Save the date: 128th Conference of the Private International Law Association of Japan (2015)

The Private International Law Association of Japan was formed as an academic organization on November 4, 1949, for the purpose of enhancing the study of private international law and promoting cooperation with similar academic bodies overseas, as well as coordination among researchers of private international law. Its 128th conference will take place on Saturday, June 6, and Sunday, June 7, 2015, at the Campus of Waseda University, Shinjuku-Ward, Tokyo. One of the panels will deal with „Regional Economic Integration and Private International Law“ from a comparative perspective. Further information and programme details will follow as and when they become available here.

Bareiß on Conflicts of Obligations in the Transnational Taking of Evidence

Andreas Bareiß has authored a book on conflicts of obligations in the transnational taking of evidence (“Pflichtenkollisionen im transnationalen Beweisverkehr. Offenbarungspflichten im Zivilprozessrecht der USA und Offenbarungsverbote nach deutschem und europäischem Recht”). The book is in German. The English abstract reads as follows:

> *Andreas Bareiß studies the legal position of German companies involved in an American pretrial discovery which are caught in a dilemma between disclosure obligations in accordance with the American law of civil procedure and the prohibition of disclosure in accordance with German and European law.*

More information is available on the publisher's website.

English High Court Rules on Art. 4 Rome II Regulation

The English High Court has recently rendered an insightful and thought provoking decision on the application of Art. 4 II and III of the Rome II Regulation (Winrow v. Hemphill, [2014] EWHC 3164). The case revolved around a road traffic accident that had taken place in Germany in late 2009. The (first) defendant, a UK national, had driven the car, while the claimant, likewise a UK national, had been sitting in the rear. As a result of the accident, caused by the (first) defendant's negligence, the claimant suffered injury and initiated proceedings for damages in England.

The court had to determine the applicable law in accordance with Art. 4 of the Rome II Regulation. What made the choice of law analysis complicated were the following – undisputed – facts (quote from the judgment):

- At the time of the accident, 16 November 2009, the Claimant was living in Germany, having moved there in January 2001 with her husband who was a member of HM Armed Services. Germany was not the preferred posting of the Claimant's husband. It was his second choice. He had four separate three year postings in Germany.
- Since the Claimant's husband was due to leave the army in February 2014 after twenty-two years' service he would have returned to England one and a half to two years before that date to undertake re-settlement training. It was always their intention to return to live in England.
- Whilst in Germany, the Claimant and her family lived on a British Army base where schools provided an English education. The Claimant's eldest son remained in England at boarding school when the Claimant's husband was posted to Germany. Their three other children were at school in Germany.

- The Claimant was employed while in Germany on a full-time basis as an Early Years Practitioner by Service Children's Education. This is a UK Government Agency.
- The Claimant and her husband returned to live in England in June 2011, earlier than planned. Her husband left the Army in August 2013.
- The First Defendant is a UK national. She was also an army wife. Her husband served with the Army in Germany. She had been in Germany for between eighteen months and two years before the accident. She returned to England soon afterwards.

Against this backdrop, the court had to decide whether to apply German law as law of the place of the tort (Art. 4 I Rome II) or English law as law of the common habitual residence of the parties (Art. 4 II Rome II) or as law of the manifestly more closer connection (Art. 4 III Rome II). After a detailed discussion of the matter Justice Slade DBE held that that German law applied because England was not the common habitual residence of the parties at the time of the accident. Nor was the case manifestly more closely connected with England than with Germany:

"41. The Claimant had been living and working in Germany for eight and a half years by the time of the accident. She was living there with her husband. Three of their children were at school in Germany. The family remained living in Germany for a further eighteen months after the accident. There was no evidence that during this time the family had a house in England. The residence of the Claimant in Germany was established for a considerable period of time. The fact that the Claimant and her family were living in Germany because the Army had posted her husband there and that it was not his first choice does not render her presence there involuntary. He and his family were living in Germany because of his job. The situation of the Claimant in Germany was similar to that of the spouses of other workers posted abroad. This is not an unusual situation. Having regard to the length of stay in the country, its purpose and the establishing of a life there – three children were in an army run school in Germany and the Claimant worked at an army base school – in my judgment the habitual residence of the Claimant at the time of her accident was Germany. When the Claimant came to live in England in 2011 her status changed and she became habitually resident here. However, the family's intention to return to live in England after the Claimant's husband's posting in Germany came to an end did not affect her status in November 2009. The Claimant has not established that the law of the tort

indicated by Article 4(1), German law, has been displaced by Article 4(2).

