Symeon C. Symeonides, The Choice-of-Law Revolution Fifty Years after Currie: An End and a Beginning

Dean Symeon C. Symeonides (Willamette University – College of Law) has posted a new article to SSRN. It is to be published in the University of Illinois Law Review, Vol. 2015, No. 2, 2015. Here is the abstract:

This Article is part of a symposium marking the fiftieth anniversary from the passing of Brainerd Currie (1913-1965), the protagonist of the American choice-of-law revolution that began in the 1960s.

The Article consists of four parts. Part I discusses what was wrong and what is right with the key component of Currie's "governmental interest analysis" — his concept of "governmental" or state interests. It contends that, when properly conceived, state interests can provide a rational basis for usefully classifying conflicts into three categories and sensibly resolving conflicts falling within two of those categories ("false" and "true" conflicts).

Parts II-IV discuss the revolution's past, present, and future. Part II chronicles the revolution in tort and contract conflicts by tracing the gradual abandonment of the lex loci delicti and lex loci contractus rules in the majority of states of the United States. Part III summarizes the methodological changes produced by the revolution and the substantive results reached by the courts that joined it. Part IV builds the case for an exit strategy that will turn the revolution's numerical victory into a substantive success by using the vehicle provided by the process of drafting the Third Conflicts Restatement.

Sandra Wandt on Party Autonomy in European Private International Law

Sandra Wandt has published an interesting doctoral thesis (in German) on „Party Autonomy in European Private International Law – A Study on the Main Codifications regarding Coherence, Completeness and Regulatory Efficiency“ (*Rechtswahlregelungen im europäischen Kollisionsrecht – Eine Untersuchung der Hauptkodifikationen auf Kohärenz, Vollständigkeit und rechtstechnische Effizienz*; PL Academic Research, Frankfurt/Main 2014). The thesis was accepted *summa cum laude* by the law faculty of the Ludwig-Maximilians-University in Munich under the supervision of Professor Dr. Abbo Junker. In her thesis, Wandt provides for an exhaustive analysis of the various rules on party autonomy found in the current EU Regulations on PIL, i.e Rome I, II, III and the Succession Regulation as well as in the Hague Maintenance Protocol and the proposal on marital property. She deals in particular with inconsistencies concerning the admissibility of a free choice of law, the requirements for a valid agreement on the chosen law and the limits imposed on the parties‘ choice. The book is a valuable contribution to the ongoing debate about achieving a more coherent codification of pervasive issues in European private international law. For those who are interested in further details, the introductory chapter is available here.

International Transport & Insurance Law Conference – Call for Papers

The University of Zagreb Faculty of Law and the Croatian Academy of Legal Sciences organise the **1st International Transport and Insurance Law**

Conference (INTRANSLAW) which will ttake place in Zagreb, Croatia, on 15 and 16 October 2015. Thee conference will join togather invited speakers and speakeres selected among those applying to the call. The call for papers is opened until 15 April 2015 and the title and abstract (up to 750 words) may be sent to info@intranslaw.eu. More information on the conference is available at the conference website.

EUPILLAR Project Workshop on "Cross-Border Litigation in Europe: European and British Perspectives on the Private International Law Legislative Framework, Juridical Experience and Practice" (Aberdeen, 17 April 2015)

The Centre for Private International Law at the Law School of the University of Aberdeen is pleased to announce that the kick-off workshop of the EUPILLAR (European Union Private International Law: Legal Application in Reality) Project, funded by the European Commission, will take place at the University of Aberdeen, King's College Conference Centre on 17 April 2015 between 9am and 5.50pm.

Pre-registration is required via email to b.yuksel@abdn.ac.uk. Please include your name and affiliation. Attendance is free of charge for the first 20 people to register for the event. For subsequent registrations, the Centre for Private International Law reserves the right to charge a small fee for catering costs and

will notify those requesting to attend how much this will be if it is required.

The programme is found here.

