Latest Issue of RabelsZ: Vol. 78 No 3 (2014)

The latest issue of "Rabels Zeitschrift für ausländisches und internationales Privatrecht – The Rabel Journal of Comparative and International Private Law" (RabelsZ) has recently been released. It contains the following articles:

- *Klaus Bartels,* **Zum Rückgriff nach eigennütziger Zahlung auf fremde Schuld – Anleihen bei DCFR und common law für das deutsche Recht** (Recourse After Self-serving Payment on Another's Debt – German Law Borrowing From the DCFR and the Common Law) pp. 479-507(29)

Under German law, the self-serving payment on another's debt must be regarded as a performance (Leistung) of the payer to the creditor. The payment leads to a discharge of the debt (§ 267 of the German BGB). A cessio legis, being incompatible with discharge, takes effect only under the exceptions provided by law. A third party may claim reimbursement from the original debtor only under the regime of benevolent intervention in another's affairs (Geschäftsführung ohne Auftrag). But the criteria for determining the meaning of concepts such as "another's affairs" and the "intention of benefiting another" are widely challenged. And having a recourse plan in mind, also positive effects on the debtor's issues, which could support the criteria of § 683 sentence 1 BGB, are regularly missed.

The prevailing German doctrine is comfortable with the Rückgriffskondiktion (§ 812 (1) sentence 1, alternative 2 BGB), hereby enabling, subsidiarily, recourse to the benefit of the true debtor. The common law has traditionally been averse to this approach. And the Draft Common Frame of Reference avoids this condictio entirely. It is obvious that the English rules on legal compulsion (with their reservation vis-à-vis full restitution as under continental regimes) are substantially convincing. And despite its cautious approach, the Draft Common Frame of Reference offers similar solutions regarding payments of a third party, who did not consent freely (Art. VII.-2:101(1)(b) DCFR). In cases involving, for instance, an "execution interest", a corresponding interpretation is needed, perhaps even an analogous application of this rule. A

similar approach is taken by the German doctrine following § 814 alternative 1 BGB by lowering the restitution barrier for cases of pressure caused by a conflict or compulsion. The already very narrow scope of application of the German Rückgriffskondiktion is thus further and markedly circumscribed: The law of unjust enrichment recognizes gratuitous interference in another's affairs only if the intervener presents substantial reasons to let his conduct be regarded as consistent.

- *Tanja Domej*, D**ie Neufassung der EuGVVO – Quantensprünge im europäischen Zivilprozessrecht** (The Recast Brussels I Regulation – Quantum Leaps in European Civil Procedure) pp. 508-550(43)

In November and December 2012, the European Parliament and the Council adopted the recast Brussels I Regulation (Regulation 1215/2012). The main feature of the reform is the abolition of the exequatur procedure. With this step, one of the main political goals in the field of European judicial cooperation, the abolition of ,,intermediate procedures" standing in the way of cross-border enforcement of judgments, has been achieved – at the price, however, of retaining the grounds for refusal of recognition and enforcement. In other respects as well, the changes introduced by the recast Regulation are modest, compared to the Commission's original political intentions. Instead of a "great leap forward", the European legislator chose incremental change. The plans to extend the rules on jurisdiction to third-state defendants were largely abandoned. The attempt to create new rules on the interface with arbitration was also unsuccessful. The changes with regard to jurisdiction agreements and provisional measures turned out more moderate than proposed by the Commission. This article discusses the innovations introduced by the recast Regulation. It analyses the upsides and downsides of the new rules and points out lost opportunities and avenues for further reforms.

- *Claudia Mayer*, **Ordre public und Anerkennung der rechtlichen Elternschaft in internationalen Leihmutterschaftsfällen** (Ordre public and Recognition of Legal Parenthood in International Surrogacy Cases), pp. 551-591(41)

Through the use of gestational surrogacy modern artificial reproductive technology provides infertile couples with new opportunities to become parents

of children who are genetically their own. While surrogacy is lawful under certain circumstances in a limited number of countries worldwide, in others – including Germany – it is prohibited. Consequently, international surrogacy tourism to countries that allow surrogacy, such as India, the United States, or Ukraine, is booming. However, there is no legal regulation at the international level regarding this matter.