42. The burden is on the Claimant to establish that the effect of Article 4(1) is displaced by Article 4(3). The standard required to satisfy Article 4(3) is high. The party seeking to disapply Article 4(1) or 4(2) has to show that the tort is manifestly more closely connected with a country other than that indicated by Article 4(1) or 4(2).

43. The circumstances to be taken into account are not specified in Article 4(3). As does Miss Kinsler, I respectfully take issue with the exclusion by Mr Dickinson from the circumstances to be taken into account under Article 4(3) of the country in which the accident and damage occurred or the common habitual residence at the time of the accident of the Claimant and the person claimed to be liable. That these are determinative factors for the purposes of Articles 4(1) and 4(2) does not exclude them from consideration under 4(3). All the circumstances of the case are to be taken into account under Article 4(3). If the only relevant circumstance were the country where the damage occurred or the common habitual residence of the Claimant and the tortfeasor the issue of the proper law of the tort would be determined by Article 4(1) or 4(2). However, these factors are not excluded as being amongst others to be considered under Article 4(3). Further, under Article 4(2), habitual residence is to be considered at the time when the damage occurs. Preamble (17) to Rome II makes clear that the country in which damage occurs, which is the subject of Article 4(1), is the country where the injury was sustained. However, under Article 4(3), the habitual residence of the Claimant at the time when consequential loss is suffered may also be relevant.

44. Mr Chapman rightly acknowledged that one system of law governs the entire tortious claim. Different systems do not govern liability and quantum. In Harding v Wealands [2005] 1 WLR 1539, the issue was whether damages for personal injury caused by negligent driving in New South Wales Australia should be calculated according to the law applicable in accordance with the Private International Law (Miscellaneous Provisions) Act 1995 ('the 1995 Act') or whether it is a question of procedure which fell to be determined in accordance with the *lex fori*, English law. Considering factors which connect the tort with respective countries, in section 12(1)(b) of the 1995 Act, a provision similar to Article 4(3), Waller LJ in observed at paragraph 12:

"…the identification is of factors that connect the *tort* with the respective

countries, not the *issue or issues* with the respective countries."

The majority judgment of the Court of Appeal, Waller LJ dissenting, was overruled in the House of Lords. The *obiter* observations of Waller LJ on the factors which connect the *tort* rather than separate *issues* with a particular country were undisturbed on appeal.

45. I do not accept the contention by Mr Chapman that the circumstances to be taken into account in considering Article 4(3) will vary depending upon the issues to be determined and, as I understood his argument, the stage reached in the proceedings. Nor do I accept the submission that "the centre of gravity" of the tort when liability was conceded and only damages were to be considered depended upon circumstances relevant to or more weighted towards that issue. As was held by Owen J at paragraph 46 of Jacobs:

"…the question under Art 4(3) is not whether the right to compensation is manifestly more connected to England and Wales, but whether the tort/delict has such a connection."

The "centre of gravity" referred to in the Commission Proposal for Rome II and by Flaux J in Fortress Value in considering Article 4(3) is the centre of gravity of the *tort* not of the *damage and consequential loss*caused by the tort.

46. Whilst I do not accept the argument advanced by Mr Chapman that different weight is to be attributed to relevant factors depending on the stage reached in the litigation, since there is no temporal limitation on these factors, a court will make an assessment on the relevant facts as they stand at the date of their decision. The balance of factors pointing to country A rather than country B may change depending upon the time but not the stage in the proceedings at which the court makes its assessment. At the time of the accident both the claimant and the defendants may be habitually resident in country A and by the time of the court's decision, in country B. At the time of the accident it may have been anticipated that all loss would be suffered in country A but by the date of the assessment it is known that current and future loss will be suffered in country B.

47. There is some difference of opinion as to whether the circumstances to be taken into account in considering Article 4(3) are limited to those connected with the tort and do not include those connected with the consequences of the tort. It may also be said that the tort and the consequences of the tort are treated as

distinct in Article 4. Article 4(1) refers separately to the tort, to damage and to the indirect consequences of the "event". Article 4(2) refers to "damage". Accordingly it could be said that the reference in Article 4(3) to *tort* but not also to *damage* or *indirect consequences* indicates that it is only factors showing a manifestly closer connection of the tort, but not the damage direct or indirect, caused by or consequential on it, which are relevant.

