Prize Question: Who Gets Carried Away by Europe?

- Europe attracts and divides. It makes us dream, but it also has a reality with boundaries that shape our lives.

What are the dynamics of integration? Whom does Europe sweep off their feet? Does European integration create community or does it lead to exclusion?

By asking this prize question, the Young Academies of several European countries are seeking insights into the motions of Europe, its destinies and processes, and the people affected by them. Answers can take all imaginable forms, from academic or literary to artistic, audiovisual, and musical submissions, provided they are accompanied by an explanatory text.

The prize question is open to everyone. Contributions are welcome in Danish, Dutch, English, French, German, Italian, Polish, Spanish, or Swedish.

The deadline for submission is December 1, 2014.

More information is available at www.aquestionforeurope.eu and here:

Vogel on Choice of Law relating to Personality Rights

- As a result of the global spread of media content, cross-border infringements of personality rights have increased significantly over recent years. However, the question of which law applies in these instances remains largely answered (see, for example, our online symposium as well as various posts). A recently published monograph, “Das Medienpersönlichkeitsrecht im Internationalen Privatrecht”, takes up the long-running debate about a Europe-

wide harmonisation of national conflict of law rules relating to personality rights. The author Benedikt Vogel, engages in a comparative analysis of media-related infringements in substantive and conflict of laws in Germany, France and the UK. The author develops a new proposal for a conflict of law rule for personality rights infringements. In doing so he takes into account the (failed) negotiations preceding the adoption of the Rome II Regulation which brought again to light the need for flexibility and compromise in all member states. The proposal aims to satisfy all conflicting interests: those of the plaintiff and the media, those of the courts in view of practicability and efficiency and, last not least, the public's interest in protecting the freedom of expression and information in Europe.

The book has been published by Nomos and is written in German. Further information (in German) is available here.

Conference on "Minimum Standards in European Civil Procedure Law

On November 14 and 15, 2014 Matthias Weller, EBS Law School, and Christoph Althammer, University of Freiburg, will host a conference on "Minimum Standards in European Civil Procedure Law" at the Research Center for Transnational Commercial Dispute Resolution at the EBS Law School in Wiesbaden, Germany. The conference will be held in German. More information is available of the Center's homepage. Registration is online.

The programme reads as follows:

Friday, November 14, 2014

- **Anmeldung**
- **Begrüßung**

Prof. Dr. Matthias Weller, EBS Law School, Wiesbaden

Teil 1 – Perspektive der Mitgliedstaaten

- **Mindeststandards und zentrale Verfahrensgrundsätze im deutschen Recht: EMRK/Verfassungsrecht/einfaches Recht**,
  Prof. Dr. Christoph Althammer, Albert Ludwigs University Freiburg
- **Mindeststandards und zentrale Verfahrensgrundsätze im französischen Recht: EMRK/Verfassungsrecht/einfaches Recht**
  Prof. Dr. Frédérique Ferrand, Université Jean Moulin Lyon
- **Mindeststandards und zentrale Verfahrensgrundsätze im englischen Recht: EMRK/einfaches Recht**
  Prof. Dr. Matthias Weller, EBS Law School, Wiesbaden
- **Transnationale Synthese: ALI/UNIDROIT Principles of Civil Procedure**
  Prof. Dr. Thomas Pfeiffer, Ruprecht Karls University Heidelberg
- **Diskussion**

Saturday, November 15, 2014

Teil 2 – Unionsrechtliche Perspektive

- **Mindeststandards und Verfahrensgrundsätze im Strafverfahren unter europäischem Einfluss**
  Prof. Dr. Michael Kubiciel, University of Cologne
- **Mindeststandards und Verfahrensgrundsätze im Verwaltungsverfahren unter europäischem Einfluss**
  Prof. Dr. Andreas Glaser, University of Zurich
- **Mindeststandards und Verfahrensgrundsätze im behördlichen und privaten Kartellverfahren unter europäischem Einfluss**
  Prof. Dr. Friedemann Kainer, University of Mannheim
- **Mindeststandards und Verfahrensgrundsätze im Recht des Geistigen Eigentums unter europäischem Einfluss,**
  Prof. Dr. Mary-Rose McGuire, University of Mannheim
- **Unionsrechtliche Synthese: Mindeststandards und Verfahrensgrundsätze im acquis communautaire/Schlussfolgerungen für European Principles of**