New Book on the Boundaries of European Private International Law

The new book *Boundaries of European Private International Law*, edited by Jean-Sylvestre Bergé (Université Jean Moulin Lyon 3), Stéphanie Francq (Université catholique de Louvain) and Miguel Gardeñes Santiago (Universitat Autònoma de Barcelona), is the result of two European workshops (funded by the Jean Monnet Programme) that brought together renowned specialists and young researchers. This collective work tackles issues relating to the boundaries of EUPIL from diverse perspectives and offers a great variety of contributions in English, French and Spanish.

Table of contents

INTRODUCTION – Open Questions concerning the Boundaries of European Private International Law, Jean-Sylvestre Bergé

FIRST PART – EUROPEAN INTERNATIONAL PRIVATE LAW AND NATIONAL AND INTERNATIONAL LAW

Introduction to the first part, Miguel Gardeñes Santiago

TITLE 1 – INTRODUCTORY CONTRIBUTIONS

Chapter 1 – The EU Regulation on Succession Matters and the Territorial Conflict of Laws within the European Boundaries, Albert Fonti Segura

Chapter 2 –Enforcement of Foreign Mediation Agreements within the European Union, Guilermo Palao Moreno

Chapter 3 – Tribunal Unificado de Patentes: Competencia Judicial y Reconocimiento de Resoluciones, Pedro Alberto De Miguel Asensio

TITLE 2 – YOUNG RESEARCHERS CONTRIBUTIONS

With the contributions of:

Eduardo *Álvarez Armas, Céline Camara*, Maria Asunción Cebrián Salvat, Clara *Isabel Cordero Álvarez, Michaël Da Lozzo,* Libor Havelka, Jayne Holliday, Nicolas Kyriakides, Nicolo Nisi, Cécile Pellegrini, Maria Teresa Solis Santos, Josep Suquet Capdevila, Verona Ti*ó.*

SECOND PART – EUROPEAN PRIVATE INTERNATIONAL LAW AND EUROPEAN LAW

Introduction to the second part, Stéphanie Francq

TITLE 1 – INTRODUCTORY CONTRIBUTIONS

Chapter 1 – The Instrumentalisation of Private international Law: *Quo Vadis*? , Veerle Van Den Eeckout

Chapter 2 – L'adaptation du droit international privé européen aux exigencies du marché intérieur, Marion Ho-Dac

TITLE 2 – YOUNG RESEARCHERS CONTRIBUTIONS

With the contributions of:

Lydia Beil, Farouk Bellil , Blandine De Clavière, Eléonore De Duve, Alexandre Defossez, María Aránzazu Gandía Sellens, Jacqueline Gray, Ulgjesa Grusic, , Marion Ho-Dac, Laura Liubertaite, Céline Moille, , Guillermo Palao Moreno, Amélie Panet, Bianca Pascale, Pablo Quinzá Redondo, Katharina Raffelsieper, Maria Teresa Solis Santos, Ioannis Somarakis, Josep Suquet Capdevila, Verona Ti*ó, Fieke Van Overbeeke, Huang Zhang.*

The full table of contents is available here.

Boundaries of European Private International law, Bruylant, 2015 – 698 pages.

ISBN 9782802746973. Publication date: 1 April 2015.

Many thanks to Céline Camara for the hint.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2/2015: Abstracts

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

Moritz Brinkmann, **„Clash of Civilizations" oder effektives Rechtshilfeinstrument? Zur wachsenden Bedeutung von discovery orders nach Rule 28 U.S.C. § 1782(a)**
The author analyses two recent decisions by U.S. federal courts on Rule 28 U.S.C. § 1782(a). Under this rule a court may grant judicial assistance with respect to a foreign or international tribunal by ordering the respondent "to give his testimony or statement or to produce a document or other thing". The decision of the District Court for the Southern District of New York in In re Kreke concerns inter alia the question whether discovery under § 1782(a) is available also with respect to documents which are not located in the U.S. The CONECEL case, decided by the Court of Appeals for the Eleventh Circuit, touches upon the highly contested issue whether under § 1782(a) judicial assistance may also be obtained with respect to arbitration tribunals.

