Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2/2016: Abstracts

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

R. Wagner, **A new attempt to negotiate a Hague Convention on Recognition and Enforcement**

In 1992 the United States of America proposed that the Hague Conference for Private International Law should devise a worldwide Convention on Recognition and Enforcement of Judgments in Civil and Commercial Matters. Especially the states of the European Union were in favor of harmonizing also the bases of jurisdiction. At the very end the Hague Conference was not able to finalize the negotiations of a convention with a broad scope including rules on bases of jurisdiction and on enforcement and recognition. On the lowest common denominator the conference concluded the Convention of 30 June 2005 on Choice of Court Agreements (Choice of Court Convention). This convention came into force on 1 October 2015 for Mexico and the European Union (without Denmark). The original idea of a convention with a broad scope has never been forgotten. The following article provides an overview of new developments in the Hague Conference and presents a preliminary draft text of the Working Group on the judgments project.

M.-Th. Ziereis/S. Zwirlein, **Article 17 (2) EGBGB and the Rome III Regulation**

According to Art. 17 (2) German Introductory Act to the Civil Code (EGBGB) within Germany a divorce may only be decreed by a state court. This prohibits private divorce. This essay shows that Art. 17 (2) EGBGB is a conflict of laws rule concerning the law applicable to the formal requirements of a divorce and can therefore be applied alongside the Rome III regulation.

A. Staudinger/C. Bauer, **The concept of contract pursuant to Art. 15 (1) lit. c Brussels I Regulation (Art. 17 (1) lit. c Brussels Ia Regulation) in cases**

where usually intermediaries are involved – a de-limitation between package travel- and investment contracts

This contribution deals with a judgement of the ECJ referring to the concept of contract in the field of International Civil Procedure Law according to Art. 15 (1) lit. c Brussels I Regulation (Art. 17 (1) lit. c Brussels Ia Regulation). The decision is about the liability of an issuing bank based on the investment contract. It offers an occasion both to discuss the current jurisprudence and comparable constellations in law on package travel where intermediaries are involved, especially the *Maletic*-case. This jurisdiction anyway is not "overruled". The European legal qualification of the relation between the consumer and the intermediary further on should be understood depending upon the certain circumstances, although a trend can be observed for a contractual comprehension. The judgement illustrates the division of labor between European and national judges and underlines the importance of the choice of the defendant. Depending on whether the claimant sues only one or both of the involved parties it might affect the possible place of jurisdiction. In the light of the present as well as of the *Maletic*-judicature it becomes apparent the mutual influence of the respective relations regarding the scope of application of Brussels Ia-Regulation respectively of the jurisdiction over consumer contracts.

Th. Pfeiffer, **Tort claims as contractual obligations under the Brussels jurisdictional regime – Characterizing the main claim according to a preliminary question?**

This article analyzes the ECJ's recent *Brogsitter*-judgment. It explains that, under previous case law relating to art. 5 no. 1 Brussels I-Regulation 44/2001, this provision was applicable only if the underlying claim itself was based on a contractual obligation, whereas, under *Brogsitter*, it is also sufficient that an interpretation of the contract is indispensable for determining the lawfulness of the allegedly tortuous conduct. The article points out that this new concept amounts to a characterization of the main claim based on the nature of a preliminary question. In particular, the article analyzes the practical advantages and disadvantages of the ECJ's new position with special regard to cases of concurring contractual and tort-related disputes. In its conclusions, the article favors recognizing that – contrary to the ECJ's existing case law – the special headings of jurisdiction in article 5 should be interpreted as to permit the court to also adjudicate on other claims resulting from the same facts, even if the latter,

because of their nature, are not directly covered by this particular jurisdictional heading.

P. Kindler, **Jurisdiction and Directors' Liability vis-a-vis the Company**

In its sentence of 10 September 2015, the ECJ held that the application of Article 5 (1) and (3) of the Brussels I Regulation is precluded, provided that the defendant, in his capacity as director and manager of a company, performed services for and under the direction of that company in return for which he received remuneration (cf. Articles 18 to 21 of the Regulation). Furthermore, pursuant to Article 5 (1) of the Regulation an action brought by a company against its former manager on the basis of an alleged breach of his obligations under company law comes within the concept of "matters relating to a contract". It is for the court to determine the place where the manager in fact, for the most part, carried out his activities in the performance of the contract. Finally, under Article 5 (3) of the Regulation, an action based on an allegedly wrongful conduct is a matter relating to tort or delict where the conduct complained of may not be considered to be a breach of the manager's obligations under company law. The author welcomes the judgment as it points out clearly under which circumstances a manager is to be classified as a "worker" for the purposes of Article 18 (2) of the Regulation. The judgment is less clear with respect to Article 5 (3) of the Regulation.

