TDM Special Issue on the CETA – Call for Papers

The **Comprehensive Economic and Trade Agreement between the European Union and Canada,** CETA, is one of the three landmark agreements – the others are the Trans-Pacific Partnership Agreement (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) – that will shape world trade and investment in the XXI century. Negotiations were launched in 2009 and a political agreement between the EU and Canada was reached on the key elements of CETA on October 18, 2013. The signing of the agreement took place in Ottawa at end of September 2014.

CETA is characterized by the further codification of international standards of investment protection by the Contracting Parties, and the introduction of new topics in international trade in goods and services, such as the efforts to remove regulatory divergence, which has been considered as the most prominent obstacle to trade and which should considerably increase economic growth for the citizens of both parties. This objective is to be achieved through Regulatory Cooperation and the establishment of a Regulatory Co-operation Fórum.

Herfried Wöss, Fabien Gélinas, Andrea Bjorklund, and John Gaffney will be editing a TDM Special Issue on the CETA. The four co-editors invite you to contribute to the special edition on CETA with unpublished or previously published articles, conference papers, research papers and case studies dealing with the Agreement and the issues raised by any of its chapters. Of particular interest in the investment chapter are:

- clarifications brought to key substantive provisions such as fair and equitable treatment;
- the definition of investment, which refers to "income generating assets" in the sense used by economists;
- the fair and equitable standard, including manifest arbitrariness, targeted discrimination on manifestly wrongful grounds and abusive treatment of investors, and its interpretation by the Contracting Parties;
- the definition of acts *de jure imperii*, and CETA's detailed language on what constitutes *indirect expropriation*.

Also of interest are CETA reaffirmation of the right of the EU and Canada to regulate to pursue legitimate public policy objectives such as the protection of health, safety, or the environment and a number of procedural changes designed notably to respond to criticisms levelled at investment treaties over the past decade.

Proposals or papers should be submitted directly to the co-editors **by January 15, 2015** hwoess@woessetpartners.com, fabien.gelinas@mcgill.ca, andrea.bjorklund@mcgill.ca and j.gaffney@tamimi.com – please CC info@transnational-dispute-management.com when submitting your materials. You can find the call for papers on the TDM website as well as here.

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

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

The third issue of 2014 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features one article, the transcript of a public interview celebrating the 120th Anniversary of The Hague Conference on Private International Law, and three comments.

Cristina Campiglio, Professor at the University of Pavia, examines the issue of assisted procreation and recent jurisprudence in **"Norme italiane sulla procreazione assistita e parametri internazionali: il ruolo creativo della giurisprudenza"** (Italian Provisions on Assisted Procreation and International Parameters: The Creative Role of the Courts).

> *Law No 40/2004 on medically assisted conception was adopted to fill-in a major gap in the Italian legal system, putting an end to the so-called "procreative wild*

west". However, its provisions had left the majority's expectations largely unfulfilled. The decade following the entry into force of the law was marked by a number of – national and international – judicial decisions which produced a progressive attrition of the law's prohibitions. The interaction between the Italian Constitutional Court and the European Court of Human Rights has thus made it possible for judges to consent – in part and as a matter of urgency – to requests of couples who, being carrier of a genetic disease, are willing to have children while avoiding to incur into the risk of transmitting the disorder. Pivotal was certainly decision No 151/2009 whence the Constitutional Court relativized the protection of the embryo. For their part, in 2012 the European Court judges emphasized the disproportion in the Italian legislation of the protection of the embryo, as compared to the other interests at stake. This creative case-law, by assimilating supranational principles, sacrifices the certainty of the law in the name of equitable justice, overcoming the inaction of the Italian Parliament.

Fausto Pocar, Professor Emeritus at the University of Milan and Editor in Chief of the *Rivista* and *Hans van Loon*, Secretary General of the Hague Conference, in the transcript of a public interview walk us through the many and significant achievements of The Hague Conference on Private International Law in **"The 120th Anniversary of The Hague Conference on Private International Law"** (in French and English).

On the occasion of a workshop convened for the celebration of the 120th Anniversary of the Hague Conference on Private International Law, the Editor in Chief of the Rivista Fausto Pocar and the Secretary General of the Hague Conference Hans van Loon held a public interview on the achievements of the Conference – from its foundation, to the establishment of the Permanent Secretariat in 1955, to modern days – as well as its future goals. The detailed report of the interactive and captivating dialogue that ensued to this encounter spans from the efforts and challenges of transforming the Conference into a global organization, to the Conference's achievements in the unification of conflict of law rules and in the effective enhancement of inter-State cooperation in civil procedure matters as well as in judicial and administrative assistance. Providing valuable examples of the Conference's tangible impact on the States' effort to establish and achieve common goals in private international law matters, this interview provides a precious and rare insight on the Conference's

activity and mechanisms shared by two of the most significant contributors to the Conference's activity in modern times.