Peter Mankowski, **International Jurisdiction in Insurance Matters: Professional Lessor as Injured Party and Standardized, not Case-by-case Assessment of Need of Protection**
The injured party can sue its opponent's liability insurer at its own domicile under Art. 11 II in conjunction with Art. 9 I lit. b Brussels I Regulation/Art. 13 II in

conjunction with Art. 11 I lit. b Brussels Ibis Regulation. This holds true also where the injured party is not a natural person but a legal entity. Likewise, it does not matter whether the injured party is a professional. Generally, the protective regimes of the Brussels I/Ibis Regulations including the regime governing insurance matters apply irrespective of whether any protected party deserves protection measured by a concrete yardstick. Conversely, the standard is abstract and typical in line with efficiency, legal certainty and predictability of jurisdiction.

Carl Friedrich Nordmeier, **Coordination of parallel proceedings according to Art. 27 Brussels I Regulation and exclusive jurisdiction – including an analysis of the scope of Art. 22 no. 1 Brussels I Regulation**

Parallel proceedings are coordinated by Art. 27 Brussels I Regulation on the ground of the principle of priority according to which the court first seized examines its international jurisdiction. The present judgment breaks this principle if the court second seized bases its jurisdiction on an in rem claim (Art. 22 no. 1 Brussels I Regulation). In the first part, this article argues that Art. 22 no. 1 Brussels I Regulation covers neither proceedings for the consent to register the transfer of ownership with the German Land Register nor proceedings for a declaration that the exercise of the right of pre-emption under German Law was ineffective and invalid. The second part shows that the reason for strengthening the court second seized – which can be identified in Art. 31 no. 2 Brussels I Regulation (recast) as well – is the protection of the especially close link between the matter in dispute and the place of trial. In contrast, the reliability to predict the (non-)recognition of the judgment which the court first seized may hand down cannot serve as a justification to break the principle of priority. Other potential reasons of non-recognition than the infringement of an exclusive jurisdiction do not allow the court second seized to continue its proceedings.

Hannes Wais, **The concept of a particular legal relationship in Article 23 Brussels I Regulation and application of Article 5 No. 1 Brussels I Regulation in matters relating to a non-competition clause**

The Higher Regional Court of Bamberg had to deal with mainly two questions: Whether, pursuant to Art 23 (I) Brussels I Regulation, choice of court agreements in sales contracts had a binding effect for a dispute arising from negotiations over a distribution agreement between the same parties (1), and whether a claim, based on an alleged violation of a non-competition agreement, qualified as contractual, pursuant to Art 5 No. 1, or as tort, pursuant to Art 5 No. 3 Brussels I

Regulation (2). The court answered the first question in the negative. With respect to the second question, the court held that this claim, even though it may qualify as tort under national law, had to be qualified as contractual under the Brussels I Regulation.

David-Christoph Bittmann, **The legitimacy of substantive objections against a European Enforcement Order in the state of enforcement**

In its judgment of 21/11/2014 the Oberlandesgericht Cologne had to deal with the controversial question whether it should be permitted to a debtor to contest a European Enforcement Order in the state of enforcement by the way of substantive objections, raised in a remedy like the Vollstreckungsabwehrklage according to § 767 of the German Code of Civil Procedure (ZPO). To answer this question, the Oberlandesgericht had to deal with two issues: First, the Senate stated that the courts of the state of enforcement have jurisdiction for such remedies according to art. 22 no. 5 of Reg. (EC) 44/2001. In its argumentation the Oberlandesgericht refers to the judgment of the ECJ in the case Prism Investments BV. Second, the Senate stated, that § 1086 ZPO, which gives a debtor the possibility to raise substantive objections by the way of the Vollstreckungsabwehrklage, is not in contrast to the provisions of Reg. (EU) 805/2004. This judgment is in line with the majority of legal writers. An analysis of the wording, the systematic and the objective of Reg. (EU) 805/2004 shows however, that § 1086 ZPO violates European Law, because the regulation concentrates substantive objections at the courts of the state of origin. A comparison with the procedure of declaration of enforceability according to Reg. (EC) 44/2001 confirms this result.