M.-P. Weller/C. Harms, **The shareholder's liability for pre-entry charges in the light of Brussels I and EuInsVO**

According to the German jurisprudence, the shareholders of a German Limited Liability Company are liable for all debts and pre-entry charges of the company arising in the period between the establishment of the company, i.e. the signing of the articles of association, and the subsequent registration in the company's register. The following article discusses the international jurisdiction for claims of the company against its shareholders resulting out of the liability for pre-entry charges (= Vorbelastungshaftung).

M.-P. Weller/I. Hauber/A. Schulz, **Equality in international divorce law – talaq and get in the light of Art. 10 Rom III Regulation**

The following article discusses the principle of non-discrimination in international divorce proceedings. It especially focuses on Article 10 of the Rom III Regulation

and draws attention to the question of whether the provision is meant to safeguard the principle of equal gender treatment in general or whether a case-by-case analysis is required in order to establish if the one of the parties has actually been treated unequally. Answering this question is of great importance with regard to both the Islamic *"talaq"* and divorce under Jewish Law.

D. Coester-Waltjen, **Co-motherhood in South African Law and the German birth registry**

Several legal systems – within and outside Europe – introduced rules which allow two partners of the same sex to be registered in the birth certificate as legal parents of a child. The number of these jurisdictions is growing – just recently being joined by Austria – up to then a system, which was relatively reluctant in the area of medically assisted reproduction and same sex unions. Although German criminal law does not forbid the artificial insemination of a woman living in a registered same sex partnership, family law rules do not provide a parental role for the female partner of the child's mother except by step-child adoption. Nevertheless, German registrars and judges have to deal with birth certificates naming two women as parents of a child – more frequently in recent times. In almost all cases the birth certificates were issued in a foreign country. Do these documents have to be recognized, which questions of private international law are concerned, and which consequences may follow from this kind of parenthood, especially with regard to the nationality of the child?

The Berlin Court of Appeal had to deal with these issues. The facts of the case differ from those which had been presented to the Court of Appeal in Celle and in Cologne before. And this is true for the reasoning and the finding of the learned judges too. This article addresses the questions which conflict rules are applicable to a "parentage of choice", which limitations have to be observed, and which consequences will follow from the established parentage.

A. Dutta, **Trusts in Schleswig-Holstein? – A didactic play on transferring property under the wrong law?**

The case note addresses the question of how a testamentary trust has to be interpreted in the applicable German succession law as a system without a trust tradition, considering also the new Succession Regulation and possible implications of the European fundamental freedoms on the recognition of foreign

trusts.

C. Thomale, **On the recognition of Californian Judgments of Paternity regarding surrogacy arrangements in Switzerland**

The Swiss Supreme Court denied recognition of a Californian Judgment of Paternity, which declared an ordering parent lacking any genetic connection with the child to be the child's legal father. The opinion feeds into current debates on surrogacy, notably reshaping the meaning of "best interest of the child". The comment analyses the decision, based upon which a transnational need for reform is identified.

F. Temming, **The qualification of the rules granting dismissal protection of employees according to sections 105, 107 of the Austrian Arbeitsverfassungsgesetz – is there finally a change of position regarding the case-law of the Austrian High Court of Vienna?**

The Austrian High Court of Vienna has published two judgments on the topic of dismissal protection of employees. The cases deal with collective preventive dismissal protection and repressive individual dismissal protection granted by sections 105, 107 of the Austrian Arbeitsverfassungsgesetz. These rules cause problems in the realm of international jurisdiction and conflict of laws because they combine co-determination rights together with the rights of individual employees. The resulting question is how to qualify the pertinent sections for the purposes of international jurisdiction and conflict of laws. The two judgements are noteworthy because they put an end to the Court's long standing case-law of qualifying these sections as being totally part of the law of co-determination. Instead, the applicable law is labour law. However much these new development can be welcomed the way of dealing with the works council right to be consulted before the employer terminates the employment contract is still subject to dogmatic criticism. There is a good case of characterising this matter as being only part of the law of co-determination and thus applying neither Art. 8 nor Art. 9 of the Rome I Regulation. With regards to the substantive law these two judgements give a good opportunity to revisit the prerequisites regarding the personal scope of the German Betriebsverfassungsgesetz in cross-border and external situations.