In addition to the foregoing, three comments are featured:

Eva De Götzen, PhD at the University of Milan, addresses cross-border employment contracts and relevant connecting factors in light of the ECJ's recent case-law in **"Contratto di lavoro, criteri di collegamento e legge applicabile: luci e ombre del regolamento (CE) n. 593/2008"** (Employment Contract, Connecting Factors and Applicable Law: Lights and Shadows of Regulation (EC) No 593/2008).

The article faces several issues concerning the choice-of-law rules, provided for by the Rome Convention and the Rome I Regulation, in employment matters. In the first place, an overview of the special connecting factors devoted to employment contracts set forth by the abovementioned uniform instruments is given and their current interpretation (see the Koelzsch, Voogsgeerd and Schlecker cases) is analyzed. In this respect, the article focuses on the relationship between the connecting factors of the locus laboris and the engaging place of business as well as on the interpretational difficulties arising from the application of the so-called escape clause. Moreover, the issue concerning the role played by some Recitals of the Rome I Regulation and by collective agreements in determining the law applicable to relationships between private parties in addition to the rules at hand will be addressed as well. The final question the article refers to is to assess whether the application of the conflict-of-laws rules in employment matters restricts the fundamental freedoms provided for by the EU Treaties or whether it strikes a balance between the free movement of workers and services in the EU internal market and the protection of the weaker party.

Giovanni Zarra, PhD candidate at the University of Naples "Federico II", analyses anti-suit injunctions in jurisdictional conflicts within the European boarders and in the international context in **"Il ricorso alle anti-suit injunction per risolvere i conflitti internazionali di giurisdizione e il ruolo dell'international comity"** (Recourse to Anti-Suit Injunctions to Solve Conflicts on Jurisdiction and the Role of International Comity).

This article analyses the anti-suit injunction, an equitable tool used by common law courts in order to restrain a party from commencing or continuing a national judgement or an arbitral proceeding abroad, the issuance of which is seen by many foreign courts as an offence and an attempt to their sovereignty. After having described the development and the main features of the anti-suit injunction, this article focuses on the possibility and the opportunity for English courts to issue anti-suit injunctions in jurisdictional conflicts within the European boarders and in the international context. With particular regard to intra-EU conflicts of jurisdiction, this article mainly focuses on the effects of the new Regulation (EU) No 1215/2012, whose Recital 12, according to certain scholars, might be interpreted as recognising again the power of English courts to issue anti-suit injunctions after the Court of Justice of the European Union forbade the use of such orders under Regulation (EC) No 44/2001. This article argues that, in a context of global economy, anti-suit injunctions should be used only in exceptional circumstances, in particular when their issuance is in accordance with the principle of international comity, which is proposed as the criterion that should usually guide common law judges when considering issuing an anti-suit injunction. In light of the above, the article eventually tries to make a practical assessment of the situations in which the use of anti-suit injunctions is permitted by the principle of international comity.

Cristina Grieco, PhD Candidate at the University of Macerata, addresses the new Italian legislation on e-proceedings in **"Il processo telematico italiano e il regolamento (CE) n. 1393/2007 sulle notifiche transfrontaliere"** (Italian E-Proceedings and Regulation (EC) No 1393/2007 on the Service in the Member States of Documents in Civil and Commercial Matters).

This paper analyzes the new Italian legislation on e-proceedings and the admissibility of the use of electronic instruments for the transmission of judicial documents in compliance with European requirements. The enquiry starts from the scope of application of Regulation No 1393/2007, as outlined by the ECJ in its Alder judgment. First, this paper provides an overview of the rules laid down by the Italian Code of Civil Procedure concerning cross-border notifications, in order to analyze the impact of the legislation on e-proceedings on existing domestic legislation. Then, this study attempts a brief overview of the level of computerization of justice achieved by the Member States and of the initiatives undertaken by the European institutions in this respect. Lastly, the present

work explores the possibility of encompassing the tools of electronic communication within the scope of application of Regulation No 1393/2007, with regard to a literal and a systematic interpretation of the relevant provisions. The enquiry focuses particularly on the possibility, at present, to use the tools available for the computerized transmission of judicial documents within the European judicial area and on whether any obstacles to such use are attributable to legal grounds rather than to purely technical considerations.