Due to the current legal situation in Germany, infertile couples face severe difficulties in view of the recognition by German courts or by public authorities of their legal parenthood of a child born abroad through surrogacy: Not only is surrogacy illegal in Germany, its prohibition is also considered as part of the German ordre public. Based on this perception, German authorities deny the recognition of existing foreign judgments conferring legal parenthood upon the intended parents, as well as the application of more liberal foreign substantive law, thus paving the way for a recourse to German law: According to the relevant German provisions, the woman who gave birth to the child – i.e. the surrogate mother – is to be considered as the legal mother, and her husband is the legal father. As a consequence, in many cases the child does not acquire German nationality by birth and is thus denied the right to a German passport and the right to enter Germany. In the worst case, the child does not acquire any nationality at all, leaving him or her stateless, which constitutes an unacceptable situation. This article shows that the German ordre publicshould not be considered as an obstacle to the procedural recognition of foreign decisions on legal parentage, nor should it hinder the application of foreign substantive law (designated by the German conflict of law rules) conferring legal parentage on the intended parents. Instead, already de lege lata the welfare of the child must be considered the primary and decisive concern in surrogacy cases. This also results from Article 8 of the European Convention on Human Rights, guaranteeing the right to respect for one's family life.

Regulation at the international level is overdue, and it is to be welcomed that international institutions have started to give attention to the matter. However, until an international consensus is reached, the national legislator should be called upon to revise the German law on descent, and to provide provisions legalizing surrogacy under certain conditions.

- *A. (Teun) Struycken V.M.*, **The Codification of Dutch Private**

International LAw- A Brief Introduction to Book 10 BW, pp. 592-614(23)

Greek Book on Brussels Ibis Regulation [Regulation (EU) No 1215/2012]

'Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters: The New Revised Regulation 1215/2012 Brussels (Ibis)', by Professor Charis P. Pamboukis, has just been published (language: greek). The book constitutes the first issue of a new series called *The Private International Law and Law of International Transactions Series*, which has the aim of publishing outstanding works in these fields under the direction of Professor Charis P. Pamboukis. The publisher is Nomiki Bibliothiki (Athens, 2014, XVI + 308 pages, ISBN 978-960-562-284-8).

> The new Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters plays a vital role in the development of the European procedural law, which gradually dominates in the regulation of the legal relationships occurring in the European Union and diminishes the practical importance of the national procedural law. It replaces -and this is important for its systematic interpretation- the Brussels I Regulation. In principle it is based on its predecessor but it also revises old and introduces new provisions. It has to be underlined that the new instrument will be applied as a whole by replacing (with a few exceptions which are included in its transitional provisions) the old Brussels I Regulation (the latter has 'communitarised' the 1968 Brussels Convention, a pioneer of great significance for this area).
>
> Taking into consideration the described relationship between these two

instruments, this book gives emphasis on the interpretation of the new as well as of the old, revised provisions which form part of the new Regulation, in order to fill a related gap which exists in the Greek, legal bibliography and prepare the ground for its application (10 January 2015, as it is provided by Article 66). Its main purpose is to make familiar to the Greek jurists the adopted amendments. Therefore, it explains the changes which have taken place concerning the scope of the Brussels I Regulation, its rules on international jurisdiction as well as on the free circulation of judgments. Regarding the provisions of the Brussels I Regulation, which have been included *verbamit* in the new Regulation, the older works and contributions remain relevant. Due to this fact, a pertinent list has been included in the end of this book. Furthermore, among others, the text of the new Regulation has also been included.

English Court of Appeal confirms Damages Award for Breach of a Jurisdiction Agreement

By Martin Illmer

In a recent decision, the English Court of Appeal confirmed a damages award for breach of a jurisdiction agreement ([2014] EWCA Civ 1010); another judgment in the Alexandros T saga, which has been unfolding before the English courts. The judgment was delivered after the Supreme Court had, in November 2013 ([2013] UKSC 70), on appeal from an earlier Court of Appeal judgment in the Alexandros T saga, held that arts 27 and 28 of Brussels I did not apply in relation to the 2006 proceedings, vis-à-vis the 2011 proceedings (see the facts below) because the claims in those proceedings did not concern the same cause of action, but merely arose out of the same factual setting and might raise common issues.