48. Section 12 of the 1995 Act considered in Harding, whilst differing from Article 4(3) by including reference to the law applicable to *issues* in the case was otherwise to similar effect in material respects to Article 4(3). Section 12(2) provides:

> *"The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question, or to any of the circumstances or consequences of those events."*

Applying section 12, Elias J, as he then was, in deciding whether the law of the place of the motor vehicle accident should be displaced, took into account "the fact that the consequences of the accident will be felt in England" [34]. This approach was not doubted on appeal CA [17]. In Stylianou, Sir Robert Nelson adopted a similar approach when considering Article 4(3) which does not expressly include the consequences of the tortious events as a relevant factor in determining whether the general rules as to the applicable law of the tort are displaced. The Judge observed that there are powerful reasons for saying that the Claimant's condition in England is a strong connecting factor with this country. [83].

49. Including the consequences of a tort as a factor to be taken into account in considering Article 4(3) has received endorsement from writers on the subject. Mr Dickinson writes in *The Rome II Regulation* at paragraph 4.86:

"The reference in Article 4(3) to 'the tort/delict' (in the French text, '*fait dommageable*') should be taken to refer in combination to the event giving rise to the damage and all of the consequences of that event, including indirect consequences."

Further the authors of *Dicey* write at paragraph 35-032:

> *"Thus it would seem that the event or events which give rise to damage, whether direct or indirect, could be circumstances relevantly considered under Art 4(3), as could factors relating to the parties, and possibly also factors relating to the consequences of the event or events."*

50. Whilst the answer to the question is by no means clear, I will adopt the approach suggested as possible in Dicey, as correct by Mr Dickinson and adopted by Sir Robert Nelson. Accordingly the link of the consequences of the tort to a particular country will be considered as a relevant factor for the purposes of Article 4(3).

51. Unlike Articles 4(1) and 4(2), Article 4(3) contains no temporal limitation on the factors to be taken into account. If, as in this case, the claimant and the defendant were habitually resident in country A at the time of the accident but in country B at the time the issue of whether the exception provided by Article 4(3) applied, in my judgment both circumstances may be taken into account. Similarly, if at the time of the accident it was anticipated that the Claimant would remain in country A and all her consequential loss would be incurred there, but by the time the issue of whether the exception provided by Article 4(3) applied, she had moved to country B and was incurring loss there, in my judgment both circumstances may be taken into account in deciding whether in all the circumstances the tort is manifestly more closely connected with country B than with country A.

52. The European Commission recognised in their proposal for Rome II that the "escape clause" now in Article 4(3) would generate a degree of unforeseeability as to the applicable law. In my judgment that unforeseeability includes not only the factors taken into account but also that the nature and importance of those factors may depend upon the time at which a court makes an assessment under Article 4(3) in deciding whether there is a "manifestly closer connection" of the tort with country B rather than country A. The court making a decision under Article 4(3) undertakes a balancing exercise, weighing factors to determine whether there is a manifestly closer connection between the tort and country B rather than country A whose law would otherwise apply by reason of Article 4(1) or 4(2).

53. Whilst Mr Chapman relied principally on the country where consequential loss

is being suffered and the current habitual residence of the Claimant and the First Defendant, I also consider other factors raised by counsel in determining whether, in all the circumstances of the case, the tort is manifestly more closely connected with England than with Germany.

54. In my judgment the common United Kingdom nationality of the Claimant and the First Defendant is a relevant consideration. Waller LJ at paragraph 18 of Harding considered the nationality of the Defendant to a road traffic accident claim to be relevant to determining the applicable law of the tort under the similar provisions of section 12 of the 1995 Act.

55. Although there is no United Kingdom law or English nationality in my judgment that does not, as was contended by Miss Kinsler, prevent the United Kingdom nationality of those involved in the tort being relevant to whether English law applies. For example the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 implementing Directive 2000/26/EC of 16 May 2000, the Fourth Motor Insurance Directive, referred in Regulation 13(1)(i) to the United Kingdom as "an EEA state". Regulation 12(4) specified the law applicable to loss and damage as that "under the law applying in that part of the United Kingdom in which the injured party resided at the date of the accident". Article 25 of Rome II provides that:

> *"Where a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation."*

I take into account the United Kingdom nationality of the Claimant and the First Defendant at the time of the accident and now, when the issue is being determined, as a factor indicating a connection of the tort with English law.