Indexes and archives of RDIPP since its establishment (1965) are available on the website of the Rivista di diritto internazionale privato e processuale. This issue is available for download on the publisher's website.

On Punitive Damages (Book)

Punitive damages have been the topic of much discussion, both by Civil Law and Private International Law scholars. In December 2014 this monograph on them by L. Meurkens will be available, also to be bought on line .

Lotte Meurkens (30 August 1982) is a private law teacher and researcher at Maastricht University in the Netherlands. She wrote this dissertation on punitive damages under supervision of professor Hartlief and professor Van Maanen, and is co-editor of 'The Power of Punitive Damages – Is Europe Missing Out?' (Antwerp: Intersentia, 2012).

Abstract:

The punitive damages doctrine, traditionally a common law doctrine that originates in England and the United States, is customary in common law countries but until now it is alien to continental European legal systems. Policymakers and legal scholars in Europe, however, increasingly exchange ideas about the potential advantages of the civil sanction. The European attention for punitive damages primarily results from changing policy views, to be precise the increased interest in private enforcement of several legal fields, on both the

European Union and national level, and in introducing more powerful civil sanctions to improve the enforcement of tort law standards and to deal with situations of serious wrongdoing. However, despite this development, the introduction of punitive damages in continental Europe does not seem to be a workable proposal at this point in time. The idea simply encounters too much resistance, which is not only caused by a number of obstacles that are intrinsic to the civil law tradition but also by an incorrect perception of the American reality of punitive damages. The main objective of this book is to increase the understanding of the civil sanction as such, because only a correct knowledge of the facts relating to the sanction can create the possibility to participate in the European punitive damages debate in a fair manner. This book is helpful for academics, policymakers and legislators who are developing ideas concerning private enforcement and more powerful civil sanctions. Moreover, this book is of use for victims, insurers, personal injury lawyers, and judges who are confronted with serious wrongdoing that may justify punitive damages. The American experience with punitive damages results in some important lessons and caveats that should be kept in mind by participants in the European debate, as well as a number of recommendations on the possible use of this civil remedy in continental Europe.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (6/2014)

The latest issue (November/December) of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (IPRax) contains the following articles:

- ***Rolf Wagner:*** "The new programme in the judicial cooperation in civil matters – a turning point?"

Since the entry into force of the Amsterdam Treaty in 1999 the European Union

is empowered to act in the area of cooperation in civil and commercial matters. This article describes the fourth programme in this area. It covers the period 2015–2019. The author provides an overview of the history and content of the new programme in so far as the area of civil and commercial law is concerned. Furthermore, he explains how this programme differs in conceptual terms from its predecessors.

- ***Michael Stürner/Christoph Wendelstein:*** "The law governing arbitral agreements in contractual disputes"

The article deals with the law governing arbitral agreements in contractual disputes. As such agreements are excluded from the material scope of application of Regulation Rome I, a conflict of laws approach has to be found in national law. Under German law, none of the existing black-letter private international law rules apply. Various connecting factors are conceivable (e.g. law of the seat of the arbitration, law governing the arbitration). Given the close connection between the arbitral agreement and the main contract, the article suggests that the law applicable to the latter will also determine the former. That applies, of course, only if the parties did not (explicitly or implicitly) choose the law applicable to the arbitral agreement.

- ***Katharina Hilbig-Lugani***: "Das gemeinschaftliche Testament im deutsch-französischen Rechtsverkehr – Ein Stiefkind der Erbrechtsverordnung" – The English abstract reads as follows:

Mutual wills have troubled German doctrine before a European instrument came along and they continue to do so under the Succession Regulation 650/2012. The Regulation lacks an explicit provision. The focus of the present contribution lies on the discussion whether a mutual will is subject to the conflict of law rule on agreements as to succession (article 25 of Regulation 650/2012) or subject to the general provision on dispositions upon death (article 24 of Regulation 650/2012). The concepts of "mutual will" and "agreement as to succession" on the European level are far from being clear. Though less favorable, the more convincing arguments – including wording, systematics and legislative history – argue in favor of the application of article 24 Regulation 650/2012.