Facts

In May 2006, the vessel Alexandros T, owned by Starlight Shipping Company, sank. Starlight filed a claim with their insurers, who initially denied liability, primarily on the basis that, to Starlight's knowledge, the vessel was unseaworthy. Starlight disputed this argument and in turn alleged that the insurers had improperly influenced witnesses, had spread false and malicious rumors and, in failing to comply with their obligations to pay Starlight under the insurance policies, had caused them consequential financial loss. Accordingly, in 2006, Starlight brought an action against the insurers before the English High Court under the exclusive jurisdiction clauses in the insurance policies. Shortly before the trial, the parties settled the claim on the basis of Tomlin Orders which provided for a stay of the action save for the purposes of carrying into effect the agreed terms of the settlement. The settlement agreements were expressed to be in full and final settlement of all and any claims under the insurance policies, and contained English choice of law and exclusive English jurisdiction clauses. In addition, Starlight agreed to indemnify the insurers in respect of any claims which might be made against them in relation to the loss of the vessel or under the policies. In 2011, however, Starlight brought proceedings in Greece against the insurers, alleging breaches of the Greek Civil and Criminal Code, relying on the factual allegations concerning witness evidence and loss made in the 2006 proceedings. In response to that claim, the insurers sought to lift the stay of the 2006 proceedings under the Tomlin Orders, and commenced proceedings before the English High Court seeking (1) a declaration that the Greek claims are covered by the releases of the settlement agreements, (2)a declaration that bringing the Greek claims was a breach of the releases in the settlement agreements as well as a breach of the jurisdiction clauses in both the policies and settlement agreements, and, (3) payments based on the indemnity clauses and damages for breach of the release and jurisdiction clauses. At first instance the High Court granted summary judgment on the insurers' claims. Starlight appealed to the Court of Appeal.

Judgment

The relevant passages of the judgment of the Court of Appeal read as follows:

> ***'Do the claims for damages infringe EU law?***

[15] The owners assert that these claims for damages interfere with the jurisdiction of the Greek court to determine its own jurisdiction and, if appropriate, the merits of the owners' claims. For this purpose they rely on Turner v Grovit [2004] 2 Lloyds Rep. 169. This reliance is, however, misplaced because Turner v Grovit related to anti-suit injunctions and no such injunction is claimed in the present case. The vice of anti-suit injunctions is that they render ineffective the mechanisms which the Jurisdiction and Judgments Regulation provides for dealing with lites alibi pendentes and related actions. One of those mechanisms is provided by Article 27 which requires any court other than the court first seised to stay proceedings involving the same cause of action. Our earlier decision did precisely that because we considered that the Greek proceedings did involve the same cause of action as the English proceedings but the Supreme Court has now held that we were wrong about that and has also refused a stay under Article 28. There is therefore no question of any interference with the jurisdiction of the Greek court.

[16] The Greek court is free to consider the Greek claims; it will, of course, have to decide whether to recognise any judgment of the English court that the Greek claims fall within the terms of the Settlement Agreement and have therefore been released. It will also have to decide whether to recognise any judgment awarding damages for breach of the Settlement Agreements and the jurisdiction clauses in both the settlement agreements and the insurance policies. But that is not an interference with the jurisdiction of the Greek court but rather an acknowledgment of the Greek court's jurisdiction. In these circumstances there is no infringement of EU law, nor is there any need for a reference to the Court of Justice of the European Union despite the owners' repetition of their request for such a reference in their new solicitors' letter of 26th June 2014.

[17] In fact the owners appear almost to recognise that this is the position since they expressly accept that the claim for an indemnity pursuant to the Settlement Agreements is not contrary to EU law (see their supplemental skeleton, para 48). That is plainly right (see also the observations of Lord Neuberger at para 132 of his judgment in the Supreme Court). But if the claims to an indemnity do not infringe EU law, it is very hard to see why claims to damages should infringe that law.'