56. That the Claimant and the First Defendant are now habitually resident in England is, in my judgment in the circumstances of this case, relevant to determining the system of law to which the tort has a greater connection. However, I view the weight to be given to this factor in the light of the Claimant's habitual residence in Germany for about eight and a half years by the time of the accident. The Claimant was not a short-term visitor to Germany. She had

established a life there with her husband for the time being.

57. I take account of the fact that the Claimant remained in Germany for a further eighteen months after the accident during which time she received a significant amount of medical treatment for her injuries including, in June 2010, an operation to remove a prolapsed disc. The Claimant states that between 15 and 25 March 2011 she spent just under two weeks in a German hospital for pain management. In April and May 2011 she had further treatment in Germany for the pain. Some of the injuries she suffered after the accident, neck and shoulder pains and pain in her stomach, resolved whilst she was in Germany.

58. Article 15 of Rome II makes it clear that the applicable law determined by its provisions applies not only to liability but also to:

> *"15(c) the existence, the nature and the assessment of damage or the remedy claimed."*

Whilst recital (33) states that when quantifying damages for personal injury in road traffic accident cases all the relevant actual circumstances of the Claimant including actual losses and costs of after-care should be taken into account by the court determining the claim of a person who suffered the accident in a State other than that where they were habitually resident, as Sir Robert Nelson observed at paragraph 78 of **Stylianou**, the recital cannot override the terms of Article 4.

59. In my judgment "all the circumstances" of the case relevant to determining whether a tort is manifestly more closely connected with country B than country A can include where the greater part of loss and damage is suffered. Where, as in this case, causation and quantum of loss are in issue, at this stage the location of the preponderance of loss may be difficult to ascertain. However, weight is to be given to the assertion by the Claimant that she continued to suffer pain after she and her husband returned to England in June 2011. She attended a pain clinic in Oxford and received treatment. She states that as a result of her pain and the effects of the accident she had become depressed. The continuing pain and suffering and medical treatment is a factor connecting the tort with England. So is the contention that loss of earnings has been and will be suffered in England.

60. The vehicle driven by the First Defendant was insured and registered in England. Whilst a factor to be taken into account, as was observed in Harding at

paragraph 18, where the motor vehicle involved in the accident was insured is not a strong connecting factor. Nor is where the vehicle was registered.

61. In Stylianou, Sir Robert Nelson considered that the continued and active pursuit of proceedings in Western Australia was an important factor to take into consideration under Article 4(3). The pursuit of proceedings by the Claimant in the English courts is taken into account in this case, however it is not a strong connecting factor. The choice of forum does not determine the law of the tort.

62. Factors weighing against displacement of German law as the applicable law of the tort by reason of Article 4(1) are that the road traffic accident caused by the negligence of the First Defendant took place in Germany. The Claimant sustained her injury in Germany. At the time of the accident both the Claimant and the First Defendant were habitually resident there. The Claimant had lived in Germany for about eight and a half years and remained living there for eighteen months after the accident.

63. Under Article 4(3) the court must be satisfied that the tort is manifestly more closely connected with English law than German law. Article 4(3) places a high hurdle in the path of a party seeking to displace the law indicated by Article 4(1) or 4(2). Taking into account all the circumstances, the relevant factors do not indicate a manifestly closer connection of the tort with England than with Germany. The law indicated by Article 4(1) is not displaced by Article 4(3). The law applicable to the claim in tort is therefore German law."

A discussion of the case can be found here.

TDM Special Issue on the CETA – Call for Papers

The **Comprehensive Economic and Trade Agreement between the European Union and Canada,** CETA, is one of the three landmark agreements – the others are the Trans-Pacific Partnership Agreement (TPP) and the

Transatlantic Trade and Investment Partnership (TTIP) – that will shape world trade and investment in the XXI century. Negotiations were launched in 2009 and a political agreement between the EU and Canada was reached on the key elements of CETA on October 18, 2013. The signing of the agreement took place in Ottawa at end of September 2014.