- ***Peter Kindler***: "Corporate Group Liability between Contract and Tort under the Brussels I Regulation"

The judgment of the CJEU of 17 October 2013 (C-519/12 – OTP Bank vs. Hochtief) confirms the consolidated case law on art. 5(1)(a) Brussels I Regulation regarding the contractual nature of the matter. The liability has to derive from "obligations freely assumed" by one party towards another. According to the Court there is no such freely assumed obligation when the claim is based on a provision of national law imposing a liability on the controlling shareholder of a corporation for the debts of such corporation in case of its failure to disclose the acquisition of control to the commercial register. Astonishingly, the CJEU goes beyond the question referred for the preliminary ruling by the Hungarian Kúria and also gives its views on art. 5(3) Brussels I Regulation. Under this provision, in matters relating to tort, a person domiciled in a Member State may be sued in the courts of the place where the "harmful event" occurred. In this regard, the judgment is incomplete as far as causation is concerned. It remains unclear which could be the defendant's conduct that caused the "harmful event".

- ***Christian Koller:*** "Conflicting Goals in European Insolvency Law: Reorganization vs. Territorial Liquidation"

In the Christianapol-case the ECJ had to resolve the conflict between main insolvency proceedings, aiming at the restructuring of the debtor, and secondary proceedings, which must be winding-up proceedings under the European Insolvency Regulation. The ECJ's solution is mainly based on the interpretation of the provisions of the Insolvency Regulation dealing with the coordination of proceedings. It does not, however, take sufficient account of the effects of restructuring measures approved by the court in the main insolvency proceedings. This contribution, therefore, discusses the effects the recognition of a restructuring plan approved by the court in the main insolvency proceedings might have on the opening of secondary proceedings.

- ***Wulf-Henning Roth***: "IZPR und IPR – terra incognita" – The English

abstract reads as follows:

The judgment of the Oberlandesgericht Karlsruhe, in its substance, deals with the much debated issue whether and under what conditions agreements on costs and charges that go along with the conclusion of an insurance contract may be regarded as void. Issues of private international law are given short shrift. In this regard however, the judgment of the renowned Appellate Court reveals an astonishing ignorance of the fundamentals of European private international law: Instead of applying Regulation No. 44/2001 the Court turns to the German law of jurisdiction; and, with regard to substance (claim based on contract; voidness of the contract; claim based on precontractual misinformation), neither the Rom I- nor the Rom II-Regulation is even mentioned. Instead, the Court bases its judgment on the Rome Contracts Convention of 1980 whose direct applicability has been explicitly excluded by German legislation.

- ***Christoph A. Kern***: "Jurisdiction based on the place of performance according to Art. 5(1) Brussels I 2001/Art. 7(1) Brussels I 2012 when a contract combines the sale of real estate with the seller's obligation to construct business premises and find financially strong tenants"

The Düsseldorf Court of Appeal held that a contract combining the sale of real estate with the seller's obligation to construct business premises on the land and to find financially strong tenants is a contract on the provision of services in the sense of Art. 5(1) lit. b 2nd indent Brussels I 2001 (Art. 7(1) lit. b 2nd indent Brussels I 2012). This holding might have been driven by the court's wish not to apply the traditional rule in Art. 5(1) lit. a Brussels I 2001 (Art. 7(1) lit. a Brussels I 2012), according to which the place of performance must be determined with reference to the primary obligation in question. In the eyes of the commentator, the obligations to construct certain premises and to find solvent tenants normally do not affect the qualification of the contract as a sale of real estate, even more so if these obligations cannot be enforced directly by the buyer but their only sanctions are a condition precedent and a right of withdrawal. The commentator sees a parallel to contracts on the supply of goods to be manufactured according to requirements specified by the buyer, which have been qualified as sales contracts by the ECJ in the case C-381/08 (Car Trim).

- ***Angelika Fuchs**:* "Direct claim and assignment after cross-border traffic accident"

Following the respective judgment of the CJEU (C-347/08), a German court decided that a federal state in Germany, acting as the statutory assignee of the rights of the directly injured party in an international motor accident, may not bring an action directly in the courts of its Member State against the insurer of the person allegedly responsible for the accident, when that insurer is established in another Member State. The court argues that – other than the injured party itself – the federal state cannot be considered to be a weaker party and can therefore not rely on the combined provisions of Articles 9(1)(b) and 11(2) of the Brussels I Regulation. The following article explains what impact the assignment of rights has on the interpretation of different rules of jurisdiction.

