Diana, Princess of Wales, and all the more upsetting to the Duke and Duchess for being so" (see The Huffington Post). Finally, despite the pictures having been disseminated by local newspapers with apparently limited national circulation, the original publications have initiated the immediate distribution of the images "over the internet like wild-fire", with the result of reaching a broad section of the public around the world (see SeeClouds).

Muir Watt on Kate Provence Pictures

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*Cachez ce sein…*It seems to me that this case – which is perhaps less intrinsically interesting, even from a conflict of laws perspective, than other recent instances in which the cross-border exercise of the freedom of press is challenged in the name of competing values, such as *Charlie Hebdo* and the satirical caricatures of Mahomet, or *The Guardian* and the *Trasfigura* super-injunction – serves to illustrate the relative indifference of the content of the relevant choice of law rules when fundamental rights are in balance. As so much has already been written about possible additions to Rome II in privacy or defamation cases, I shall concentrate on what could be called the *Duchess of Cambridge hypothesis:*

whatever the applicable rules, the only real constraint on adjudication in such an instance, and the only real arbiter of outcomes, is the duty of the court (assumed to be bound, whatever its constitutional duties, by the European Convention on Human Rights, or indeed the Charter if Rome II were in the end to cover censorship issues) to carry out a proportionality test in context.

One might start with a few thoughts about the balance of equities in this case. Back at the *café du commerce* (or the ranch, or the street, or indeed anywhere where conventional wisdom takes shape), the debate is usually framed in moral terms, but remains inconclusive, neither side inspiring unmitigated sympathy. On the one hand, invasion of privacy of public figures by the gutter press (however glossy) can on no account be condoned. If the royal couple were stalked in a private place by prying *paparazzi*, then the immediate judicial confiscation of the pictures by the *juge des référés* was more than justified. Of course, there is clearly a regrettable voyeur-ism among the general public that supports a market for pictures of intimate royal doings. The real responsibility may lie therefore with those governments which have failed adequately to regulate journalistic practices. On the other hand (so the debate goes), the main source of legitimacy of devoting large amounts of public resources to fund the essentially decorative or representational activities of national figures abroad (whether royals, ambassadors or others) lies in the reassuring, inspiring or otherwise positive image thus projected, which in turn serves to divert attention from domestic difficulties, to smooth angles in foreign policy etc. Surely the Duchess of Cambridge, who appears to have been driven from the start by a compelling desire to enter into this role, should have taken particular care to refrain from endangering the public image of niceness of which the British royal family places its hope for survival? Moreover, she can hardly claim not to be accustomed to the prying of the gutter press at home – although of course, in England, the medias may be more easily gagged (see *Trasfigura*), and have apparently agreed in this instance to remain sober, in the wake of last year's hacking scandals and in the shadow of pending regulation. And so on…

The circularity of this imagined exchange is not unlinked to the well-known difficulties encountered in the thinner air of legal argument. The conflict involving the invasion of privacy of public figures (including those who otherwise capitalize on publicity), and claims to journalistic freedom of expression (albeit by paparazzi whose profits rise in direct proportion to the extent to which they expose the

intimacy of the rich and famous), is both a *hard case* (in terms of adjudication of rights) and a *true conflict* (in terms of the conflict of laws). As to the former, of course, there is no more an easy answer in this particular case than an adequate way of formulating general legal principle. If these unfortunate photographs do not provide a convincing enough example, the (less trivial?) *Charlie Hebdo* case reveals a conflict of values and rights which is equally divisive and ultimately insoluble from "above", that is, in terms of an overarching, impartial determination of rights and duties. Take Duncan Kennedy's *A Semiotics of Legal Argument* (Academy of European Law (ed.),?*Collected Courses of the Academy of European Law*, Volume Ill. Book 2, 309-365): all the oppositional pairs of conventional argument-bites can be found here, within the common clusters of substantive or systemic legal arguments (morality, rights, utility or expectations, on the one hand; administrability and institutional competence, in the other), as well as all the various "operations" which they instantiate. Thus, when challenged with invasion of privacy, *Closer* responds, predictably, by denial ("no, we did not cross the bounds, the royals were visible through a telescopic lense"); counter-argument ("well, we merely made use of our fundamental freedom in the public interest"); the formulation of an exception to an otherwise accepted principle ("yes, we admit that the pictures were unauthorized, but these were public figures whose deeds are traditionally of public interest"); then finally by "shifting levels" from the fault/not fault to the terrain of the reality of injury. How could anyone possibly complain about pictures which were both esthetic and modern, and which will undeniably contribute to bring glamour to the somewhat fuddy-duddy, or goody-goody, royal style?