Short Note

The judgment of the Court of Appeal raises a number of interesting questions, which cannot all be addressed here. From a European perspective, the crucial aspect is the compatibility of such a damages award with the ECJ's judgment in *Turner v Grovit,* and potentially also West Tankers (although the latter concerned an arbitration agreement, raising the additional problem that arbitration is excluded from the Regulation's substantive scope). Although the Court of Appeal's judgment builds partially upon the prior decision of the Supreme Court on the issue of arts 27 and 28 of Brussels I – in particular, the finding of the Supreme Court that the claims in the two proceedings did not concern the same cause of action – it is likely that the Court of Appeal would have reached the same decision irrespective of the Supreme Court's prior decision. What is most striking about the Court of Appeal's judgment is the fact that Longmore LJ, in the first sentence of para 15, refers to the Greek court's right to determine its own jurisdiction whereas subsequently, after having explained the Supreme Court's decision on jurisdiction, the court simply refers to an interference with the Greek court's jurisdiction, which is of course not the same. Even though the Supreme Court held that arts 27 and 28 of Brussels I do not apply, a damages claim may still interfere with the right of the Greek court to determine its jurisdiction, or, more generally speaking, the threat of such a damages claim may deter parties from even bringing a claim in a foreign forum which would have the same effect as an anti-suit injunction. One may well argue that if an anti-suit injunction that amounts to specific performance of the jurisdiction agreement should no longer be granted, damages may equally not be awarded.

In light of the principle of effectiveness, the ECJ might well find an incompatibility of a damages award with the Brussels I Regime, and it is therefore somewhat surprising that the Court of Appeal did not refer the matter to the ECJ for a preliminary ruling. The Court of Appeal simply held, by way of its own interpretation, that there is no infringement of EU law, even though the matter has not yet been decided by the ECJ nor resolved by EU legislation. It is mentioned, in passing, that the English courts, in the litigation that followed the ECJ's West Tankers ruling, appear to be very reluctant to refer matters to the ECJ for a preliminary ruling (see also the issue of enforcement of an arbitral award by entering judgment in terms of the award under section 66(2) Arbitration Act 1996

in West Tankers v Allianz [2011] EWHC 829, confirmed by [2012] EWCA Civ 27). It seems that certain of the ECJ's decisions, such as West Tankers, Turner, and Gasser were so shocking to English courts that they want to avoid a repetition by all means. Moreover, the English courtsequally do not want to see the alternatives to anti-suit injunctions that are provided by English law (some even exclusively by English law) to be destroyed by the ECJ for an incompatibility with the Brussels I Regime.

The matter is somewhat different with regard to arbitration agreements, since arbitration is excluded from the Regulation's scope and there is consequentially no lis pendens mechanism that applies to it. While a state court appears to be barred from granting damages for breach of an arbitration agreement for incompatibility with the ECJ's West Tankers judgment, an arbitral tribunal may well award such damages. While arbitral tribunals are bound by substantive EU law (see ECJ Case C-126/97 Eco Swiss v Benetton [1999] ECR I-3055), they are not bound by procedural EU law that is specifically intended and designed to apply only to the Member States' courts. Consequently, the procedural principles underlying the Brussels I regime do not bind arbitral tribunals even if seated in a Member State, so as to foster mutual trust in other Member States' courts, by allowing them to rule independently on their jurisdiction. The matter was recently heard before the English High Court, which held that the Brussels I Regulation does not apply to an arbitral tribunal, and accordingly that it may award damages for breach of an arbitration agreement free from any restraints due to the principles of the Brussels I Regime (West Tankers v Allianz [2012] EWHC 854). Interestingly, the Swiss Supreme Court reached the same result, (although it was of course not restrained by EU law) when it dealt with an arbitral award rendered by a tribunal whose members included Lord Hoffmann.

Email Updates

Readers of this blog will know that our email updates (which allows you to subscribe to receive our new content directly into your inbox) had been broken for a while. The service we used, Feedburner, is no longer operational. We're

happy to say that we've now created a new email update subscription service for Conflict of Laws .net. You can **subscribe here** (the link is also permanently in the menu to the right.)