- ***Martin Gebauer:*** "The Autocomplete Features of „Google" and the Infringement of Personality Right – Jurisdiction to Adjudicate and Choice of Law"

In its recent "Google"-decision, the German Federal Supreme Court (FSC) ruled that German courts have jurisdiction to adjudicate under Section 32 of the German Code of Civil Procedure in an action brought against Google Inc., a company seated in California, USA, for the infringement of personality rights by means of the autocomplete feature offered by "Google.de". The FSC also held that German law applied. For the first time after the "eDate Advertising" ruling of the European Court of Justice (ECJ), the FSC had the opportunity to synchronize the approach of its own case law, in terms of the German autonomous rules of jurisdiction, with the approach developed by the ECJ. Without picking it out as a central theme, the FSC approach differs from the approach of the ECJ. Whereas the ECJ is looking for the place where the alleged victim has its centre of interests, the FSC requires that the forum state be the place where the diverging interests of both parties collide. This test is applied both to the question of jurisdiction to adjudicate and to the question of choice of law (under autonomous German conflict rules). Mainly for three reasons, the FSC in the long run should bring its case law more in line with the "eDate-doctrine" of the ECJ: First, the centre of interests of a person is more predictable as a ground of jurisdiction than the place of colliding interests.

Second, jurisdiction to adjudicate and choice of law fit together in the sense that a court having jurisdiction under the Brussels Regulation for the alleged infringement of personality rights should preferably be empowered to apply the law of the forum. Third, the coordination of parallel proceedings within the EU is closely linked to the scope of the jurisdictional rules in the member states. Coordination works better when these rules resemble each other even in cases where the defendant is domiciled in a third state.

- ***Andreas Engel:*** "Conflict of Laws in Property Law: Statutory Limitation and Changes in the Applicable Law"

In a lawsuit for the recovery of a classic car which was originally sold in Germany and then went missing after the Second World War, only to later reappear in the U.S. where it was sold at an auction in California and then re-transferred to Germany for an exhibition, the Oberlandesgericht Hamburg had to grapple with diverging national laws. Under Californian law, but not under German law, the pertinent period of limitation is not deemed to accrue until the discovery of the whereabouts of the article, and there is no tacking of previous possessors.

According to German conflict-of-law rules regarding property, German law was applicable for the recovery claim and its limitation. However, even the special provision of art. 43 para. 3 EGBGB does not allow for a retroactive modification of final legal determinations arrived at pursuant to a law formerly applicable. A final legal determination of facts in that sense can also be of a negative nature. In the given case, this meant that German property law had to respect and uphold the Californian decision as to when the period of limitation began to accrue.

- ***Bettina Heiderhoff:*** "Return of the child in case of child's objection under the Hague Child Abduction Convention"

The decisions mainly concern issues of Art. 13(2) Hague Child Abduction Convention. In both cases, the children were relatively old (between 11 and 16 years) and objected to the return.

In the ECHR case, the court order to return the children to their mother in

England was not enforced by the French authorities following an unsuccessful mediation meeting between the mother and the children. The ECHR held that France should have tried harder to influence the position of the children (para. 94). The OGH found that even at the age of 15 it was necessary for the courts to assess the individual maturity of the child.

In fact, Art. 13(2) Child Abduction Convention must be interpreted in a narrow way. Only where a child possesses the necessary maturity, and is objecting in a determined and distinct manner, may the return be refused by the authorities. While it must be deplored that Art. 13(2) is so imprecise, courts should still try to establish a clear line. For children below a certain age (one might consider the age of 10, for instance) the necessary maturity should, generally, be denied. Correspondingly, there might also be an age above which maturity is assumed without further investigation (this might be appropriate for children of 13 years and older).

Only where a child has been unduly influenced by the abducting parent is there reason for an attempt to change the child's opinion.

- ***Hans Jürgen Sonnenberger:*** "Transkription einer von zwei Italienern in den USA – New York – geschlossenen gleichgeschlechtlichen Ehe in das italienische Personenstandsregister" – The English abstract reads as follows:

For the first time in Italy the Tribunale of Grosseto ordered the transcription of an Italian same-sex couple's marriage, who was wedded abroad. This note analyzes the decision, demonstrates the development of Italian and European case law and evaluates it in the light of the reasoning of the Tribunale.

- ***Christa Jessel-Holst:*** "Recodification of the Private International Law of Montenegro"

The contribution analyses the new Montenegrin Act on Private International Law of 23 December, 2013, as the first comprehensive PIL-reform in a Yugoslav successor state. The Act regulates conflict of laws as well as procedural international law in 169 articles. EU-harmonization is a main objective of the reform. Habitual residence is introduced as a connecting factor, for which a

legal definition is provided. The scope of party autonomy is considerably expanded. Novelties include inter alia a general escape clause and a provision on overriding mandatory rules. Issues like maintenance, personal name, agency or intellectual property are regulated for the first time, others have been totally reformed. The reciprocity requirement for the recognition of foreign judgments has been abolished. For the recognition of foreign arbitral awards it is referred to the New York UN-Convention of 1958. For Montenegro, the new Act replaces the Yugoslav codification of 1982.