Leonhard Hübner, **Cross-border change of legal form – implementation of ECJ's Vale judgment into German law**

The following article discusses the national implementation of the cross-border change of legal form by means of transfer of the statutory seat against the background of the Vale judgment of the ECJ. First, it treats the issues arising in case of a cross-border change of legal form to Germany. These include the missing legal foundation, the treatment of the de-registration of the company from the foreign register, and the protection of the stakeholders. It then examines the reverse situation – the cross-border change of legal form to a foreign country.

Thomas Rauscher, **Unbilligkeit bei Versorgungsausgleich mit Auslandsbezug**

Both decisions in comment apply the hardship clause in article 17 (3) (2) introductory law to the civil code (EGBGB). The article explains intertemporal and substantial consequences of the coming into force of the Rome III-Regulation on the law applicable to divorce as far as the distribution of pension rights (Versorgungsausgleich) is concerned. As to the boundaries between the international hardship clause under article 17 (3) 2, the material hardship clause (para 27 Law on the Distribution of Pension Rights, VersAusglG) and forfeiture of rights the author favors a narrow interpretation of the scope of application of the international clause.

Kurt Siehr, **Habitual Residence of Abducted Children before and after Their Return**

Two children, born in 2002 and 2003, had been abducted by their mother from La Palma (Spanish Canary Islands) to Germany. Both parents had custody rights (patria potestad) according to Spanish law. In Germany the parents agreed on 13 February 2013 that the children had to be returned to La Palma. In March 2013 the children were brought back by their mother. In La Palma the Spanish court declined jurisdiction because, according to Spanish law, the mother is entitled to take the children to Germany. She returned with them to Germany and here the father applied for enforcement of the agreement of 13 February 2013 and for an order to return the children to La Palma. The mother argued that she had already performed her obligation by returning the children to La Palma in March 2013. The father, however, objected and was of the opinion, supported by a decision of the Court of Appeal of Karlsruhe of 14 August 2008, that a child is only returned if it had established habitual residence in the state of origin. But this was not the case in the present situation because the children, after a short visit in La Palma in March/April 2013, returned to Germany. The Court of Appeal for the German State of Schleswig-Holstein (Oberlandesgericht in Schleswig), seized of this matter, finally decided that the duty of the mother to return the children had been performed in March 2013. The establishment of a new habitual residence in the state of origin is not necessary for the performance of the duty to return. Therefore no new return order is given by the court. – Discussed is the habitual residence of an abducted child before and after return to the country of origin from which the child has been abducted. Mentioned is also the English case O v. O (Abduction: Return to Third Country), [2013] EWHC 2970 (Fam), in which the "return" of a child was ordered to a country (USA) from which the child had not been abducted and in which the child was not habitually resident immediately

before being abducted. The child had to be “returned” to the state in which the parents agreed to establish their new habitual residence after having given up their former habitual residence in Australia.

Alexandra Hansmeyer, **Legal effects of a third party notice (Streitverkündung) filed in German court proceedings on court and arbitration proceedings in China**

As the world’s second largest economy and its largest exporter, China’s manufacturers occupy an increasing number of positions across the supply chains of a wide range of industries. With Chinese manufactured or processed products being sold globally, many international product liability cases require bringing claims up the supply chain against Chinese manufacturers. Third party notices (“Streitverkündung”) provide a mechanism for courts to recognize specific aspects regarding such claims made in a preceding court proceeding. The article examines the legal impact of third party notices filed in German court proceedings against a Chinese party on subsequent proceedings in Chinese civil courts or by the China International Economic and Trade Arbitration Committee (“CIETAC”). The article concludes that according to the current Chinese law and state of jurisprudence, third party notices have no legally binding effect on subsequent proceedings in China, neither with regard to ordinary courts, nor with regard to CIETAC arbitrations. Further, even if a Chinese party accedes to German court proceedings, such action, according to Chinese contract law, cannot be deemed as an implicit waiver of an arbitration clause in an underlying Chinese law contract.