M. Dregelies, **The lex auctoritatis in Polish and German law**

Although agency is important and necessary in modern business life, a codification of the lex auctoritatis is missing in the Rome I Regulation and the German Private International Law (EGBGB). As a result, the lex auctoritatis has been developed by judicial lawmaking and the doctrine. In 2011 the Polish parliament passed a new code on private international law, including the first Polish codification of a lex auctoritatis. After a short overview of the Polish substantive law, this article illustrates the need for a change in the German court ruling by comparing the Polish with the German solution and pointing out their problems. The Polish codification is recommended as the start of a new discussion of a uniform European lex auctoritatis.

The conclusions of the first meeting of the Hague Expert's Group on Parentage / Surrogacy

In 2015, the Council on General Affairs and Policy of the Hague Conference decided that an Experts' Group should be convened to explore the feasibility of advancing work on the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements (for further information on the Parentage / Surrogacy project, see here).

The Experts' Group on Parentage / Surrogacy met from 15 to 18 February 2016 (the full report is available here). The discussion, based on a background note drawn up by the Permanent Bureau, revealed significant diversity in national approaches to parentage and surrogacy.

The Group noted that "the absence of uniform private international law rules or approaches with respect to the establishment and contestation of parentage can lead to conflicting legal statuses across borders and can create significant problems for children and families", including limping parental statuses, uncertain identity of the child, immigration problems, uncertain nationality or

statelessness of the child, abandonment including the lack of maintenance. “Common solutions”, the Group observed, “are needed to address these problems”.

In particular, as regards the *status quo*, the Group noted the following.

(*a*) Most States do not have specific private international law rules regarding assisted reproductive technologies and surrogacy agreements.

(*b*) Regarding jurisdiction, issues mostly arise in the context of legal parentage being established by or arising from birth registration, voluntary acknowledgment of legal parentage or judicial proceedings. The experts reported, however, that jurisdiction issues tend to arise not as a stand-alone topic, but rather in connection with recognition.

(*c*) Regarding applicable law, there is a split between those States whose private international law rules point to the application of the *lex fori* and those whose private international law rules may also lead to the application of foreign law.

(*d*) Regarding recognition, the Group acknowledged the diversity of approaches of States with respect to the recognition of foreign public documents such as birth certificates or voluntary acknowledgements of parentage, and noted that there is more congruity of practice with respect to the recognition of foreign judicial decisions.

Based on the foregoing, the Group determined that “definitive conclusions could not be reached at the meeting as to the feasibility of a possible work product in this area and its type or scope” and expressed the view that “work should continue” and that, at this stage, “consideration of the feasibility should focus primarily on recognition”. The Group therefore recommended to Council, whose next meeting is scheduled to take place on 15 to 17 March 2016 (see here the draft agenda), that the Group’s mandate be continued.

Conference: EU Cross-Border Succession Law (Milan, 4 March 2016)

The **University of Milan** will host on **4 March 2016** the final conference of a project co-funded by the Civil Justice Programme of the EU: "Towards the Entry into Force of the Succession Regulation: Building Future Uniformity upon Past Divergencies".

The project, lasting from April 2014 to March 2016, focuses on the impact of Regulation 650/2012 on national legal systems and the related national and European case law with the aim of assessing the changes that it introduces to legal practice, arising awareness within the legal professionals (notaries, lawyers and court judges), providing training and disseminating information in order to promote future uniformity in the application of its provisions. Video footage of the conferences and seminars organized in the frame of the project are available on its website, as well as a database of caselaw and legislation related to succession matters.

The sessions of the final conference will be held in English and Italian (with simultaneous interpreting). Here's the programme (available as a .pdf file):

Welcome addresses – Presentation of the Project

- *Stefania Bariatti* (Univ. of Milan)
- *Domenico Cambareri* (Notary in Milan)
- *Petra Jeney* (EIPA, Luxembourg)

SESSION 1: Scope and definitions. Chair: *Alegría Borrás* (Univ. of Barcelona)

- Introduction to the Regulation and to Its Scope, *Domenico Damascelli* (Notary in Turi and Univ. of Salento)
- The Definition of "Succession" and Habitual Residence Within the Meaning of the Regulation (EU) 650/2012, *Peter Kindler* (Ludwig-Maximilians-Universität München)

SESSION 2: Applicable law. Chair: *Roberta Clerici* (Univ. of Milan)