Call for Application for Max Planck Scholarships (2015)

The Max Planck Institute Luxembourg offers a limited number of research scholarships for foreign scholars to support their research stay at the Institute.

For further information on eligibility and application instructions please click here.

Revista de Arbitraje Comercial y de Inversiones, 2014 (3)

The last issue of *Arbitraje. Revista de Arbitraje Comercial y de Inversiones*, 2014 (3), has just been released. Although contributions are in Spanish, most provide for an abstract in English; I reproduce them below. The Journal also offers a section on recently published texts concerning arbitration, case law (Spanish and foreign), as well as news of interest for the arbitration world.

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orders in the competent jurisdiction as well as in the arbitration, and it will be analyzed the interaction between normative blocks and the derivative malfunctions of a complex assembly between the conventional sources (particularly CMR) and the derivative of the Europe institutions normative. From the operators sector's point of view, it will tackle that when the aim of the legal security is achieving or on the contrary the absence of the compatibility of the rules between those deserve rules finishes producing doubts that harm all the interests of the present cast

Hernando DÍAZ CANDIA , *Viabilidad y operatividad práctica contemporánea del arbitraje tributario en Venezuela (The practical feasibility of tax arbitration in Venezuela)*

The article refers to arbitration of tax disputes in Venezuela. While it is focused on domestic Venezuelan law, it is useful as a source of comparative tax and arbitration laws to study the differences and similarities of various legal systems. The article explains that the arbitrability of tax disputes is provided in the Venezuelan Tax Code at least since 2001, but that there have been no actual tax arbitrations reported in Venezuela, except in investment arbitrations. The lack of actual cases may be due to complicated legal provisions, which, if taken isolated and literally, could imply that tax arbitration is just a burdensome step within judicial tax matters, which makes the resolution of disputes lengthier and more expensive for the taxpayer. The article proposes that tax arbitration must be approached as arbitration is generally conceived by the Venezuelan Constitution of 1999: as a truly alternative and efficient dispute resolution mechanism. That implies that the Tax Code must be construed to permit the annulment of tax assessment by arbitrators and that the intervention of judicial courts must be limited. Tax arbitration can further the perception of fairness of the tax system, which can ultimately reduce tax evasion

Horacio ANDALUZ VEGACENTENO, *Retando el concepto de validez?. La naturaleza jurídica del reconocimiento de laudos anulados (Challenging the Concept of Validity? The Legal Nature of the Recognition of Annulled Awards)*

The recognition in 2013 in the United States of a Mexican arbitral award annulled by Mexicans courts seems to bring the implicit affirmation that it is legally possible to grant recognition to an annulled award. Such affirmation itself challenges the concept of legal validity, since it means that what have been

declared void can, at the same time, be valid as to produce legal effects. The point of this article is to find the legal nature behind the so called recognition of annulled awards. In order to do so, the article reviews nine judicial decisions, from 1984 to 2013, and concludes that behind the recognition of annulled awards there are three different hypotheses, each one with a distinctive legal nature and none of them being a challenge to the concept of legal validity.

Brian HADERSPOCK, *Revisión de laudos arbitrales en Bolivia: una propuesta plausible (Review of arbitration awards in Bolivia: a plausible proposal)*

The contribution focuses on the question whether or not an extraordinary review of judgments in respect of arbitral awards would be positive in the Bolivian legal system. Through this note, the author tries to discuss the feasibility of this extraordinary appeal in Bolivia's arbitration process. To do this, the author presents certain criteria that, in his opinion, are positive, therefore concluding, that considering implementing this resource in the Bolivian arbitration legislation would be a feasible decision. In this sense, the author proposes changes to the current arbitration legislation, allowing the value of justice prevail over any judicial or extrajudicial decision

Seguimundo NAVARRO*, Cuestiones relativas al* third party funding *en arbitraje*

Francisco RUIZ RISUEÑO, *Árbitros e instituciones arbitrales: la ética como exigencia irrenunciable de la actuación arbitral*

The French Cour de cassation and the « Thalys babies »

I am glad to post this comment by F. Mailhé, Associate Professor Paris 2, Panthéon-Assas

On September 22, 2014, the French *Cour de Cassation* (Supreme Court for civil and criminal matters) published two prejudicial opinions on the validity, in a same-sex couple, of the adoption by a woman of a child born to her wife thanks to a foreign medically-assisted procreation (Avis n°15010 and 15011, ECLI:FR:CCASS:2014:AV15010 and ECLI:FR:CCASS:2014:AV15011).