Marc-Philippe Weller/Alix Schulz, **Maintenance obligations and Legal kidnapping – Jurisdiction at the illegally established habitual residence?**

The following article discusses ”habitual residence” as a ground for jurisdiction in maintenance claims according to Art. 5 Nr. 2 Brussels-I-Regulation as well as pursuant to Art. 3 of the Regulation n° 4/2009 on maintenance obligations. In cases of legal kidnapping by one of the parents, it may be worth discussing whether habitual residence can be established in the destination state, even if the change of the child’s living environment itself has been illegal.

Carl Zimmer, **The change in the habitual residence under the 2007 Hague Maintenance Protocol**

The Austrian Supreme Court’s case gave rise to two crucial questions concerning the application of the Hague Maintenance Protocol from 2007: First, whether a

change of habitual residence may already occur as from the moment of relocation to another State and secondly, whether Art. 4 para 3 or Art. 3 para 1 Hague Maintenance Protocol applies when, at the moment of commencement of proceedings, the maintenance creditor and the maintenance debtor have their habitual residence in the same state. While the second instance court addressed both questions, the Austrian Supreme Court did not: the father's appeal was dismissed because of a lack of motivation. The author supports the solution of the second instance court to grant the claimant a choice of procedure with regard to Art. 4 para 3 Hague Maintenance Protocol. The court's concept of habitual residence based on a fixed time-criterion, however, seems questionable.

4th Petar Šarcevic Conference on Competition and State Aid

The fourth Petar Šarcevic international scientific conference is entitled EU Competition and State Aid Rules: Interaction between Public and Private Enforcement. Its aim is to explore the contemporary questions of antitrust law, in particular those arising in the context of public and private enforcement on the EU and national levels. The review of the recent practices in these areas is provided first hand from those involved in the decision-making process. Additionally, the focus is on the novelties related to the enactment of the Directive on Antitrust Damages Actions. Of interest to the readers of this blog is probably the last section of the conference dedicated to the private international law aspects.

The conference is to be held on 9-10 April 2015 in Rovinj, Croatia. More information is available at the conference website ps4conference.law.hr.

XV World Congress Procedural Law (IAPL) – Istanbul 25-28 May 2015

The XVth World Congress of the International Association of Procedural Law will be held in Istanbul from 25-28 May 2015.

The Congress is dedicated to **Effective judicial relief and remedies in an age of austerity.**

The key note speeches will be given by *Richard Marcus (*Hastings College of Law) and *Teresa Wambier (*Sao Paolo University). The presentations of the General reports will focus on:

- **Interim relief** (*Muhammet Özekes* and *David Bamford)*
- **Relief in small and simplified matters** (*Xandra Kramer* and *Shusuke Kakiuchi*)
- **Civil constraints on personal mobility** (Soraya Amrani Mekki and *Dirk van Heule*)
- **Coercive in personam orders** (*Selçuk Öztek* and *Antony TH Smith*)
- **Reform of institutions** (*Baki Kuru* and *Hakan Pekcan?tez)*

For the last session on **Forms of relief** there is a Call for papers (open till 31 March).

For more information and registration visit the Congress website.

ASIL Private International Law

Prize 2015

The Private International Law Interest Group of the American Society of International Law invites submissions for this year's ASIL Private International Law prize. The prize is given for the best text on private international law written by a young scholar. Essays, articles, and books are welcome, and can address any topic of private international law, can be of any length, and may be published or unpublished, but not published prior to 2014. Submitted essays should be in the English language. Competitors may be citizens of any nation but must be 35 years old or younger on December 31, 2014. They need not be members of ASIL.

This year, the prize will consist of a $400 stipend to participate in the 2015 or 2016 ASIL Annual Conference, and one year's membership to ASIL. The prize will be awarded by the Private International Law Interest Group based upon the recommendation of a Prize Committee. Decisions of the Prize Committee on the winning essay and on any conditions relating to this prize are final.