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

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

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

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

Proposals or papers should be submitted directly to the co-editors **by January 15,**

2015 hwoess@woessetpartners.com, fabien.gelinas@mcgill.ca, andrea.bjorklund@mcgill.ca and j.gaffney@tamimi.com – please CC info@transnational-dispute-management.com when submitting your materials. You can find the call for papers on the TDM website as well as here.

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

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

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

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

> *Law No 40/2004 on medically assisted conception was adopted to fill-in a major gap in the Italian legal system, putting an end to the so-called "procreative wild west". However, its provisions had left the majority's expectations largely unfulfilled. The decade following the entry into force of the law was marked by a number of – national and international – judicial decisions which produced a progressive attrition of the law's prohibitions. The interaction between the Italian Constitutional Court and the European Court of Human Rights has thus made it possible for judges to consent – in part and as a matter of urgency – to requests of couples who, being carrier of a genetic disease, are willing to have*

children while avoiding to incur into the risk of transmitting the disorder. Pivotal was certainly decision No 151/2009 whence the Constitutional Court relativized the protection of the embryo. For their part, in 2012 the European Court judges emphasized the disproportion in the Italian legislation of the protection of the embryo, as compared to the other interests at stake. This creative case-law, by assimilating supranational principles, sacrifices the certainty of the law in the name of equitable justice, overcoming the inaction of the Italian Parliament.

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

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

In addition to the foregoing, three comments are featured:

Eva De Götzen, PhD at the University of Milan, addresses cross-border employment contracts and relevant connecting factors in light of the ECJ's recent

case-law in **“Contratto di lavoro, criteri di collegamento e legge applicabile: luci e ombre del regolamento (CE) n. 593/2008”** (Employment Contract, Connecting Factors and Applicable Law: Lights and Shadows of Regulation (EC) No 593/2008).

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

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

This article analyses the anti-suit injunction, an equitable tool used by common law courts in order to restrain a party from commencing or continuing a national judgement or an arbitral proceeding abroad, the issuance of which is seen by many foreign courts as an offence and an attempt to their sovereignty. After having described the development and the main features of the anti-suit injunction, this article focuses on the possibility and the opportunity for English courts to issue anti-suit injunctions in jurisdictional conflicts within the

European boarders and in the international context. With particular regard to intra-EU conflicts of jurisdiction, this article mainly focuses on the effects of the new Regulation (EU) No 1215/2012, whose Recital 12, according to certain scholars, might be interpreted as recognising again the power of English courts to issue anti-suit injunctions after the Court of Justice of the European Union forbade the use of such orders under Regulation (EC) No 44/2001. This article argues that, in a context of global economy, anti-suit injunctions should be used only in exceptional circumstances, in particular when their issuance is in accordance with the principle of international comity, which is proposed as the criterion that should usually guide common law judges when considering issuing an anti-suit injunction. In light of the above, the article eventually tries to make a practical assessment of the situations in which the use of anti-suit injunctions is permitted by the principle of international comity.

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

This paper analyzes the new Italian legislation on e-proceedings and the admissibility of the use of electronic instruments for the transmission of judicial documents in compliance with European requirements. The enquiry starts from the scope of application of Regulation No 1393/2007, as outlined by the ECJ in its Alder judgment. First, this paper provides an overview of the rules laid down by the Italian Code of Civil Procedure concerning cross-border notifications, in order to analyze the impact of the legislation on e-proceedings on existing domestic legislation. Then, this study attempts a brief overview of the level of computerization of justice achieved by the Member States and of the initiatives undertaken by the European institutions in this respect. Lastly, the present work explores the possibility of encompassing the tools of electronic communication within the scope of application of Regulation No 1393/2007, with regard to a literal and a systematic interpretation of the relevant provisions. The enquiry focuses particularly on the possibility, at present, to use the tools available for the computerized transmission of judicial documents within the European judicial area and on whether any obstacles to such use are attributable to legal grounds rather than to purely technical considerations.