- Applicable Law: Choice of Law, *Ilaria Viarengo* (Univ. of Milan)
- Agreements as to Successions, *Jacopo Re* (Univ. of Milan)
- Public Policy and Overriding Mandatory Rules, *Francesca C. Villata* (Univ. of Milan)
- Renvoi, *Luigi Fumagalli* (Univ. of Milan)
- Practice Paper, *Daniele Muritano* (Notary in Empoli)

SESSION 3: Jurisdiction and recognition. Chair: *Alexandra Irina Danila* (Notary in Romania)

- Jurisdiction: General Rules and Choice of Court, *Ilaria Queirolo* (Univ. of Genoa)
- Jurisdiction: Other Grounds, *Stefania Bariatti* (Univ. of Milan)
- Recognition of Judgments, *Stefano Dominelli / Francesco Pesce* (Univ. of Genoa)
- European Certificate of Succession: First Remarks concerning its Application, *Carlo Alberto Marcoz* (Notary in Turin)

SESSION 4: Round Table: The Impact on Member States and Third Countries. Chair: *Stefania Bariatti* (Univ. of Milan)

- *Isidoro Calvo Vidal* (Notary in Coruña)
- *Cyril Nourissat* (Univ. Jean Moulin Lyon 3)
- *Peter Kindler* (Ludwig-Maximilians-Universität München)
- *Andrew Godfrey* (Russell-Cooke, London)
- *Paul Beaumont/Jayne Holliday* (Univ. of Aberdeen)

Further information and the registration form are available on the conference's webpage.

Now hiring: Assistant in Private

International Law in Freiburg (Germany)

At the Institute for Foreign and Private International Law of the **Albert-Ludwigs-University Freiburg im Breisgau** (Germany), **a vacancy** has to be filled at the chair for **private law, private international law and comparative law (chairholder: Prof. Dr. Jan von Hein)**, from 1 April, 2016 with

a legal research assistant (salary scale E 13 TV-L, personnel quota 50%) limited for 2 years.

The assistant is supposed to support the organizational and educational work of the chairholder, to participate in research projects of the chair as well as to teach his or her own courses (students' exercise). Applicants are offered the opportunity to obtain a doctorate.

Applicants are expected to be interested in the chair's main areas of research. They should possess an above-average German First State Examination (at least "vollbefriedigend") or a foreign equivalent degree and be fluent in German. In addition, a thorough knowledge of German civil law as well as conflict of laws, comparative law and/or international procedural law is a necessity. Severely handicapped persons will be preferred provided that their qualification is equal.

Please send your application (curriculum vitae, certificates and, if available, further proofs of talent) to Prof. Dr. Jan von Hein, Institut für ausländisches und internationales Privatrecht, Abt. III, Peterhof, Niemensstr. 10, D-79098 Freiburg (Germany) no later than 1 March, 2016.

As the application documents will not be returned, applicants are kindly requested to submit only unauthenticated copies. Alternatively, the documents may be sent as a pdf-file via e-mail to ipr3@jura.uni-freiburg.de.

Now hiring: Assistant in Private International Law in Freiburg (Germany)

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Please send your application (curriculum vitae, certificates and, if available, further proofs of talent) to Prof. Dr. Jan von Hein, Institut für ausländisches und internationales Privatrecht, Abt. III, Peterhof, Niemensstr. 10, D-79098 Freiburg (Germany) no later than 30 November, 2015.

As the application documents will not be returned, applicants are kindly requested to submit only unauthenticated copies. Alternatively, the documents may be sent as a pdf-file via e-mail to ipr3@jura.uni-freiburg.de.

Out now: Commentary on the EU Succession Regulation

Ulf Bergquist, Domenico Damascelli, Richard Frimston, Paul Lagarde, Felix Odersky and Barbara Reinhartz have written an article-by-article commentary on the new EU Succession Regulation that recently entered into force. Authored by members of the Experts Group that drafted the Commission's Proposal for the Regulation the commentary discusses all crucial points of the new legal framework including:

- law applicable to a succession,
- election as to the applicable law,
- recognition and enforcement,
- authentic instruments,
- the European Certificate of Succession.

The commentary is available in English, French and German. More information is available here and here.

European Succession Regulation in Force

On 17 August 2015 the European Succession Regulation has entered into force. It provides for uniform rules on the applicable law as well as recognition and enforcement of decisions in matters of succession. It also creates a European Certificate of Succession that enables person to prove his or her status and rights as heir or his or her powers as administrator of the estate or executor of the will without further formalities.