Submissions to the Prize Committee must be received by June 1st 2015.

Entries should be submitted by email in Word or pdf format. They should contain two different documents: a) the essay itself, without any identifying information other than the title; and b) a second document containing the title of the entry and the author's name, affiliation, and contact details.

Submissions and any queries should be addressed by email to Private International Law Interest Group Co-Chairs Prof. S.I. Strong (strongsi@missouri.edu) and Cristian Gimenez Corte (cristiangimenezcorte@gmail.com). All submissions will be acknowledged by e-mail.

German Federal Court of Justice on Surrogacy and German Public Policy

By Dina Reis, Albert-Ludwigs-University Freiburg (Germany)

In its ruling of 10 December 2014 (Case XII ZB 463/13), the German Federal Court of Justice (Bundesgerichtshof – BGH) had to decide whether, despite the domestic prohibition of surrogacy, a foreign judgment granting legal parenthood to the intended parents of a child born as a result of a surrogacy arrangement should be recognized.

The appellants, a same-sex couple habitually resident in Berlin, are German citizens and live in a registered partnership. In August 2010, they concluded a surrogacy contract with a woman in California. The surrogate mother, a citizen of the United States, is habitually resident in California and was not married during the surrogacy process. In accordance with the contract, the child was conceived by way of assisted reproduction technology using appellant no. 1's sperm and an anonymously donated egg. Prior to the child's birth, appellant no. 1 acknowledged paternity at the German Consulate General in San Francisco with the surrogate mother's consent, and by judgment of the Superior Court of the State of California, County of Placer, legal parenthood was assigned exclusively to the appellants. In May 2011, the surrogate mother gave birth in California; thereafter, the appellants travelled with the child to Berlin where they have been living since. After the civil registry office had refused to record the appellants as the joint legal parents of their child, they brought proceedings for an order requiring the civil registry office to do so, which was denied by the lower courts.

The BGH held that recognition of the Californian judgment could not be refused on the grounds of violation of public policy and ordered the civil registry office to register the child's birth and state the appellants as the joint legal parents. The Court found that German public policy was not violated by the mere fact that legal parenthood in a case of surrogacy treatment was assigned to the intended parents, if one intended parent was also the child's biological father while the surrogate mother had no genetic relation to the child.

Public policy exception within the scope of 'procedural' recognition

First, the Court outlined that, contrary to a mere registration or certification, the Californian judgment could be subject to a 'procedural' recognition laid down in §§ 108,109 of the German Act on the Procedure in Family Matters and Matters of Non-contentious Jurisdiction (FamFG), which enumerate limited grounds for denying recognition. The Court noted that the Californian decision was based on a substantive examination of the validity of the surrogacy agreement and the resulting status issues, which was not to be reviewed (prohibiton of '*révision au fond*'). According to § 109(1) No. 4 FamFG, recognition of a judgment will be refused where it leads to a result which is manifestly incompatible with essential principles of German law, notably fundamental rights (public policy exception). The Court stated that, in order to achieve an international harmony of decisions and to avoid limping status relationships, the public policy exception was to be interpreted restrictively. For this reason, a mere difference of legislation did not imply a violation of domestic public policy; the contradiction between the fundamental values of domestic law and the result of the application of foreign law in the case at hand had to be intolerable.

Paternity of one intended parent

With regard to the legal parenthood status of appellant no. 1, the Court pointed out that no violation of public policy could be found because the application of German law would produce the same result as the decision of the Superior Court of the State of California: Due to the fact that the surrogate mother was not married at the time of the child's birth and appellant no. 1 had acknowledged paternity with her prior consent, German substantial law (§§ 1592 No. 2, 1594(2) German Civil Code) would also regard appellant no. 1 as the legal father of the child.