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

On Punitive Damages (Book)

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

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

Abstract:

The punitive damages doctrine, traditionally a common law doctrine that originates in England and the United States, is customary in common law countries but until now it is alien to continental European legal systems. Policymakers and legal scholars in Europe, however, increasingly exchange ideas about the potential advantages of the civil sanction. The European attention for punitive damages primarily results from changing policy views, to be precise the increased interest in private enforcement of several legal fields, on both the European Union and national level, and in introducing more powerful civil sanctions to improve the enforcement of tort law standards and to deal with situations of serious wrongdoing. However, despite this development, the introduction of punitive damages in continental Europe does not seem to be a workable proposal at this point in time. The idea simply encounters too much resistance, which is not only caused by a number of obstacles that are intrinsic to the civil law tradition but also by an incorrect perception of the American reality of punitive damages. The main objective of this book is to increase the understanding of the civil sanction as such, because only a correct knowledge of

the facts relating to the sanction can create the possibility to participate in the European punitive damages debate in a fair manner. This book is helpful for academics, policymakers and legislators who are developing ideas concerning private enforcement and more powerful civil sanctions. Moreover, this book is of use for victims, insurers, personal injury lawyers, and judges who are confronted with serious wrongdoing that may justify punitive damages. The American experience with punitive damages results in some important lessons and caveats that should be kept in mind by participants in the European debate, as well as a number of recommendations on the possible use of this civil remedy in continental Europe.

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

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

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

Since the entry into force of the Amsterdam Treaty in 1999 the European Union is empowered to act in the area of cooperation in civil and commercial matters. This article describes the fourth programme in this area. It covers the period 2015–2019. The author provides an overview of the history and content of the new programme in so far as the area of civil and commercial law is concerned. Furthermore, he explains how this programme differs in conceptual terms from its predecessors.

- ***Michael Stürner/Christoph Wendelstein:*** "The law governing arbitral

agreements in contractual disputes”

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

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

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

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

The judgment of the CJEU of 17 October 2013 (C-519/12 – OTP Bank vs. Hochtief) confirms the consolidated case law on art. 5(1)(a) Brussels I Regulation regarding the contractual nature of the matter. The liability has to derive from “obligations freely assumed” by one party towards another. According to the Court there is no such freely assumed obligation when the

claim is based on a provision of national law imposing a liability on the controlling shareholder of a corporation for the debts of such corporation in case of its failure to disclose the acquisition of control to the commercial register. Astonishingly, the CJEU goes beyond the question referred for the preliminary ruling by the Hungarian Kúria and also gives its views on art. 5(3) Brussels I Regulation. Under this provision, in matters relating to tort, a person domiciled in a Member State may be sued in the courts of the place where the "harmful event" occurred. In this regard, the judgment is incomplete as far as causation is concerned. It remains unclear which could be the defendant's conduct that caused the "harmful event".

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

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

- ***Wulf-Henning Roth***: "IZPR und IPR – terra incognita" – The English abstract reads as follows:

The judgment of the Oberlandesgericht Karlsruhe, in its substance, deals with the much debated issue whether and under what conditions agreements on costs and charges that go along with the conclusion of an insurance contract may be regarded as void. Issues of private international law are given short shrift. In this regard however, the judgment of the renowned Appellate Court reveals an astonishing ignorance of the fundamentals of European private

international law: Instead of applying Regulation No. 44/2001 the Court turns to the German law of jurisdiction; and, with regard to substance (claim based on contract; voidness of the contract; claim based on precontractual misinformation), neither the Rom I- nor the Rom II-Regulation is even mentioned. Instead, the Court bases its judgment on the Rome Contracts Convention of 1980 whose direct applicability has been explicitly excluded by German legislation.

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

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

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

Following the respective judgment of the CJEU (C-347/08), a German court decided that a federal state in Germany, acting as the statutory assignee of the rights of the directly injured party in an international motor accident, may not bring an action directly in the courts of its Member State against the insurer of

the person allegedly responsible for the accident, when that insurer is established in another Member State. The court argues that – other than the injured party itself – the federal state cannot be considered to be a weaker party and can therefore not rely on the combined provisions of Articles 9(1)(b) and 11(2) of the Brussels I Regulation. The following article explains what impact the assignment of rights has on the interpretation of different rules of jurisdiction.