What does all this tell us about the conflict of laws issue? Potentially, the choice of connecting factor entails significant distributional consequences in such a case. At present, outside the sway of Rome II, each forum makes its own policy choices in respect of conflict of law outcomes, and these probably balance each other out across the board in terms of winners and losers – at the price of transnational havoc on the way (through the risk of parallel proceedings and conflicting decisions, which Brussels I has encouraged with *Fiona Shevill*, although *Martinez* may be a significant improvement in this respect). If it were to be decided at some point that Rome II should cover privacy and personality issues, whatever consequences result from the choice of any given connecting factor would obviously be amplified through generalization; the risk of one-sidedness would then have to be dealt with. However, as illustrated by the continued failures of

attempts to design an adequate regime in Rome II, any such scheme is highly complex. One might initially assume, say, that editors generally choose to set up in more permissive jurisdictions, whereas victims of alleged violations might more frequently issue from more protective cultures, which encourage higher expectations as to the protection of privacy or personality rights. Any clear-cut rule would therefore be likely to favor either the freedom of the press (country of origin principle, constantly lobbied by the medias from the outset), or conversely the right to privacy (place of harm or victim's habitual residence). However (and allowing for the switch from privacy to defamation), while the *Charlie Hebdo* case may conform to this pattern, the *Duchess of Cambridge* affair turns out to be (more or less) the reverse. To establish a better balance, therefore, exceptions must be carved out, whichever principle is chosen as a starting point. The place of injury might be said to be paramount, unless there are good reasons to derogate from it under, say, a foreseeability exception in the interest of the defendant newspaper. Alternatively, the country of origin principle may carry the day (as in the E-commerce directive and *Edate Advertising*), but then the public policy of the (more protective) forum may interfere to trump all. In terms of the semiotics of legal argument, this endless to-and-fro illustrates the phenomenon of "nesting" (Kennedy *op cit*, p357). Each argument carries with it its own oppositional twin. Chase a contrary principle out of the door in a hard case and inevitably, at some point in the course of implementation of its opposite, it will reappear through the window.

Of course, even if one settles for the inevitable impact of public policy as a matter of private international law, this is not the end of the story. Because the public policy exception itself will have to mirror the balance of fundamental rights to which the Member States are ultimately held (under the ECHR or, if Rome II is extended to cover such issues, under the Charter). Consider the case of unauthorized pictures of Caroline of Hannover, which had given rise to judicial division within Germany over the respective weight to be given to freedom of press and privacy of the royal couple. In 2004, the ECtHR observed (Grand Chamber, case of VON HANNOVER v. GERMANY (no. 2), Applications nos. 40660/08 and 60641/08):

> *§124. … the national courts carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life. In doing so, they attached fundamental importance*

> *to the question whether the photos, considered in the light of the accompanying articles, had contributed to a debate of general interest. They also examined the circumstances in which the photos had been taken…§126. In those circumstances, and having regard to the margin of appreciation enjoyed by the national courts when balancing competing interests, the Court concludes that the latter have not failed to comply with their positive obligations under Article 8 of the Convention. Accordingly, there has not been a violation of that provision.*

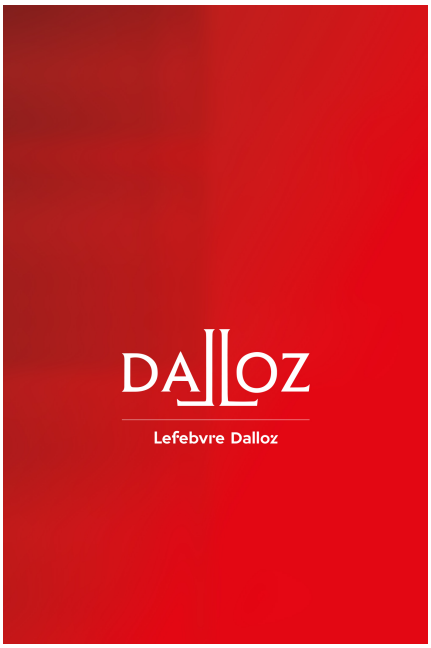
Outside the German domestic context, whatever the legal basis supporting the competing interests here, it would be difficult to imagine a very different outcome. My point, therefore, is merely that given the conflict of values involved, the choice of conflict rule – national or European, general principle or special rule, bright-line or flexible, with foreseeability clause or public policy – is for a significant part, indifferent in the end. The forum will be bound ultimately to a proportionality test, whatever the starting point. And in the end, no doubt, the way in which it implements such a test will depend on its own view of the equities in a specific case. Human rights law indubitably places constraints on adjudication, but it is of course largely context-sensitive and does not mandate one right answer. The economy of any choice of law rule, along with its exceptions, special refinements or escape clauses, is likely to reflect similar constraints – no more, no less.

It may be that the unfortunate saga of the Duchess of Cambridge's topless pictures will begin and end on a purely jurisdictional note, with the interim measures already obtained. These gave the claimants partial satisfaction, at least on French soil and for the existing digital versions of the pictures. At the time of writing, we do not know if further legal action is to be taken with a view to monetary compensation (nor where), and whether the issue of applicable law will arise. We know that the French provisional measures have not entirely prevented copies from circulating on the Internet, nor the medias in other countries (including of course some which would not be bound by Rome II in any event) from publishing or intending to publish them. This raises the additional and much discussed issue (or "can of worms" to borrow Andrew Dickinson's term) of the adequate treatment of cross-border cyber-torts (whether or not linked to the invasion of personality rights). As apparent already in the Duchess of Cambridge case, cyber-privacy conflicts will usually comprise a significant jurisdictional