Assigning legal parenthood to the registered partner of the biological father not contrary to public policy

With regard to the legal parenthood status of appellant no. 2, the Court argued that the outcome of the Californian judgment in fact deviated from the domestic determination of parenthood. However, this divergence would not violate public policy if one of the intended parents, unlike the surrogate mother, was genetically related to the child.

Deviation from German substantive law

Commercial as well as altruistic surrogacy are prohibited under § 1(1) No. 7 German Embryo Protection Act and § 14b Adoption Placement Act, which penalize the undertaking of surrogacy and commercial activities promoting surrogacy such as placement of surrogate mothers. However, the surrogate mother and the intended parents are not punished. The scope of the provisions is limited to acts committed within German territory (§ 7 German Criminal Code).

In addition to the penal aspects, § 1591 German Civil Code defines the woman who gives birth as the mother of a child and excludes the motherhood of another woman even if the latter is the child's genetic mother. The provision respects the social and biological bond between child and birth mother and aims at avoiding 'split' motherhood resulting from surrogacy treatment, including cases where the latter is performed abroad. The BGH outlined that German law provided neither for joint legal parenthood of two men acknowledging paternity nor for assigning legal parenthood to the registered partner of a parent by operation of law; same-sex partners could establish joint legal parenthood solely by means of adoption.

Then the Court held, first, that assigning joint legal parenthood to same-sex partners did, in itself, not violate public policy because, according to the ruling of the German Federal Constitutional Court on so-called 'successive adoption' – a practice granting a person the right to adopt a child already adopted by their registered partner -, married couples and couples living in a registered partnership were considered as equally suited to provide conditions beneficial to the child's upbringing [German Federal Constitutional Court 19.02.2013, Case 1 BvL 1/11 and 1 BvR 3247/09, para 80 with further references = FamRZ 2013, 521, 527].

Secondly, the Court pointed out that the general preventive aims underlying the provisions mentioned above needed to be distinguished from the situation where surrogacy had been nevertheless – lawfully – carried out abroad, because now the welfare of the child as a legal subject with independent rights had to be taken into account. A child, however, could not be held responsible for the circumstances of his or her conception. And while on the one hand a violation of the fundamental rights of the surrogate mother or the child could imply a public policy infringement, the Court stressed that, on the other hand, fundamental rights could also argue for a recognition of the foreign judgment.

Birth mother's human dignity not *per se* violated by surrogacy: drawing a parallel to adoption

With regard to the surrogate mother, the Court argued that the mere fact that surrogacy had been undertaken was, in itself, not sufficient to ascertain an infringement of human dignity. That applied, *a fortiori*, in respect of the child who owed his or her existence to the surrogacy process. The Court emphasized that the surrogate mother's human dignity could be violated if it was subject to doubt whether her decision to carry the child and hand it over to the intended parents after birth had been made on a voluntary basis. However, the Court found that if the law applied by the foreign court imposed requirements to ensure a voluntary participation of the surrogate mother and the surrogacy agreement as well as the circumstances under which the surrogacy treatment was performed had been examined in proceedings that complied with the standards of the rule of law, then, in the absence of any contrary indications, the foreign judgment provided reasonable assurance of the surrogate mother's voluntary participation. According to the surrogate mother's declaration before the Superior Court of the State of California, she was not willing to assume parental responsibilities for the child. The Court held that in this case, the surrogate mother's situation after childbirth was comparable to that of a mother giving her child up for adoption.

Focus on the best interests of the child

Given those findings, the Court concluded that the decision whether to grant recognition to the foreign judgment should be guided primarily by the best interests of the child. For this purpose, the Court referred to the guarantee of parental care laid down in Art. 2(1) in conjunction with Art. 6(2) first sentence of the German Constitution, which grants the child a right to be assigned two legal parents [cf. German Federal Constitutional Court 19.02.2013, Case 1 BvL 1/11 and 1 BvR 3247/09, paras 44, 73 = FamRZ 2013, 521, 523, 526], and the case-law of the European Court of Human Rights on Art. 8(1) ECHR concerning the child's right to respect for his or her private life: The European Court of Human Rights had ruled that the latter encompassed the right of the child to establish a legal parent-child-relationship which was regarded as part of the child's identity within domestic society [ECtHR of 26.06.2014, No. 65192/11 – Mennesson v. France, para 96].

