Book: The Brussels I Regulation Recast (OUP) – Dickinson & Lein (eds)



Brussels I Regulation Recast (OUP)

A new, major commentary on the Brussels I Regulation Recast has been published by Oxford University Press. Here's the summary:

- The only text describing the provisions of the Regulation and their inter-relationship with one another, with focus on the changes introduced in the recast process
- Summarises the structure of the Regulation and the role played by the case law of the European Court of Justice
- A bibliography for each article enables readers to access other sources of commentary (including leading texts in key jurisdictions, monographs and articles)
- Critical analysis of the text of the relevant Articles and recitals are combined, with a short reference to the legislative history
- Written by leading experts in the field
- Helpfully written in an accessible and concise way

> *The Brussels I Regulation has undergone a lengthy review process, resulting in Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). The provisions of the new Regulation apply from 10 January 2015.*
>
> *This work, written by a number of leading experts on the subject, provides a commentary on the Recast Regulation. It contains a concise article-by-article commentary on all provisions of the recast Regulation with reference to the existing case law of the European Court of Justice and leading national decisions, and provides additional focus on the newly introduced changes, in*

particular to the provisions on lis pendens and the recognition and enforcement of judgments.

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Needless to say, this is highly recommended to all. It's available to order for £165 from the OUP website.

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

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

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

Jan von Hein, **Authorization Requirements for a Guardian's Transaction Concerning a Vulnerable Adult's Immovable Property – Jurisdiction and Conflict of Laws**

The Court of Justice excluded, in Case C-386/12 – Siegfried Janós Schneider, the applicability of the Brussels I-Regulation to a court's authorization that an adult's guardian required for a transaction concerning immovable property belonging to the adult (Article 1(2)(a) of the Regulation). In his case note, von Hein agrees with the Court's ruling because the authorization requirement was the main object of the proceedings. If the necessity to obtain an authorization arises merely as an incidental question in litigation related to property, however, the Regulation, including the forum rei sitae, remains applicable. Moreover, the author analyses which court is competent to rule on granting an authorization to an adult's guardian for the sale of immovable property and which law is applicable to this question. He looks at this problem both from the point of view of autonomous German PIL and of the Hague Convention on the International Protection of Adults. The article shows that autonomous PIL and the Hague conflicts rules differ considerably and that in the Hague Convention's framework, authorization requirements are treated in a very differentiated manner.

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

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

of the judgment by raising grounds for non-recognition.

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

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

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

Article 12 (3) of Council Regulation (EC) No 2201/2003 of 27 November 2003 applies to separated matters of parental responsibility. The ECJ classifies this rule as a prorogation of jurisdiction for the holders of parental responsibility. This paper submits several arguments against this judgment. The jurisdiction of the courts is always justified for the particular application and it does not continue after pending proceedings have been brought to a close. This acceptance must be obtained at the time the matter is seized to the courts including the specific

issues of the proceeding. An agreement, after the matter was brought to court, does not justify jurisdiction. The tight time requirements must be transferred to the jurisdiction under Article 8 (1) of that regulation. An interpretation whereupon the requirements of the jurisdiction can be fulfilled after pendancy and which orientates to the best interests of the child remains for an amendment of the regulation.

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

Rainer Hüßtege, **Grenzüberschreitende Wohngeldzahlungen**

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

Malte Kramme, **Conflict law aspects of the successor's responsibility for debts of the acquired business, before and after the Rome-Regulations**
The German Federal Court of Justice deals, in its decision of 23 October 2013, with several current questions in the field of private international law. Firstly, the

court adopts a position on the question of which conflict rule applies to the liability claim against the successor to a mercantile business carrying on the business under an identical trade-name (section 25 para. 1 sentence 1 German Commercial Code). Furthermore, the court decided which law applies to forfeit and limitation of claims underlying the United Nations Convention on Contracts for the International Sale of Goods. As the court applied the old legal regime prior to the entry into force of the Rome-Regulations, the article focuses on the question of how the case has to be solved under the new legal regime. This analysis shows that the Regulations "Rome I" and "Rome II" do not cover the law of obligations in an exhaustive manner. Remaining gaps need to be filled applying nonunified German private international law.

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

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

Susanne Lilian Gössl, **Adaptation of Status Registration Rules in Cases of**

‚Limping' Status

The subject of this article is how to handle the birth registration of a child born by a surrogate mother according to German and Swiss law. Both legal systems are absolutely opposed to surrogacy but also under the obligation to protect the child's right to know his/her decent. The Swiss Court found a possibility to resolve the resulting legal tension. The author shows that the court's resolution, an adaptation of the national civil status registry law, is a mechanism which has already been frequently used by German courts in other situations of "limping" status. She proposes to extend that existing jurisprudence to cases of cross-border surrogacy.

Alexander R. Markus, **Jurisdiction in Matters Relating to a Contract Under the Brussels/Lugano Regime: Agreements on the Place of Performance of the Obligation in Question and the Principle of Centralisation of Jurisdiction**

According to the Swiss Federal Supreme Court, parties can by agreement only specify the place of performance of the characteristic obligation under article 5(1)(b) of the 2007 Lugano Convention; contractual specifications of the place of performance of non-characteristic obligations are irrelevant in terms of jurisdiction.

Jörn Griebel, **Investment Arbitration Awards in Setting Aside Proceedings in the US – Questions Regarding the Review of Local Remedies Clauses Within Investment Treaties**

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

Conference on Jurisdiction & Dispute Resolution in the Internet Era

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

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

More information is available at the conference website.

The Much Expected Ruling on Case C-536/13

The Grand Chamber says:

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as not precluding a court of a

Member State from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State, since that regulation does not govern the recognition and enforcement, in a Member State, of an arbitral award issued by an arbitral tribunal in another Member State.

Click here to access the decision.

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

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

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

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

Professor Ron Brand on “Understanding Judgments Recognition”

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

La Ley-Unión Europea, April 2015

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

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

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

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

L.M. Jara Rolle, “Contratos tipo de servicios jurídicos concluidos por un abogado con una persona física que actúa con un propósito ajeno a su actividad professional”. **Abstract**: Unfair terms in consumer contracts extend to standard form contracts for legal services, as contracts concluded by a lawyer with a natural person acting for purposes which are outside his trade, business or profession.

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

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

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

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

Johannes Schmidt on Legal Certainty in European Civil Procedure Law

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

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

“continuity of the case law” make the decisions of the CJEU foreseeable. Secondly, the results reached by the CJEU are analysed with respect to the principle of legal certainty. This part takes the perspective of the lawyers and courts who have to apply the European civil procedure rules in their interpretation by the CJEU. It investigates the foreseeability of jurisdiction and lis pendens and it raises the question, which price is to be payed for legal certainty.

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

Thanks to Johannes Schmidt for providing the text.

Le Précédent en Droit International (Conference)

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

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

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

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

Workshop 2 : Precedent in International Law before Arbitral Tribunals

Workshop 3 : Precedent in International Law before National Tribunals

Proposals must be sent by 15 March 2015 to sfdi2015@gmail.com, indicating

“Proposal for Workshop 1/2/3 and (applicant’s name)” as the subject matter of the email. A CV and a list of publications shall be attached. Proposals written and to be presented in English are welcome, but the author should be able to read and understand French.

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