dimension, frequently debated in terms of the lack of effectiveness of traditional measures (such as seizure of the unauthorized pictures), which are usually territorial in scope (not cross-border), and merely geographical (no effect in virtual space). The first deficiency might be overcome through injunctive relief, but the second requires specifically regulatory technology (as opposed to merely legal or normative: see for example, on the regulatory tools available, Roger Brownsword's excellent *Rights, Regulation and the Technological Revolution*, Oxford, OUP, 2008). However, given the inevitable conflicts of values in all cases and the variable balance of equities as between any given instances, it is not necessarily desirable that any such measure should actually achieve universal water-tightness. Look at the *Trafigura* case, after all (a saga involving the silencing of journalists relating to a case involving the international dumping of toxic waste: see, on the extraordinary judicial journey of the *Probo Koala*, *Revue critique DIP 2010.495*). Was it not lucky that the super-injunction which purported to gag *The Guardian* newspaper to the extent allowed by the most sophisticated judicial technology, did not succeed in preventing an unauthorized twit (but that's also a sore point in French politics at the moment!)?

First Issue of 2012's Revue Critique de Droit International Privé

The last issue of the *Revue critique de droit international privé* was just released. It contains four articles and several casenotes.



The first article is a survey of the 2011 Polish law of private international law by the late Tomasz Pajor, who was a professor at Lodz University (*La nouvelle loi polonaise de droit international privé*).

The second article is authored by Isabelle Veillard and explores the scope of res judicata of arbitral awards (*Le domaine de l'autorité de la chose arbitrée*). It is this only one to include an English abstract:

> *Expanding from specific arguments to the cause of action itself, the requirement that the dispute be concentrated may, in the field of arbitral res judicata, be beneficial from the standpoint of procedural speed and fairplay, but it threatens the adversarial principle all the more so that there is a presumption in favour of renunciation of the right to appeal ; this is why the non-concentration of the legal grounds of action should not be sanctioned unless it is the fruit of gross negligence or abuse in the exercise of the right to bring suit. The distrust of French law towards res judicata could be mitigated in respect of arbitral awards given the contractual nature of arbitration, by the adoption as between the parties of a mechanism of collateral estoppel, along with safeguards designed to guarantee both efficiency and fairplay with the requirements of a fair trial ; the distinction between res judicata and third party effects suffices no doubt to protect the latter.*

In the third article, Aline Tenenbaum, who lectures at Paris Est Creteil University, discusses the issue of the localization of financial loss for jurisdictional

purposes in the light of the Madoff case (*Retombées de l'affaire Madoff sur la Convention de Lugano. La localisation du dommage financier*).

Finally, in the last article, Fabien Marchadier, who is a professor at Poitiers University, explores the consequences of the ECHR case *Genovese v. Malta* as far as awarding citizenship is concerned (*L'attribution de la nationalité à l'épreuve de la Covnentino européenne des droits de l'homme. Réflexion à partir de l'arrêt* Genovese c. Malte).

Hess on Germany v. Italy

State Immunity, Violation of Human Rights and the Individual's Right for Reparations – A Comment on the ICJ's Judgment of February 2, 2012 (Germany v. Italy, Greece Intervening)

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In this blog, the pronouncement of the judgment of the ICJ in the case *Germany v. Italy* was announced, but no comment has been posted yet. I would like to start a discussion on this judgment and its implications for the development of international law, because this judgment seems a landmark decision to me. My following comments are part of a more comprehensive article (written in German) commenting the judgment which will be published in *IPRax* 3/2012.

1. The Background of the Decision

As the background of the ICJ's judgment is well known to most of the readers of this blog it can be briefly summarised as follows: Since the 1990s, Germany has been sued by many victims of Nazi atrocities in European (and American) courts. The plaintiffs asserted that they had not been fully compensated for losses of the lives of their family members, for their personal injuries, for violations of their personal liberty and for losses of property through the reparation agreements after WW II. A major incentive triggering these lawsuits was the ambiguous wording of the Treaties on the Reunification of Germany (especially the so-called

2+4 Treaty) which stipulated to be “final regarding the legal effects of WW II”, but did not comment on the reparation issue. In the late 1990s, German companies were sued in American and German courts for reparations of forced (or more correctly: slave) labour during the war. Finally, these claims were settled by a governmental agreement establishing the Foundation “Remembrance, Responsibility and Future” which provided for compensation for many, but not all victims of Nazi atrocities. Especially those victims who were not compensated initiated additional lawsuits against Germany (and German corporations) in their respective home-states.

In 2000, the Supreme Greek Civil Court gave a judgment against Germany and ordered the compensation of damages (of several million Euros) for atrocities committed by the German Wehrmacht and SS soldiers in the Greek village of Distomo where almost the whole population was killed in 1944. The Greek Court denied Germany’s claim for sovereign immunity for two reasons: First the Court held that the crime committed by the German soldiers was considered a non-commercial tort in the forum state which was no longer covered by state immunity. Secondly, and more importantly, the Court opined that the claims were based on violations of jus cogens and, therefore, Germany was not entitled to immunity. However, two years later a Greek special court declared that this judgment was not to be enforced in Greece. In 2002, the plaintiffs challenged this case law in the ECHR, but without success. In 2004, the Italian Corte di Cassazione, in the *Ferrini*-decision gave judgment against Germany and denied the immunity for the same reasons: first because the crimes had been committed by the soldiers of the German Reich on Italian soil and secondly, because the atrocities were qualified as war crimes and crimes against humanity belonging to jus cogens. According to the *Ferrini*-decision, jus cogens overrules state immunity which cannot bar the victims’ civil action for damages. In 2008, the Corte di Cassazione rendered two additional judgments against Germany which confirmed that Italian courts had jurisdiction over Germany in compensation cases for war damages. Since 2005, the Greek claimants sought the enforcement of the Distomo decision in Italy and, finally, seized the Villa Vigoni, a property of the German State near the Lac Como which is used for cultural exchanges.