Despite its relatively restricted purpose, the French Same-Sex Marriage Act of May 17, 2013, just starts to give its first private international law consequences (On that law and private international law, see e.g. H. Fulchiron, *JDI* 2013. 1055 ; P. Hammje, *RCDIP* 2013. 774 ; S. Godechot and J. Guillaumé, *D.* 2013. 1756).

Indeed, avoiding any fundamental change in French family law, the Act was only meant to enable same-sex couples to get married. As a consequence, same-sex couples are for example still not allowed to get medically-assisted procreation (MAP) techniques by Article 2141-2 of the Public Health Code ("Code de la Santé Publique", CSP), according to which:

"The purpose of [MAP] is to remedy a couple's infertility which pathological character was medically diagnosed or to avoid the transmission of a particularly severe disease to the child or to the other member of the couple".

Some things changed in adoption law, though. Among other provisions, in order for lonely parents getting married to provide the child with a second parent when the other parent was unknown or deceased, the 2013 Act allowed for their husband or wife to adopt the child in those situations.

The adoption procedure has therefore been used by a number of women in situations where the father was not known… because the baby was born from an insemination with anonymous donor, an MAP, abroad, especially in Belgium. Contrary to France, Belgium had authorized MAP for lonely mothers since July 2007. Called "Thalys babies", by the name of the train which connects Paris to Brussels, a certain number of babies were born from such travels in the last years.

In July, almost 300 files for adoption had apparently been enrolled in different courts of first instance in France, and the reaction and interpretation of the law was quite diverging. For most, the interest of the child and the evolution of the law asked for the adoption to be allowed (see e.g. TGI Nanterre, July 8, 2014, *D.* 2014. 1669, note Ph. Reigné). For some others, to the contrary, the situation was

a plain fraud, since it was the conclusion of a procedure by which the couple simply tried to bypass different French law prohibitions (MAP by a lonely woman or same-sex couple). After the press echoed the emotion of couples blaming a "two tier justice", two courts (Avignon and Poitiers) decided to use a specific prejudicial procedure to ask the *Cour de cassation* to issue an opinion on the matter.

On Sept. 22, 2014, the *Cour de cassation* answered in its uniquely concise style:

"Having resort to medically-assisted procreation, in the form of artificial insemination with anonymous donor abroad, does not bar the mother's wife from adopting the child born from this procreation, as long as the adoption's legal conditions are fulfilled and that it is in line with the child's interest".

The arguments in defense of the prohibition to adopt were indeed rather weak and it is no surprise that this decision of autumn 2014 was in favor of the adoption.

First, the prohibition of Article 2141-2 CSP is of ambiguous nature. Instead of regulating MAP as a filiation issue, it is regulated as a technical one, and destined to medical professionals, not to parents. Its consequence is therefore not a civil one for the parents, but a sort of disciplinary penalty for the professionals. Designed for purely domestic matters, it is therefore not as assertive as it needs to be in international matters: Does it concern the persons getting an MAP abroad, or is it just organizing French clinics and hospitals' life?

Second, and as a consequence, contrary to the sister question of surrogacy, the international public policy is not at stake. Its foundation in Article 2141-2 CSP is too fragile. Actually, the problem does not seem to come so much from the foreign MAP itself than from the fact that a French mother, with no ties to Belgium, went abroad to get what she could not get in France, i.e. a problem of fraud. This is a much harder question in purely philosophical and political terms. What does "forbidden in France" mean in that context? Should a person be allowed to "internationalize" the situations to bend the law to its will? One of the arguments of counsel for defense in those cases was that freedom of movement within Europe allows for such "legal optimization". If the Court of Justice has approved the reasoning in company law since Centros (Aff. C-212/97), and has peeped into family and personal matters with cases such as Garcia-Avello (Aff. C-148/02), pure

choice of law in family matters (and MAPs) does not seem the rule yet, if only because the European private international law regulations in family matters have not provided for such a complete freedom. Unfortunately for the debate, it comes at a time when France was already punished on a neighboring matter where the *Cour de cassation* had used the same rationale, so that, in the eyes of that Court, the door to negotiations seemed closed.

As readers of Conflictoflaws.net have noticed, in *Menesson vs. France* and *Labassée vs. France*, the European Court of Human Rights (ECHR) recently condemned France for refusing to recognize the filiation of the "parents of intent" (here an heterosexual couple) with the children born in the United States from a surrogate mother. The decisions are actually not as assertive as it has been said in the press, the ECHR judging only that the children should each get at least recognition of their filiation with their father (who happened to be both father of intent and biological father). But the ECHR paid scant regard, in both cases, to the argument the *Cour de cassation* has used in more recent ones : fraud.