Here, the Court stressed that not only was the surrogate mother not willing to

assume parental responsibilities, but she was, in fact, also not available as a parent on a legal basis: An assignment of legal motherhood to the surrogate mother, which could only be established under German law, would have no effect in the surrogate mother's home state because of the opposing foreign judgment.

Under those circumstances, the Court found that depriving the child of a legal parent-child-relationship with the second intended parent who – unlike the surrogate mother – was willing to assume parental responsibilies for the child, violated the child's right laid down in Art. 8(1) ECHR. According to the Court's view, the limping status relationship between the surrogate mother and the child failed to fulfill the requirements laid down in Art. 2(1) in conjunction with Art. 6(2) of the German Constitution and Art. 8(1) ECHR.

The Court agreed with the opinion of the previous instance that adoption would be an appropriate instrument in the case at hand because, unlike a judgment based on the foreign legislature's general assessment of surrogacy cases, the adoption procedure included an individual examination of the child's best interests. However, the Court pointed out that in cases of stepchild adoption, the outcome of this individual evaluation would usually be favourable and thus coincide with the Californian decision, leading to legal parenthood of the biological parent's registered partner. The consistent results clearly argued against a violation of public policy. Moreover, the Court observed that adoption would not only encounter practical difficulties in the child's country of birth, where the appellants were already considered the legal parents, it would also pose additional risks for the child: It would be left to the discretion of the intended parents whether they assumed parental responsibilities for the child or changed their minds and refrained from adoption; for example, if the child was born with a disability.

Conclusion

The Court's decision has been received with approval within German academia and legal practice [see the notes by *Helms*, FamRZ 2015, 245; *Heiderhoff* NJW 2015, 485; *Mayer*, StAZ 2015, 33; *Schwonberg*, FamRB 2/2015, 55; *Zwißler*, NZFam 2015, 118]. Before this judgment, lower courts had shown a tendency to regard public policy as violated by the mere fact that surrogacy had been performed [cf. Higher Regional Court Berlin 01.08.2013, Case 1 W 413/12, paras 26 *et seqq.* = IPRax 2014, 72, 74 *et seq.*; Administrative Court of Berlin

05.09.2012, Case 23 L 283.12, paras 10 *et seq.* = IPRax 2014, 80 *et seq.*]. In recent years, however, some scholars had advocated a more cautious and methodical handling of the public policy exception [see especially *Heiderhoff*, NJW 2014, 2673, 2674 and *Dethloff*, JZ 2014, 922, 926 *et seq.* with further references]. Instead of resorting to a diffuse disapproval of surrogacy as a whole, the ruling of the BGH is essentially based on an accurate analysis of the concrete alternatives at hand and a critical evaluation of the possible outcomes in the present case.

However, it has rightly been pointed out that, within the complex field of surrogacy, the situation in the case at hand was fairly straightforward: The surrogate mother was not married so that the biological father could acknowledge paternity without complications, there was no conflict between the intended parents and the surrogate mother because the latter did not want to keep the child, and the legal parenthood of the intended parents had been established in a judicial procedure where the rights of the child and the surrogate mother, especially her voluntary participation, had been subject to review [cf. *Heiderhoff*, NJW 2015, 485].

The BGH expressly left open whether a different finding would have been appropriate if neither of the intended parents had been the child's biological parent or if the surrogate mother had been also the genetic mother [para 53]. Neither did the court discuss the issue of 'recognition' of civil status situations and documents. Furthermore, surrogacy arrangements that are undertaken in countries with poor human rights standards and a lower degree of trust in the administration of justice may not fulfill the requirements for a recognition established by the BGH. Insofar, the judgment could have a deterrent effect as regards seeking surrogacy treatment in countries that do not meet the required standards [*Heiderhoff*, NJW 2015, 485].