In 2008, Germany initiated proceedings in the ECJ under the European Convention on the Peaceful Settlement of Disputes of 1957 which confers the ICJ the jurisdiction for disputes among the Contracting parties on the interpretation

of international law. Italy counterclaimed for war damages, but the ICJ rejected this counterclaim in 2010 as inadmissible because the European Convention of 1957 did not confer jurisdiction on disputes which arose before its entry into force. Finally, Greece intervened in the proceedings in order to "protect" the judgments of its courts and the ICJ permitted this intervention.

2. The Arguments of the ICJ

On February 2, 2012, the ICJ found by a majority of twelve to three judges that Germany's right to sovereign immunity had been infringed by the decisions of the Italian courts and by a majority of fourteen to one vote that the enforcement measures against the Villa Vigoni equally infringed Germany's sovereign immunity from enforcement measures. The majority opinion was written by President *Owada*; only the dissent of *Cancado Trindade* asserted that international law generally privileges human rights claims. Accordingly, the fundamental issue before the court was the relationship between jus cogens and state immunity. The importance of the decision is underlined by its clear outcome: although recent decisions of the ECtHR on the relationship of human rights protection to state immunity (*ECtHR, Al Adsani v. United Kingdom*, ECHR-Reports 2001-XI, p. 101, *Kalegoropoulou v. Germany and Greece,* ECHR Reports 2002 X-p.417), had been given by very small majorities (of only one vote), the majority of the ICJ is clear and unambiguous. The majority opinion on jurisdictional immunity unfolds in three steps: first, it enounces the importance of state immunity as a principle of the international legal order and derives from this premise thatItaly must demonstrate that modern customary law permits a limitation of state immunity in the situation under consideration. Secondly, the Court scrutinises whether there is an exception from immunity in the case of tortuous conduct committed by foreign troops in the forum state. Thirdly, the Court addresses the issue of whether the violation of a peremptory norm (jus cogens) demands an exception from state immunity. The argument of the majority is based on a positivist approach to customary international law which can be summarised as follows:

2.1 Setting the Scene: State Immunity as a Fundamental Principle of International Law

The majority opinion acknowledges the importance of state immunity as a principle of the international legal order which is closely related to the principle

of the sovereign equality of States, and in addition recognises that present international law distinguishes acta jure imperii and acta jure gestionis, Furthermore the Court states that the dispute depends on the determination of customary international law in this area of law. However, the Court notes that the underlying atrocities of the troops of the German Reich clearly were acta iure imperii, regardless of their unlawfulness. Consequently, the Court states thatItalymust prove that customary international law provides for an exception from state immunity in the present case.

2.2 The Territorial Tort Principle

The Court addresses the first argument ofItalythat the jurisdiction of the Italian courts could be based on an exception from state immunity in cases where the defendant state caused death, personal injury or damage to property on the territory of theforumState, even if the act performed was an act jure imperii. In this respect, the ICJ carefully reviews the pertinent practice and opinion juris which it finds in international conventions, national legislation and court decisions on this issue. The result, however, is unambiguous: with the exception of the Italian case law (and the Distomo decision which the Court considers overruled), there are almost no cases holding such an exception – although the ICJ cited several judgments which expressly stated that foreign troops on domestic soil still enjoy full immunity – even in the case of tortuous conduct.

2.3 State Immunity and jus cogens

The most important part of the judgment deals with the relationship between state immunity and jus cogens. Again, the findings of the Court are rigid and succinct: It starts by expressing doubts on the argument that the gravity of a violation entails an exception from immunity. According to the Court, immunity from jurisdiction does not only shield the State from an adverse judgment, but from the judicial proceedings as such. However, an exception based on the "gravity of the violation of law" would demand an inquiry of the court on the existence of such gravity. Here, the Court differentiates between State immunity as a procedural defense and the (asserted) violations of international law which belong to the merits of the claim. In a second step, the Court inquires whether State practice supports the argument that the gravity of acts alleged implies an exception from immunity. Again, the Court does not find sufficient evidence for a new rule of customary law in this respect.

The distinction between procedure and substance is also used as the main argument against the assertion that jus cogens overrules state immunity. Again, the argument of the ICJ is unambiguous: There is no conflict of rules, because the rules address different matters: procedure and substance. The peremptory character of the norm breached does not per se entail any remedy in domestic courts. According to the ICJ, the breach of a peremptory norm of international law entails the responsibility of the state under international law, but does not deprive it from its claim for sovereign immunity (in this respect, the Court refers to its judgment in the Arrest Warrant of 11 April 2000, Congo v. Belgium, ICJ Reports 2002, p. 3 paras 58 and 78). Again, the Court quotes case law of national and international courts where the plea of immunity had been uphold in cases of violations of ius cogens.