Civil Procedure, *Prof. Dr. Burkhard Hess,* Director of the Max Planck Institute for International, European and Regulatory Procedural Law, Luxembourg

- **Diskussion**

Article on special jurisdiction in IP matters, including a comment on Coty

The previously reported CJEU decision in *Coty Germany GmbH v. First Note Perfumes NV*, concerning the infringement of the rights in the 3D Community trade mark, unlawful comparative advertising and unfair imitation, is the subject of a comment by Prof. Annette Kur, in her article **Durchsetzung gemeinschaftsweiter Schutz-rechte: Internationale Zuständigkeit und anwendbares Recht**, fortcomming in GRUR Int., Issue 7/8, 2014.

Her criticism is primarily addressing the answer to the first question in which the CJEU reiterated that jurisdiction under Article 93(5) of CTM Regulation may be established solely in favour of CTM courts in the MS in which the defendant committed the alleged unlawful act. This is because she finds an interpretation of the provision contrary to the principle of territoriality of intellectual property rights, both national and unitary. She explains that the effect of this principle is absence of any possibility that there might be a single infringement of an intellectual property right with the event causing damage in one country, and the damage occurring in another. In such a situation there would be two distinct acts of infringement, one in each of the countries. Kur qualifies the CJEU reasoning as a fundamental misunderstanding of the structural features of the intellectual property law that distinguish it from other areas of tort law.

Job Vacancy at the University of Bonn

Professor Dr. Matthias Lehmann, currently University of Halle-Wittenberg, is looking for a research assistant at his new Chair at the University of Bonn as of October 1, 2014. The candidate is required to speak and write English at the level of a native speaker and have knowledge in Private International Law and/or Banking and Financial Law

The position will be half-time (50%) and will be paid at around 1.700 Euro (approx. 1.200 Euro net) per month. The contract will start on 1 October 2014. It will run for two years, with an option to renew. Your tasks include the support in research and teaching, as well as to teach your own classes (2 hours per week), in particular in the areas of private law and private international law and/or banking and financial law.

You need:

- knowledge of English at the level of a native speaker, at least basic knowledge of the German language
- a University degree in law equivalent to the First German State Exam with an above-average result
- knowledge in private and/or business law
- computer literacy (at least MS-Office)

We offer:

- the possibility to obtain a doctorate (provided that the Faculty's rules are fulfilled)
- a stimulating working environment
- payment as a German civil servant
- possibility to buy cheap public transport ticket

The University is committed to a policy of equal opportunity. Candidates with

disabilities will be preferred in cases where they have the same qualifications as others.

If you are interested in this position, please send an application (consisting of your cv, bachelor's degree, an overview of your performance during your law studies as well as your diploma for the law degree and any other titles you may hold) by August 2, 2014 to:

Institut für Internationales Privatrecht und Rechtsvergleichung, c/o Ms Fabricius, Adenauerallee 24-42, 53113 Bonn, Germany, reference no. 28/14/3.13.

For further enquiries, please contact Professor Dr. Lehmann: matthias.lehmann@gmail.com

Only applications sent per post will be considered. Applications made by email will unfortunately not be accepted. If you wish to have your documents returned after the recruitment process, please include a self-addressed envelope with your application.

Cross-Border Effects of Banking Resolution

As part of the overhaul of the financial system, the EU has recently enacted two texts that will profoundly change the way in which banking crises will be dealt with. Those texts are the Bank Recovery and Resolution Directive (BRRD) and the Regulation on a Single Resolution Mechanism (SRM). Under them, supervisory authorities will have the power to order the transfer of assets, rights and liabilities of a bank to a purchaser or to a bridge institution. They may also prescribe the mandatory bail-in of creditors by conversion of their claims into equity or by a write down to zero. These measures may affect assets situated in other countries or rights and liabilities governed by foreign law. This raises

serious conflict of laws issues. These and related topics will be dealt with during a conference on Thursday, 10 July 2014, at the British Institute of International and Comparative Law (BIICL) in London. The conference will be chaired by Professor Dr Rosa Lastra (Queen Mary). Speakers are Dr Anna Gardella (EBA), Professor Dr Matthias Lehmann (University of Halle-Wittenberg), Dr Philipp Paech (LSE) and Dr Peter Werner (ISDA). Further details can be found here.