The blog has been updated to the latest software available, and we hope everything is working as it should be. If you spot a problem or bug, just let us know.

The Protection of Privacy in the Aftermath of the CJEU's Judgments – Conference at the Max Planck Institute Luxembourg

On September 29, 2014 the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law will host a conference on 'The Protection of Privacy in the Aftermath of the CJEU's Judgments in *eDate Advertising*, *Digital Rights Ireland* and *Google Spain*'.

Ensuring the effective right to privacy regarding the gathering and processing of personal data has become a key issue both in the internal market and in the international arena. The extent of people's right to control their data, the implications of the "right to be forgotten", the actual impact on national systems of the CJEU's decisions on jurisdiction on the infringement of personality rights, and recent legislation addressing libel tourism are all shaping a new understanding of data protection and the right to privacy, and also have an impact on other fundamental rights such as freedom of speech.

This Conference will explore these issues to assess the status quo and possible developments in this area of the law which is undergoing significant changes and reforms that are not always easy to reconcile.

Program

14:15 *The CJEU's Decision in Google Spain: An Assessment*

Professor Christopher Kuner, Honorary Fellow of the Centre for European Legal Studies, University of Cambridge, and Honorary Professor at the University of Copenhagen

Dr Cristian Oro Martinez, Max Planck Institute Luxembourg – discussant

15:00 *The CJEU's Decision on the Data Retention Directive*

Professor Martin Nettesheim, University of Tübingen

Dr Georgios Dimitropoulos, Max Planck Institute Luxembourg – discussant

16:30 *The CJEU's Decision in eDate Advertising and Its Implementation by National Courts*

Professor Burkhard Hess, Director, Max Planck Institute Luxembourg

Professor Patrick Kinsch, University of Luxembourg – discussant

17:15 *The 2010 U.S. SPEECH Act and the U.K. Reaction of 2013*

Dr Cristina M. Mariottini, Max Planck Institute Luxembourg

Professor David P. Stewart, Georgetown University – discussant

18:00 *Discussion*

For further information and to register, please click here.

Note: The following day, the Institute will host the first meeting of the ILA Committee on the Protection of Privacy in Private International and Procedural Law (this latter event is by invitation only).

Kupelyants on Sovereign Debt Restructuring

Hayk Kupelyants from the University of Cambridge as posted a paper on “Police Powers of States in Sovereign Debt Restructurings” on SSRN. The abstract reads as follows:

> *The paper looks at the powers of the States to unilaterally modify their debt obligations in the context of sovereign debt restructurings. Drawing on the national case law on the unilateral modifications of domestic debt, the paper argues that the States entering into sovereign bonds act in private capacity and cannot modify the private obligations in a unilateral manner. To support the argument, paper relies on the case law from the US, the Russian Federation and England. The paper also considers the powers of the State to modify private-to-private debt obligations and the debt entered into by quasi-public entities.*

The full paper is available here.

Latest on Spanish Journals (II)

The last issue of *La Ley. Unión Europea* (July 2014) has also been released this month. Prof. P. de Miguel Asensio (Universidad Complutense of Madrid) is the author of the first contribution, entitled “El tratamiento de datos personales por buscadores de Internet tras la sentencia *Google Spain* del Tribunal de Justicia”.

> Summary: In the light of the most recent case law of the ECJ, the territorial scope of application of the EU data protection law is discussed, with a special focus on the applicability of EU legislation to Google Inc., as search engine

provider. Additionally, the position of the undertaking managing a search engine as data controller, the obligations of the search engine in this respect as well the relationship with the position of the pusblishers of websites are addressed. Finally, the scope of the right of erasure and its consequences on the activities of search engines are also discussed.

Directly related to Prof. de Miguel's paper is Dr. M. López García's "Derecho a la información y derecho al olvido al internet", published a little bit later (under *Tribuna*) in the same issue.

Summary: Internet is major change in society. Everything we do is published in the network. If you're not on the Internet doesn't exist. But it has important legal consequences especially regarding the right to privacy and protection of personal data, specifically the right to control the privacy of each person and decide that we want you to know or want you to forget about us. This problem has a different solution in each country. Common response is required for legal certainty.