The last part of the judgment addresses the so-called last resort argument: according to argument Italy asserted that the denial of immunity was the only way to secure compensation to the various groups of victims not included in the international reparation regime after WW II. Although the ICJ notes – with "surprise and regret" that the so-called Italian internees have been excluded from compensation, it nevertheless reiterates the argument that immunity and state responsibility are entirely different issues. The ICJ concludes that there is *"no basis in State practice from which customary international law is derived that international law makes the entitlement of a State dependent upon the existence of alternative means of securing redress."* (no 101). Furthermore, the Court sticks to the adverse practical consequences of such situation as the domestic courts would be called to determine the appropriateness of international reparation schemes for the compensation of individual victims. Finally the Court states that it is well aware of the fact that its conclusions preclude judicial redress for the individual claimants, but recalls the State parties to start further negotiations in order to resolve the issue.

3. Evaluation

3.1 The Methodological Approach of the ICJ

The line of argument of the ICJ demonstrates a positivist approach mainly based on the determination of customary international law. According to this approach, the argument based on legal theory that the international legal order had changed and a new exception of state immunity was imminent, was not decisive.

The majority of the Court held that any asserted change of the established rule on state immunity required the determination that such change was supported by state practice and opinion juris – consequently, the majority does not quote any scholarly opinion . The dissent of *Cancado Trindade* is different in its methodology and its conclusions: it is based on the idea that a new international constitutional order is emerging which is aimed at the enforcement of human rights. The dissent bases its argument on the opinion of international institutions and reputable scholars, not – as did the majority – on state consent. In this respect, the opinion of the majority is more conservative, but reflects much more the present state of international law. These considerations may explain the clear majority of the judgment which is supported by 12 of the 15 judges.

3.2 The Lacking Reference to American Case Law in the ICJ's Judgment

The practical consequences of the positivist approach of the majority are twofold: as the determination of state practice was decisive, the Court had not to review the line of arguments of national court decisions, but mainly focus on the outcome of these decisions. Accordingly, the Court could refrain from evaluating the different arguments used by domestic courts. However, there is some evaluation of state practice in the opinion of the majority: the ICJ gives considerable weight to national decisions which were supported by the European Court of Human Rights and improves the (indirect) dialogue of international courts and tribunals on the coherent application and development of international law. The opinion even quotes literally parts of the judgments of the ECtHR.

On the other hand, the ICJ does not refer to decisions on state immunity which are mainly based on the application of domestic law. However, it comes as a matter of surprise that the (pertinent) practice of American courts does not appear in the judgment – even the pertinent and prominent case *Amerada Hess v. Argentina*, or *Hugo Princz v. Germany*. The striking absence of American case law may be explained by the attitude of American courts to interpret international law via the lenses of domestic doctrines like the Alien Tort Claims Act and comity. However, according to the ICJ's decision in Germany v. Italy, sovereign immunity is not a matter of comity (as it is sometimes asserted by American authors), but directly determined by customary international law. Regarding the American practice, the Court simply noticed that the exception from immunity for "state sponsored terrorism" as provided for in 28 USC § 1605A "has no counterpart in the legislation of other states" and, therefore, was not considered relevant for the

development of state immunity under international law (no 88). The question remains, however, whether national laws on State immunity which deviate considerably from international customary law in this field are compatible with international law.

3.3 The Impact of the Judgment on the so-called International Human Rights Litigation in Domestic Courts

One important aspect of the judgment relates to the individual's right of access to a court and its relationship with state immunity. In this respect, the findings of the Court are twofold: first, the Court does apparently not consider this fundamental right of the individual as part of jus cogens. Furthermore, the Court notes that public international law does not confer an individual right for full compensation to victims of war atrocities, but refers to set-off and lump sum agreements in the context of war reparations which clearly demonstrate that international law does not provide for a rule of full compensation of the individual victim from which no derogation is permitted (no. 94). These findings are important with regard to doctrinal thinking as advocated by authors like *H.H. Koh, J. Paust* and *B. Stephens* on the decentralised enforcement of human rights by civil courts. According to these authors, domestic courts shall actively implement peremptory human right laws in a decentralised way. This idea is – to some extent – borrowed from the case law of the ECJ which refers to national courts of EU-Member States as decentralised European courts. According to the present judgment of the ICJ, the situation in international law is distinct when foreign states (and their agents) are targeted: In this case state immunity sets the limits and does not provide for any jus cogens exception.

However, the issue remains to what extent individuals or corporate actors may be sued for damages instead of the foreign state. Permitting these lawsuits (based mainly or even solely on international law) logically contradicts to the procedural bar of these lawsuits against the main actors (the States) under international law. However, the possibility remains to base such lawsuits on the private law of torts which applies to tortuous and criminal actions among private persons. In this respect, further clarification is needed and the decision of the U.S. Supreme Court in *Kiobel v. Royal Dutch Petroleum* is imminent. It is hoped that the U.S. Supreme Court will take the ICJ's judgment in the present case into account.

Finally, it should be noted that the ICJ's landmark decision on State immunity

does not exclude the possibility that domestic courts refer to international law when determining legal obligations of their own governments and administrations under international law. The same considerations apply to criminal responsibility of individuals under international and under domestic criminal law.