Oil Spills in Nigeria, Damages in the UK

On June 20, a United Kingdom Court delivered a judgment on preliminary issues raised in the legal action brought by about 15,000 members of a Nigerian community against Shell Petroleum Development Company of Nigeria, seeking compensation for damages caused by two oil spills in 2008 and 2009. The ruling comes as part of a civil claim brought by people from the Bodo community in the Niger Delta; the legal action was instituted at the High Court in March 2012, following the breakdown of talks over compensation and a clean- up package for the community. A full trial will commence next year.

The hearing took place in April 2014 before the President of the Technological and Construction Court, Justice Akenhead. The preliminary judgment rendered last week ruled that whilst Shell did not have an obligation to provide policing or military defence (which is the function of the state), it could be legally liable if it has failed to take other reasonable steps to protect the pipeline such as the use of appropriate technology (leak detection systems), a system of effective surveillance and reporting to the police and the provision of anti-tamper equipment. The ruling has thus opened the door for Nigerian claimants to demand compensation if oil leaks were a result of sabotage or theft – if the sabotage or theft was due to neglect on the part of the [licence] holder or his agents, servants or workmen to protect, maintain or repair any work structure or thing.

As regards PIL, several interesting issues were pointed out by the Judge: the

significant jurisdictional problems that arise when claims relating to Nigerian land are brought in England rather than in the Nigerian courts that have jurisdiction in relation to such land; and the need to apply and therefore interpret Nigerian law (in particular, the Nigerian Oil Pipelines Act). Both will be analyzed in the main trial next year.

Mennesson v. France, ECtHR 26.06.2014

I happened to be in France when I heard the news about the ECtHR finding against France in *Menesson v. France*, on surrogate motherhood. The Court considered established a violation of Art. 8.1 ECHR as regards the twin daughters of the couple. Here is a resumée of the case (together with a similar one, *Labassee v. France*) as presented in the Press release issued by the Registrar of the Court. The judgment itself can be found here, but only in French.

The applicants in the first case are Dominique Mennesson and Sylvie Mennesson, a husband and wife, French nationals who were born in 1955 and 1965 respectively, and Valentina Mennesson and Fiorella Mennesson, American nationals, who were born in 2000. They live in Maisons-Alfort (France). The applicants in the second case are Francis Labassee and Monique Labassee, a husband and wife, French nationals who were born in 1950 and 1951 respectively, and Juliette Labassee, an American national who was born in 2001. They live in Toulouse. The French authorities have refused to recognise the family relationship, legally established in the United States, between, on the one hand, the children Valentina Mennesson and Fiorella Mennesson, and Juliette Labassee, children who were born following surrogate pregnancy agreements, and on the other, the intended parents, the Mennesson and Labassee spouses respectively.

Mr and Mrs Mennesson had recourse to surrogate pregnancy in the United States, in which embryos created from Mr Mennesson’s sperm and donated ova were implanted in the uterus of a third woman. Mr and Mrs Labassee also used

this procedure. Judgments delivered respectively in California, in the first case, and Minnesota in the second, indicate that Mr and Mrs Mennesson are the parents of Valentina and Fiorella, and that Mr and Mrs Labassee are the parents of Juliette. In France, the applicants requested that the American birth certificates be entered in the French civil status registers; Mr and Mrs Labassee further applied for a notarial deed to be entered as a marginal note. They were dismissed at final instance by the Court of Cassation on 6 April 2011 on the ground that such entries or marginal notes would give effect to an agreement on surrogate pregnancy, null and void on public-policy grounds under the French Civil Code.

The seven applicants, relying on Article 8 (right to respect for private and family life), complain about the fact that, to the detriment of the best interests of the child, they had been unable to obtain recognition in France of a family relationship legally established abroad. The applicants in the Mennesson case, relying on Article 14 (prohibition of discrimination) taken together with Article 8, allege that, on account of this refusal by the French authorities, they experience a discriminatory legal situation compared to other children in exercising their right to respect for their family lives. Further relying on Article 12 (right to marriage), they allege a violation of their right to found a family and, under Article 6 (right to a fair hearing), complain about the proceedings at the close of which the French courts refused to recognise the effects of the "American" judgment.

Guest Post by Professor Vivian Grosswald Curran: The French Supreme Court Reverses Itself in an Islamic Veil Case in « L'Affaire

Baby Loup »

Professor Curran is a Distinguished Faculty Scholar and Professor of Law at the University of Pittsburgh School of Law. The Editors are grateful for this contribution.