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

In its recent "Google"-decision, the German Federal Supreme Court (FSC) ruled that German courts have jurisdiction to adjudicate under Section 32 of the German Code of Civil Procedure in an action brought against Google Inc., a company seated in California, USA, for the infringement of personality rights by means of the autocomplete feature offered by "Google.de". The FSC also held that German law applied. For the first time after the "eDate Advertising" ruling of the European Court of Justice (ECJ), the FSC had the opportunity to synchronize the approach of its own case law, in terms of the German autonomous rules of jurisdiction, with the approach developed by the ECJ. Without picking it out as a central theme, the FSC approach differs from the approach of the ECJ. Whereas the ECJ is looking for the place where the alleged victim has its centre of interests, the FSC requires that the forum state be the place where the diverging interests of both parties collide. This test is applied both to the question of jurisdiction to adjudicate and to the question of choice of law (under autonomous German conflict rules). Mainly for three reasons, the FSC in the long run should bring its case law more in line with the "eDate-doctrine" of the ECJ: First, the centre of interests of a person is more predictable as a ground of jurisdiction than the place of colliding interests. Second, jurisdiction to adjudicate and choice of law fit together in the sense that a court having jurisdiction under the Brussels Regulation for the alleged infringement of personality rights should preferably be empowered to apply the law of the forum. Third, the coordination of parallel proceedings within the EU is closely linked to the scope of the jurisdictional rules in the member states. Coordination works better when these rules resemble each other even in cases where the defendant is domiciled in a third state.

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

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

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

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

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

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

In fact, Art. 13(2) Child Abduction Convention must be interpreted in a narrow way. Only where a child possesses the necessary maturity, and is objecting in a determined and distinct manner, may the return be refused by the authorities.

While it must be deplored that Art. 13(2) is so imprecise, courts should still try to establish a clear line. For children below a certain age (one might consider the age of 10, for instance) the necessary maturity should, generally, be denied. Correspondingly, there might also be an age above which maturity is assumed without further investigation (this might be appropriate for children of 13 years and older).

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

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

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

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

The contribution analyses the new Montenegrin Act on Private International Law of 23 December, 2013, as the first comprehensive PIL-reform in a Yugoslav successor state. The Act regulates conflict of laws as well as procedural international law in 169 articles. EU-harmonization is a main objective of the reform. Habitual residence is introduced as a connecting factor, for which a legal definition is provided. The scope of party autonomy is considerably expanded. Novelties include inter alia a general escape clause and a provision on overriding mandatory rules. Issues like maintenance, personal name, agency or intellectual property are regulated for the first time, others have been totally reformed. The reciprocity requirement for the recognition of foreign judgments has been abolished. For the recognition of foreign arbitral awards it is referred to the New York UN-Convention of 1958. For Montenegro, the new Act replaces the Yugoslav codification of 1982.

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

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

Table of Contents

Miguel VIRGÓS, *La eficacia de la protección internacional de las inversiones extranjeras (The Effectiveness of International Protection of Foreign investments)*

Foreign investments are subject to certain risks arising from host countries that exercise sovereign rights, and typically the risk of opportunistic behavior. In this article expropriation is taken as an example and two different investor protection scenarios are compared: a world without investment protection treaties, and a world with investment protection treaties. To this end, it compares the situation of Spanish nationals' whose property was expropriated during the Cuban

revolution, and the more recent expropriation suffered by a Spanish oil company in Argentina. It also reviews the enforcement mechanisms in public international law and its application to foster compliance in this sector.

Bernardo CREMADES ROMÁN, *Nuevas perspectivas de la protección de inversiones en América Latina: Análisis de la situación en Bolivia (New Perspectives of Investment Protection in Latin America: Analysis of the Situation in Bolivia)*

This article will review the expropriations executed by the Government of Evo Morales in the Plurinational State of Bolivia. The article will subsequently explore the Bolivian economic indicators and the impact of the expropriations on such indicators. Finally, the author will analyze the new legal framework of foreign investment in Bolivia and the possibility of resorting to arbitration. In particular, the author will analyze and provide a brief commentary on Law No. 516, of 4 April 2014, on the Promotion of Investment and on the Draft Bill on Conciliation and Arbitration.