The second main article, written by Prof. J. García López (also from the Universidad Complutense, Madrid) and entitled "El acuerdo de asociación transatlántico sobre comercio e inversiones: aproximación desde el Derecho del comercio internacional", focuses on the TTIP:

Summary: The USA and the EU started one year ago their negotiations for the conclusion of the Transatlantic Trade and Investment Partnership (TTIP). In this paper we propose an approach from the point of view of International Trade Law. The TTIP will have to satisfy the conditions of both art XXIV GATT and art V Gats. This will produce the abolition of tariff and non-tariff barriers for the transatlantic trade, inducing a well-known effect of trade creation. On the other side, third countries like Mexico and Turkey will suffer as a consequence of the trade diversion caused by the rules of origin of the TTIP. To conclude, we will make reference to the new areas of negotiation beyond goods and services.

A comment on the ECJ decision to the aff. C-478/2012, Maletic, is provided by J.I. Paredes Pérez (Centro Europeo del Consumidor en España; University of Alcalá)

Summary: The subject of the controversy of the judgment places us within the territorial scope of protection forums included in Regulation No. 44/2001 for

contracts held by consumers in order to assess the assumptions of internationality that justify their application. In this context, the judgment is of great significance, since in the appreciation of the international element of the litigious situation, the Court of Justice of the European Union does not use so much criteria of spatial type, characteristic of private international law as substantive criteria that arise from material logic. In particular, it appreciates the international nature of a consumption contract apparently domestic, taking into account intrinsic aspects of the contractual relationship, as it turns out the root cause of the matter related to connected contracts.

A selection of European case law and some news of juridical -but also of general- interest are delivered in the final part of the journal.

Latest on Spanish Journals (I)

Vol. VII (2014, 2) of the Spanish journal *Arbitraje. Revista de Arbitraje Comercial y de Inversiones* has just been released. The following contributions are to be found therein:

Under the heading *Estudios*

Franco FERRARI: Forum shopping: la necesidad de una definición amplia y neutra

Ana FERNÁNDEZ PÉREZ: Los contenciosos arbitrales contra España al amparo del Tratado sobre la Carta de la Energía y la necesaria defensa del Estado.

As *Varia*

Miguel GÓMEZ JENE: Hacia un estándar internacional de responsabilidad del árbitro

Marco DE BENITO LLOPIS–LLOMBART: El arbitraje y la acción

Simon P. CAMILLERI: Anti–suit injuctions en el régimen de Bruselas I: ¿una cuestión de principios?

Álvaro SORIANO HINOJOSA: El Estado y demás personas jurídicas de Derecho público ante el arbitraje internacional

José Pablo SALA MERCADO: La actualidad de la inversión extranjera en Argentina. Una realidad que despierta inseguridad.

As usual, the issue provides as well with the notice of relevant recently adopted legal texts, case law (sometimes commented) of several jurisdictions, reviews of books and other journals, and of events.

Save the Date: Next Conference of the German Academic Association for International Procedural Law

The next biannual conference of the German Academic Association for International Procedural Law (Wissenschaftliche Vereinigung für Internationales Verfahrensrecht e.V.) will take place from 25 to 28 March 2015 in Luxemburg. It will be hosted by the Max Planck Institute for International, European and Regulatory Procedural Law and will be dedicated to three topics:

- The European Court System
- International Dimensions of European Procedural Law
- International Commercial Arbitration

The conference language will (for the most part) be German. More information is available here.

Colloquium on Collective Redress in Zurich in October 2014

On 3 and 4 October 2014, Tanja Domej from the University of Zurich will host a colloquium on collective redress in Zurich. Speakers from various European jurisdictions and the US will discuss their experiences with existing instruments and possible future developments. The draft programme is available at http://www.rwi.uzh.ch/lehreforschung/alphabetisch/domej/tagungen/ccr.html. The working language will be English.

Attendance is free of charge but registration is required as the number of places is limited. You can register online at http://www.rwi.uzh.ch/lehreforschung/alphabetisch/domej/tagungen/registration.html or via e-mail (lst.domej@rwi.uzh.ch).