France's Cour de cassation decided yesterday (June 25, 2014) in plenary session that a private day care center could terminate an employee for wearing an Islamic veil (or outward sign of another religion) where the latter contravenes company rules deemed to be reasonable and proportionate in terms of the employer's mission. The case had made its way to the Supreme Court once before, in March of 2013. At that time, the Court had held that the employee could not be terminated because the private company's prohibition against outward signs of religion infringed its workers' religious freedom. A key word here is « private.» Where the employer is public, by contrast, the principle of laïcité , or secularism in the public space, is deemed to justify the absence of manifestations of religious conviction.

Yesterday, however, the Court reversed itself, finding for Baby Loup, a rare day care center open seven days a week and around the clock, so that poorer women and especially single mothers, sometimes working night shifts, can find a place for their young children. The Court approved the lower court's finding that the restriction on religious freedom at issue was justified inasmuch as the center was a small business whose employees come into continual contact with young children and their parents, such that the day care center has a legitimate interest in trying to make parents from all backgrounds feel welcome.

A note on French procedure may be of interest. Since the Supreme Court can only in the rarest of cases directly decide the substantive result of cases, in 2013 it had remanded to the Court of Appeals for further decision-making. In France, moreover, courts of appeal need not agree with the Supreme Court in its initial ruling, and the second appellate court rejected the high court's ruling, thus leading the plaintiff to appeal to the Supreme Court a second time, yielding yesterday's decision.

The facts of the case beyond those mentioned above add a potentially pragmatic cast to the plaintiff's quest. She had been an assistant manager of the day care

center before taking three years of maternity leave, followed by another three years of parental leave. When she returned after six years, she asked her employer to release her from her contract through a rupture conventionnelle, which would have guaranteed her certain benefits. The company refused, saying she would have to resign. Instead, she returned to work wearing an Islamic veil, knowing that it violated the company's rules because she had helped draft those rules. When the company then terminated her employment for violating the prohibition, she sued.

A last legal option remaining to the plaintiff is an appeal to the European Court of Human Rights. Baby Loup, meanwhile, according to press accounts, is skirting financial failure due to the accumulated costs of its legal defense.

For those who read French, the decision is Arrêt n° 612 du 25 juin 2014 (13-28.369) – Cour de cassation – Assemblée Plénière – ECLI:FR:CCASS:2014:AP00612, and is available here.

First 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 first issue of 2014 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features three articles, one comment and two reports.

Alberto Malatesta, Professor at the University Cattaneo-LIUC in Castellanza, examines the interface between the new Brussels I Regulation and arbitration in **"Il nuovo regolamento Bruxelles I-bis e l'arbitrato: verso un ampliamento dell'*arbitration exclusion*"** (The New Brussels I-bis Regulation and Arbitration:

Towards an Extension of the Arbitration Exclusion; in Italian).

> *This article covers the "arbitration exclusion" as set out in the new EU Regulation No 1215/2012 of 12 December 2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters, recasting the old "Brussels I" Regulation, No 44/2001. The new Regulation apparently retains the same solutions adopted by the latter by providing only for some clarifications in lengthy Recital No 12. However, a careful analysis shows that under the new framework the above "exclusion" is more far reaching than in the past and it impinges on some controversial and much debated issues. After reviewing the current background and the 2010 Proposal of the European Commission on this issue – rejected by the Parliament and by the Council –, this article focuses mainly on the following aspects: i) the actions or the ancillary proceedings relating to arbitration; ii) parallel proceedings before State courts and arbitration and the overcoming of the West Tankers judgment stemming from Recital No 12; iii) the circulation of the Member State courts' decisions ruling whether or not an arbitration agreement is "null and void, inoperative or incapable of being performed"; iv) the recognition and enforcement of a Member State judgment on the merits resulting from the determination that the arbitration agreement is not effective; v) the potential conflicts between State judgments and arbitral awards.*

Pietro Franzina, Associate Professor at the University of Ferrara, addresses the issue of lis pendens involving a non-EU Member State in **"Lis Pendens Involving a Third Country under the Brussels I-bis Regulation: An Overview"** (in English).