Latest Issue of IPRax: No. 1, 2012

The latest issue of "Praxis des Internationalen Privat- und Verfahrensrecht (IPRax)" has just been released. The table of contents is available on the IPRax-Homepage and reads as follows:

***Articles**:*

H.-P. Mansel/K. Thorn/R. Wagner, **Europäisches Kollisionsrecht 2011: - Gegenläufige Entwicklungen,** p. 1:

> *The article gives an overview on the developments in Brussels in the judicial cooperation in civil and commercial matters from November 2010 until October 2011. It summarizes current projects and new instruments that are prevently making their way through the EU legislative process. It also refers to the laws enacted on a national level in Germany which are a consequence of the new European instruments. Furthermore, the article shows areas of law where the EU has made use of its external competence. The article discusses both important decisions and pending cases before the ECJ as well as important decisions from German courts touching the subject matter of the article. In addition, the present article turns to the current projects of the Hague Conference as well.*

C. F. Nordmeier, **Stand, Perspektiven und Grenzen der Rechtslagenanerkennung im europäischen Rechtsraum anhand Entscheidungen mitgliedstaatlicher Gerichte,** p. 31:

Current judgments of the ECJ – most recently in Runevi?-Vardyn – have given rise to the question if and under which circumstances a legal situation may be recognised, based on the rights of EU citizenship, in the European judicial area. The present article analyses the reception of the ECJ cases by courts of the member states. Based hereon, it is possible to demonstrate that the recognition of legal situations is not a new phenomenon. Some national courts resort to Art. 8 ECHR in order to generalize the ECJ decisions which does not convince without further differentiation. Regarding the conditions of application of rights derived from citizenship of the Union, the necessity of a cross-border element and the development of a substantial effect criteria are discussed. The analysed cases lead to the conclusion that it does not seem recommendable to replace classic private international law by a principle of recognition.

T. Rauscher, **Von prosaischen Synonymen und anderen Schäden – Zum Umgang mit der Rechtssprache im EuZPR/EuIPR**, p. 40:

EC/EU-Regulations on Conflict Law (Brussel I Regulation, Rome Regulations etc.) are suffering from significant linguistic problems. This article analyses different types of such defects including imprecisely used legal terms (like "damage" when used in the context of the concept of unjust enrichment), meaningless tautologies (like the use of "Schriftstück" and "Dokument" for what the English version consistently calls a "document"), redundancies in different Regulations featuring unclear variations of the respective wording or merely improper translations into other official languages of the EU of what originally had been developed in one of the EU's working languages.
The author does not suggest at all to replace the system of multiple official languages with a system of only one legal lingua franca. However, the quality of the rule making and translation process should be given greater attention including the co-operation of lawyers and interpreters in this process and a mechanism of control in comparative networks. Last but not least, in order to improve the consistency of the entire system of Regulations, a systematic codification of European Conflict Law should be taken into consideration.

M. Günes/K. Freidinger, **Gerichtsstand und anwendbares Recht bei - Konsignationslagern,** p. 48:

Consignment stocks are one of several techniques to ensure that goods reach

the intended market. In particular consignment agreements are used as a method of commercial transactions for oversea markets. Despite the fact that such agreements are regularly bedded in an international context the applicable law and the place of jurisdiction for any disputes have not been discussed scientifically in German law yet. After assessing the possible legal nature(s) of contracts in the context of a consignment stock, the paper establishes that in most cases – if contractual provisions do not stipulate otherwise –, German law would declare the Law of the storage location applicable and the Court of the storage location competent if it had to assess a legal question concerning the storage contract (the master agreement) itself. In a case concerning an individual sale agreement to this master agreement, a German court should – in most cases – hold the law of the place of residence of the seller applicable and determine the place of jurisdiction in the exact same manner as it does in case of an ordinary sale agreement. Nevertheless, these findings are not the only possible ones. Therefore, it is recommendable to conclude consignment agreements with paying special attention to the questions of the applicable law and the place of jurisdiction. The parties and in particular the seller must hereby consider that any agreed legal system may not be applied to the questions of title and the retention of the title in the goods.

C. Luttermann/S. Geißler, **Haftungsfragen transnationaler Konzern-finanzierung (cash pooling) und das Bilanzstatut der Gesellschaft,** p. 55:

We will enter a core domain of international legal practice and jurisprudence: Companies are globally organised as groups, consisting of numerous corporations (legal entities); as a rule, these are financed within the framework of common cash management in the affiliate relations (cash pooling). Under the dominion of the separate legal entity doctrine, this is problematic, for the individual corporation has only limited "assets". These have to be determined on the basis of accounting law. This means that transnationally, it is a matter of central questions of liability and in general, for an adequate asset order, a change of perspective regarding conflict of law rules, as will be shown: Instead of dealing with the classic company statute regarding organisational law (lex societatis), the material issue is rather which accounting law is valid for the individual company and its valuation (accounting statute of the company). This is the necessary basis on which a sustainable legal order can be developed. The fact that this is still lacking is illustrated by the ongoing worldwide "financial

crisis" with largely ailing balance sheets (financial reporting).