In 3 decisions of Sept. 13, 2013 and March 19, 2014 on another foreign surrogacy case, the *Cour de cassation* had preferred to argue that the parents of intent could not avoid the French interdiction of gestational surrogacy by going to get one in the United States and then ask recognition of the American decision in France (on those decisions, see e.g. L. Gannagé, *RCDIP* 2013. 587 ; J. Guillaumé, *JDI* 2014. 1 ; J. Heymann, *JCP* 2014. 613 ; H. Fulchiron et Ch. Bidaud-Garon, *D.* 2014. 905). This change of rationale (from international public order to fraud) was understood by some authors as showing a change in the strategy of the *Cour de cassation* to persuade the ECHR who was already seized of the *Menesson* and *Labassée* cases. But if this was the aim, it failed. Its case-law was condemned nonetheless.

The consequence of the *Menesson* and *Labassée* cases on the issue of the adoption of a child born by artificial insemination with anonymous donor was of course not obvious, but the analogy is strong. In both cases, parents had gone abroad to get a child through a medical procedure they could not get in France. How could the *Cour de cassation* therefore decide otherwise than for its validity, when the value argument (through international public order) was so weak, and when the political argument (fraud) had already been knocked down by the European Court of Human Rights for an analog and much stronger case?

One last word, though. This was just a prejudicial opinion. Opinions by the *Cour de cassation* are not issued by plenary sessions of the Court, and do not bind its judging Chambers. It is therefore possible that (as has been seen in other matters) some Chambers will not follow the Opinion and decide otherwise. But, after the EHCR decision in *Menesson* and *Labassée*, after the refusal of the French government to appeal of those decisions (the government actually seems favorable to it), after this Opinion by some members of the *Cour de cassation*, and if the evolution of the French society keep on the same way in the years to come, years which would be needed before the *Cour de cassation* may be seized in its judging formation of the matter, such a reluctance would certainly go against the tide, if not too late, after the tide.

The Evolution of European Private International Law – Coherence, Common Values and Consolidation

The last decade has seen a number of important legislative developments in the field of European private international law and cross-border litigation, including the Rome I-III Regulations, the Brussels I (Recast) and Brussels II bis Regulations, the Succession Regulation, and other instruments in the area of civil procedure.

As these legislative initiatives were introduced at different stages and with different objectives, the question is whether they constitute a *coherent legal framework* with *common legal concepts*, which has fostered the development of *common values* and *principles*, or whether they need consolidation or even a new structure.

A joint conference BIICL- Queen Mary University of London taking place on the 25 and 26 of November, will addressed the abovementioned question with the aim to assess the European framework for conflict of laws and jurisdictions and to reflect on the possible directions of its future evolution.

Click here to download the event flyer; here for the program.

Notice: 35 Years CISG and Beyond in Basel

The University of Basel, SVIR/SSDI (Swiss Association for International Law) and UNCITRAL are hosting a conference with the title

35 Years CISG and Beyond.

The conference will take place on **29 and 30 January 2015** at the **University of Basel**. Its main focus will be on open issues in regard to the CISG's application and on any possible further harmonization and unification of contract law.

For more information or registration please click here.

Van Den Eeckhout on Choice and Regulatory Competition and on Business and Human Rights

The working paper "Choice and regulatory competition. Rules on choice of law and forum", written by Veerle Van Den Eeckhout (https://www.uantwerpen.be/nl/personeel/veerle-vandeneeckhout/) is now available on ssrn, here. The paper is the short written version of her contribution to the Conference "Norm-Setting, Enforcement and Choice", held in Maastricht (the Netherlands) on 18 October 2013. The Conference report is available here.
The paper analyzes PIL from the perspective of "Choice and regulatory

competition". The final version of the paper will be published in the Congress book.

The Power Point of another Presentation of Veerle Van Den Eeckhout has also been made publicly available: The Power Point of her contribution to the Conference at Lausanne on 10 October 2014 is available on slideshare, see http://www.slideshare.net/vvde/lausanne10oktober201419septdefinitief . This Power Point was presented during the Conference "The Implementation of the UN Principles on Business and Human Rights in Private International Law" at Lausanne, see for the programme of the Conference http://www.isdc.ch/d2wfiles/document/4713/4018/0/Human%20Rights%20in%20PIL-%2010-10-2014.pdf The presentation of Veerle Van Den Eeckhout was entitled "The Private International Law Dimension of the Principles. Introduction."