Unai BELINTXON MARTIN, *Jurisdicción / arbitraje en el transporte de mercancías por carretera: ¿comunitarización frente a internacionalización? (Jurisdiction / Arbitration in the transport of goods by road: communitarization against internationalization?)*

The aim of this research is to analyze and evaluate the regulations development in the international carriage of goods by road sector, as well as its ascription in the Private International Law area. The analysis will identify the role of the autonomy orders in the competent jurisdiction as well as in the arbitration, and it will be analyzed the interaction between normative blocks and the derivative malfunctions of a complex assembly between the conventional sources (particularly CMR) and the derivative of the Europe institutions normative. From the operators sector's point of view, it will tackle that when the aim of the legal security is achieving or on the contrary the absence of the compatibility of the rules between those deserve rules finishes producing doubts that harm all the interests of the present cast

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

Venezuela)

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

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

The recognition in 2013 in the United States of a Mexican arbitral award annulled by Mexicans courts seems to bring the implicit affirmation that it is legally possible to grant recognition to an annulled award. Such affirmation itself challenges the concept of legal validity, since it means that what have been declared void can, at the same time, be valid as to produce legal effects. The point of this article is to find the legal nature behind the so called recognition of annulled awards. In order to do so, the article reviews nine judicial decisions, from 1984 to 2013, and concludes that behind the recognition of annulled awards there are three different hypotheses, each one with a distinctive legal nature and none of them being a challenge to the concept of legal validity.

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

The contribution focuses on the question whether or not an extraordinary review

of judgments in respect of arbitral awards would be positive in the Bolivian legal system. Through this note, the author tries to discuss the feasibility of this extraordinary appeal in Bolivia's arbitration process. To do this, the author presents certain criteria that, in his opinion, are positive, therefore concluding, that considering implementing this resource in the Bolivian arbitration legislation would be a feasible decision. In this sense, the author proposes changes to the current arbitration legislation, allowing the value of justice prevail over any judicial or extrajudicial decision

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

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

The French Cour de cassation and the « Thalys babies »

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

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

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

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

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

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

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

In July, almost 300 files for adoption had apparently been enrolled in different courts of first instance in France, and the reaction and interpretation of the law was quite diverging. For most, the interest of the child and the evolution of the law asked for the adoption to be allowed (see e.g. TGI Nanterre, July 8, 2014, *D.* 2014. 1669, note Ph. Reigné). For some others, to the contrary, the situation was a plain fraud, since it was the conclusion of a procedure by which the couple simply tried to bypass different French law prohibitions (MAP by a lonely woman or same-sex couple). After the press echoed the emotion of couples blaming a "two tier justice", two courts (Avignon and Poitiers) decided to use a specific prejudicial procedure to ask the *Cour de cassation* to issue an opinion on the matter.

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

"Having resort to medically-assisted procreation, in the form of artificial insemination with anonymous donor abroad, does not bar the mother's wife from

adopting the child born from this procreation, as long as the adoption's legal conditions are fulfilled and that it is in line with the child's interest".

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

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

Second, and as a consequence, contrary to the sister question of surrogacy, the international public policy is not at stake. Its foundation in Article 2141-2 CSP is too fragile. Actually, the problem does not seem to come so much from the foreign MAP itself than from the fact that a French mother, with no ties to Belgium, went abroad to get what she could not get in France, i.e. a problem of fraud. This is a much harder question in purely philosophical and political terms. What does "forbidden in France" mean in that context? Should a person be allowed to "internationalize" the situations to bend the law to its will? One of the arguments of counsel for defense in those cases was that freedom of movement within Europe allows for such "legal optimization". If the Court of Justice has approved the reasoning in company law since Centros (Aff. C-212/97), and has peeped into family and personal matters with cases such as Garcia-Avello (Aff. C-148/02), pure choice of law in family matters (and MAPs) does not seem the rule yet, if only because the European private international law regulations in family matters have not provided for such a complete freedom. Unfortunately for the debate, it comes at a time when France was already punished on a neighboring matter where the *Cour de cassation* had used the same rationale, so that, in the eyes of that Court, the door to negotiations seemed closed.

As readers of Conflictoflaws.net have noticed, in *Menesson vs. France* and *Labassée vs. France*, the European Court of Human Rights (ECHR) recently condemned France for refusing to recognize the filiation of the "parents of intent" (here an heterosexual couple) with the children born in the United States from a

surrogate mother. The decisions are actually not as assertive as it has been said in the press, the ECHR judging only that the children should each get at least recognition of their filiation with their father (who happened to be both father of intent and biological father). But the ECHR paid scant regard, in both cases, to the argument the *Cour de cassation* has used in more recent ones : fraud.

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

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

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