Case Notes

D.-C. Bittmann, **Ordnungsgeldbeschlüsse nach § 890 ZPO als Europäische Vollstreckungstitel? (BGH, S. 72),** p. 62:

In the decision reviewed in this article the German Federal Supreme Court held that penalty payments according to § 890 ZPO cannot be issued as European Enforcement Orders. The Court is reasoning that a decision imposing a penalty payment does not comply with the procedural minimum standards set in force by Regulation (EU) 805/2004. Decisions according to § 890 ZPO especially do not inform the debtor about how to contest the claim and what the consequences of not contesting are (art. 17).
The following article agrees with this result. It looks, however, critically at the way of reasoning of the Federal Supreme Court. The central point of the decision is the question, who is entitled to enforce a penalty payment. Different from the French system, according to which a penalty payment (astreinte) goes to the claimant of the injunctive relief, which shall be enforced, penalty payments according to § 890 ZPO flow into the treasury. As a consequence, in Germany the claimant of an injunctive relief cannot apply for a penalty payment issued as European Enforcement Order.

D. Schefold, **Anerkennung von Banksanierungsmaßnahmen im EWR-Bereich (LG Frankfurt a.M., S. 75)**, p. 66:

On appeal against a preliminary seizure order, the district court in Frankfurt on Main held that such an order by a German court against a German branch of an Icelandic credit institution violates the European directive 2001/24/EC, adopted for the entire European Economic Area (EEA), on the reorganisation and winding up of credit institutions when the credit institution undergoes reorganisation in its home state and the reorganization procedure entails a suspension of enforcement. In line with art. 3 of directive 2001/24/EC, the district court held that the administrative or judicial authorities of the home member state of a credit institution are alone competent to decide on implementation measures for a credit institution, including branches established in other member states. Such measures are fully effective according

to the law of the home member state, including against third parties in other member states, and subject to mutual recognition throughout the EEA without any further formalities.

Overview over Recent Case Law

OLG München 19.10.2010 31 Wx 51/10, **Noterbrecht nach griechischem Recht des einzigen Sohnes eines in Deutschland?1. ansässigen und verstorbenen Auslandsgriechen. Die Rückkehr nach Griechenland zur Ableistung des Wehrdienstes?2. stellt jedenfalls dann eine Aufgabe des Wohnsitzes in Deutschland dar, wenn der Wehrpflichtige seinen Hausstand auflöst und die gesamte Familie nach Griechenland umzieht. [E. J.],** p. 76

no abstract

View abroad

M. Pazdan, **Das neue polnische Gesetz über das internationale Privatrecht**, p. 77:

On 16th of May, 2011, the new act on private international that was enacted on the 4th February, came into force. The new law replaces the old act from 1965. It is harmonized with European private international law. The act governs matters excluded from the scope of regulations Rome I and Rome II and supplements the Hague Convention of 19th October, 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children with respect to issues not regulated therein.
The act of 2011 fills out many of the gaps that existed previously. For example, it determines the law applicable to power of attorney, personal rights, name and surname of a person, as well as to arbitration agreement and intellectual property. It also alters some of the rules adopted under the law of 1965. It permits, inter alia, a choice of law for matrimonial property regimes, marriage contract and succession. Moreover, the obligations arising out of unilateral legal acts have been treated differently than in the law of 1965. As with respect to the formal validity of legal acts related to the dispositions of immovable

property or corporate matters (such as creation, transformation or liquidation of a legal entity), the new law gives up the rule according to which it was sufficient to satisfy the requirements of the form of lex loci actus.

Finally, the act establishes a general rule in article 67, which applies in the circumstances where the act itself or other provisions of Polish law fail to indicate governing law. The provision is based on the concept of the closest connection.

M. Melcher, **Das neue österreichische Partnerschaftskollisionsrecht**, p. 82:

Due to the introduction of the registered partnership ("eingetragene Partnerschaft") as a legal institution for same-sex couples in Austria in January 2010, several provisions were added to the Austrian Private International Law Act (IPRG), which determine the law applicable to the establishment (§ 27a IPRG), the personal effects (§ 27b IPRG), the property regime (§ 27c IPRG) and the dissolution (§ 27d IPRG) of registered partnerships. The article analyzes the personal and temporal scope of application and describes the new conflict rules. Besides, a thorough assessment of the applied connecting system and its impact on registered partnerships is included, which identifies the inconsistency of connecting factors regarding the establishment and the dissolution of registered partnerships and the non-adaptation of conflict rules on inheritance, surnames and adoption to the particularities of registered partnerships as main areas of concern.

P. F. Schlosser, **Aus Frankreich Neues zum transnationalen einstweiligen - Rechtsschutz in der EU (Cour de cassation, 8.3.2011 – 09-13830 und Cour de cassation, 4.5.2011 – 10-13712)**, p. 88:

The author informs the readers of two decision of the French Cour de cassation (8 March 2011 09-13830 and 4 May 2011 10-13712) which according to him should be supported.
In the later decision the Cour de cassation is confirming its prior ruling that the rules of the Brussels I Regulation on provisional, including protective, measures cover measures for obtaining evidence. The German doctrine is spit on that issue. The Cour de cassation should, however, be encouraged to continue emphasizing that the Brussels I Regulation covers only evidentiary measures to

be granted in a case of urgency.
In the first decision the issue was the binding character of a Greek court decision refusing, after opposition of the debtor, to order the arrest of a seagoing vessel anchoring in a Greek port. When subsequently the vessel was anchoring in the port of Rouen the creditor tried again to obtain an arrest invoking the more creditor-friendly rules of French law. But he was again unsuccessful The Cour de cassation decided that pursuant to Art 32 Brussels I Regulation foreign decisions refusing to grant provisional measures must be recognized. The innovative nature of the decision is due to the fact that for the first time the issue of the binding force of a decision refusing to grant provisional protection was discussed. There is no trace of such a discussion in previous case law or legal doctrine.