> *The paper provides an account of the provisions laid down in Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I-bis) to deal with proceedings concurrently pending in a Member State and in a third country (Articles 33 and 34). It begins by discussing the reasons for addressing the issue of extra-European lis pendens and related actions within the law of the European Union. Reference is made, in this connection, to the relevance accorded to third countries' proceedings and the judgments emanating therefrom under the Brussels Convention of 1968 and Regulation (EC) No 44/2001, as evidenced inter alia by the rule providing for the non-recognition of*

decisions rendered in a Member State if irreconcilable with a prior decision coming from a third country but recognized in the Member State addressed. The paper goes on to analyse the operation of the newly enacted provisions on extra-European lis pendens and related actions, in particular as regards the conditions on which proceedings in a Member State may be stayed; the conditions on which a Member State court should, or could, dismiss the claim before it, once a decision on the merits has been rendered in the third country; the relationship between the rules on extra-European and intra-European lis pendens and related actions in cases where several proceedings on the same cause of actions and between the same parties, or on related actions, have been instituted in two or more Member States and in a third country.

Chiara E. Tuo, Researcher at the University of Genoa, examines the recognition of foreign adoptions in the framework of cultural diversities in **"Riconoscimento degli effetti delle adozioni straniere e rispetto delle diversità culturali"** (Recognition of the Effects of Foreign Adoptions and Respect for Cultural Diversity; in Italian).

This paper focuses on the protection of cultural identities (or of cultural pluralism) in the context of proceedings for the recognition of the effects of adoptive relationships established abroad. The subject is dealt with in light of the case-law of the European Court of Human Rights (ECtHR) as it has recently developed with regard to Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which, as it is well known, enshrines the right to family life. According to the ECtHR's case-law, a violation of Art. 8 of the Convention may be ascertained when personal status legally and stably constituted abroad are denied transnational continuity. Thus, on the basis of said ECtHR jurisprudence, this paper raises some questions (and tries to provide for the related answers) with regard to the consistency therewith of the conditions that familial relationships created abroad must satisfy when their recognition is sought pursuant to the relevant provisions currently applicable within the Italian legal system.

In addition to the foregoing, the following comment is featured:

Sara Tonolo, Associate Professor at the University of Trieste, **"La trascrizione degli atti di nascita derivanti da maternità surrogata: ordine pubblico e**

interesse del minore" (The Registration of Birth Certificates Resulting from Surrogacy: Public Policy and Best Interests of the Child; in Italian).

> *Nowadays surrogacy is a widespread practice for childless parents. Surrogacy laws vary widely from State to State. Some States require genetic parents to obtain a judicial order to have their names on the original birth certificate, without the name of the surrogate mother. Other States (e.g. Ukraine) allow putting the name of the intended parents on the birth certificate. In Italy all forms of surrogacy are forbidden, whether traditional or gestational, commercial or altruistic. Act No 40 of19 February 2004, entitled "Rules on medically-assisted reproduction", introduces a prohibition against employing gametes from donors, and specifically incriminates not only intermediary agencies and clinics practicing surrogacy, but also the intended parents and the surrogate mother. Other penal consequences are provided by the Criminal Code for the registration of a birth certificate where parents are the intended ones, as provided by the lex loci actus (Art. 567 of the Italian Criminal Code, concerning the false representation or concealment of status). In the cases decided by the Italian Criminal Courts of First Instance (Milan and Trieste), the judges excluded the criminal responsibility of the intended parents applying for the registration of foreign birth certificates which were not exactly genuine (due to the absence of genetic ties for the intended mothers), affirming in some way that subverting the effectiveness of the Italian prohibition of surrogacy may be justified by the best interests of the child. Apart from the mentioned criminal problems, several aspects of private international law are involved in the legal reasoning of the courts in these cases: among these, probably, the one that the principle of the child's best interests should have been read not like an exception to the public policy clause but like a basic value of this clause, in light, among others, of the case law of the European Court of Human Rights.*

Finally, this issue of the Rivista di diritto internazionale privato e processuale features two reports on recent German case-law on private international and procedural issues, and namely:

Georgia Koutsoukou, Research Fellow at the Max Planck Institute Luxembourg, **"Report on Recent German Case-Law Relating to Private International Law in Civil and Commercial Matters"** (in English).

Stefanie Spancken, PhD Candidate at the University of Heidelberg, **"Report on Recent German Case-Law Relating to Private International Law in Family Law Matters"** (in English).

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.