H. Wais, **Zwischenstaatliche Zuständigkeitsverweisung im Anwendungsbereich der EuGVVO sowie Zuständigkeit nach Art. 24 S. 1 EuGVVO bei rechtsmissbräuchlicher Rüge der Unzuständigkeit (Hoge Raad, 7.5.2010 – 09/01115),** p. 91:

In this decision of the Dutch Hoge Raad, which deals with an alimony dispute between Dutch citizens domiciled in Belgium, three main issues arise: first, the applicability of the Brussels I-Regulation in cases where both parties are domiciled in the same member state; second, the observation of a cross-border transfer of a case on the grounds of a bilateral treaty when the Brussels I-Regulation is applicable; and third, the possibility of taking into account in its scope the abuse of process of one party. This article examines these questions, before presenting some thoughts on a possible alternative approach.

C. Aulepp, **Ein Ende der extraterritorialen Anwendung US-amerikanischen - Kapitalmarkthaftungsrechts auf Auslandstransaktionen? (US Supreme Court, 24.6.2010 – No. 08-1191 – Morrison v. National Australia Bank Ltd.),** p.95:

U.S. law provides for a broad issuer liability for securities fraud, especially under § 10(b) Securities Exchange Act of 1933 in connection with SEC Rule 10b-5. Together with the availability of opt-out class actions, this sets the United States apart from most other jurisdictions. In the past, the U.S. Federal Courts of Appeal have held that § 10(b) applies extraterritorially if there are

significant effects on American investors or the American market; or if significant conduct in the US contributed to the fraud scheme. In a landmark decision, the U.S. Supreme Court held in Morrison v. National Australia Bank, Ltd., 130 S. Ct. 2869 (U.S. 2010) that § 10(b) of the Exchange Act and Rule 10b-5 possess no extraterritorial reach. It adopted a bright-line rule that these provisions only apply to transactions in securities listed on domestic exchanges, and domestic transactions in other securities. The author argues that the Morrison decision constitutes a step in the right direction, as it provides a certain degree of legal certainty for transnational issuers in a previously convoluted area of international securities law. It is submitted that Morrison might provide valuable impulses for resolving conflicts of law in securities disputes within the European Union as well, as a transaction-base rule like the one articulated in Morrison can well be integrated within the framework of the Rome I and Rome II Regulations.

Announcements

H.-P. Mansel, **Werner Lorenz zum 90. Geburtstag,** p. 102

no abstract

E. Jayme, **Zur Kodifikation des Allgemeines Teils des Europäischen - Internationalen Privatrechts – 20 Jahre GEDIP (Europäische Gruppe für Internationales Privatrecht) – Tagung in Brüssel,** p. 103

no abstract

López de Tejada on the Abolition

of Exequatur

María López de Tejada holds a PhD in law from the University of Paris II with a thesis on the abolition of the exequatur procedure. She has recently published an article on the topic in the Spanish journal La Ley (Diario La Ley, Nº 7766, Sección Tribuna, 30 Dic. 2011). Here is a summary of the contents.

The execution of foreign judgments has traditionally been subject to an enforcement procedure in the European judicial area. However, the Community lawgiver wants to get rid of that process so that any judicial decision could deploy its effects and be enforced throughout the community, without prior declaration of enforceability or control in the executing Member State. Several regulations of limited material scope have already achieved that objective, but the idea is to go further and abolish the exequatur procedure for all civil and commercial matters. Such an objective looks like praiseworthy at first sight, because it tends to break with a traditional legal lack of openness and to restore the continuity of the right to enforcement of anyone who has obtained a favorable judgment. But a deeper analysis of the issue shows that right now, the abolition of exequatur would be a hasty, even dangerous step for both the citizens and the harmony of the juridical systems of the Member States. The suppression of the exequatur procedure is based on the assumption that foreign court rulings, delivered under common jurisdictional criteria, provide similar guarantees and should be regarded as national decision. The truth is that until a higher level of integration has been reached such presumption, which implies the perfect equivalence of all national decisions, is simply excessive and unrealistic. On the one hand, the European system of jurisdiction set in regulations is still far from perfect; and the practical application of the rules leads too often to unpredictable consequences. On the other hand, the judicial area is characterized by a profound heterogeneity in as far as procedural law is concerned; and unfortunately both the ECHR and the ECJ case law still show scenarios of violations of fundamental rights by the States -in particular of Article 6 of the ECHR.

The suppression of all kind of control (meaning, public order clause included) of foreign rulings opens the door to the community space of judgments contrary to the fundamental rights enshrined in the ECHR and in the European Charter of Fundamental Rights, notwithstanding the Member States commitment to abide by both them.