More information is available on the European Commission's website.

Issue 2015.2 Nederlands Internationaal Privaatrecht

The second issue of 2015 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht,* includes the following contributions:

- Xandra Kramer, 'Editorial: Empirical legal studies in private international law' , p. 195-196.
- S.H. Barten and B.J. van het Kaar, ''Grensverleggend' derdenbeslag: over de reikwijdte van een Nederlands beslagverlof onder de Herschikking Brussel I', p. 197-204.

This article deals with the new opportunities that the revised Brussels Regulation ('Recast') may offer to claimants who wish to obtain a Dutch pre-judgment garnishee order against garnishees located in other Member States. Under the former Brussels Regulation, the recognition and enforcement of 'ex parte' provisional measures in another Member State than that of the courts ordering the measures fell outside the scope of Chapter III Brussels Regulation in accordance with the case law from the European Court of Justice (Denilauler/Couchet). The Recast, in contrast, allows the enforcement of 'ex parte' garnishee orders in other Member States, provided the court issuing the order has jurisdiction as to the subject-matter of the proceedings. However, the enforcement of a Dutch ex parte garnishee order in other Member States may give rise to practical difficulties. The Recast requires the ex parte judgment to be served upon the debtor before the enforcement (garnishment) takes place. It may therefore prove to be difficult for claimants to ensure that garnishment will take place only shortly after the garnishee order was served on the debtor in order to prevent the dispersal of funds by the debtor. It is argued that these problems may be solved by good coordination between the competent enforcement authorities of the Member States. However, in all likelihood, successful coordination by the creditor is only possible in the event of a limited number of garnishees involved.

In light of this abolition of impediments at the European level, the article considers whether Dutch national procedural law may restrict courts in the Netherlands from issuing extraterritorial garnishee orders against garnishees who do not have their domicile in the Netherlands. Based on the current guidelines and case law it is to be expected that the Dutch courts will exercise restraint when dealing with a request for an extraterritorial order. It is argued that, although Dutch law does require a certain connection with Dutch territory, the said connection may also be established if the creditor can make a reasonable case that one of the anticipated garnishees has its domicile within the Netherlands and that there are clear indications that the funds will be dispersed. This could, for instance, succeed if the debtor and garnishee are in a close relationship to one another (e.g. a parent company and its subsidiary).
It remains to be seen whether the Dutch courts are willing to issue orders against garnishees outside the Netherlands. If they are, this jurisdiction may soon offer a solution for creditors of Dutch parent companies having claims against their subsidiaries in other Member States. In the Netherlands it is relatively easy to obtain a prejudgment garnishee order. Under the Recast, even EU jurisdictions not familiar with a pre-judgment garnishee order will have to recognize and enforce a Dutch order.

- Miriam Kullmann, 'Tijdelijke grensoverschrijdende detachering en gewoonlijk werkland: over de verhouding tussen de Rome I-Verordening en de Detacheringsrichtlijn en de rol van de Handhavingsrichtlijn', p. 205-216.

The cross-border posting of workers involves the applicability of two EU laws: the Posting of Workers Directive 96/71/EC and the Rome I Regulation. In neither of these legal regulations are the terms 'temporariness' and the 'country in/from which the employee habitually carries out his work' concretised. This contribution aims at clarifying the meaning of these two terms in both legal regulations in the context of the temporary cross-border posting of workers. Moreover, it assesses the role of the Enforcement Directive, adopted in May 2014, supplementing the Posting of Workers Directive. The new Directive introduces a provision containing criteria by which to identify a 'genuine posting'. In practice it seemed that often no country where the work was being habitually carried out could be identified. The question then was whether the Posting of Workers Directive would be applicable and what role

Articles 8 and 9 Rome I Regulation would play in identifying the applicable law. In addition, the unclear relationship between the Posting of Workers Directive and the Rome I Regulation is analysed.

- Steven Stuij, 'De wetsontduiking in het ipr: de opleving van een leerstuk?', p. 217-225.

Recital 26 of the preamble to the EU Regulation (650/2012) on Succession and Wills allows national authorities to suppress evasions of the law by using the doctrine of fraude à la loi. The referral to this doctrine is an interesting development, since the Regulation is the first in a series of EU Regulations in the field of private international law to expressly mention fraude à la loi as a potential corrective mechanism. Besides, this doctrine is rather underdeveloped in Dutch private international law. It will therefore be interesting to analyse this doctrine and to assess its added value in contemporary (EU) private international law. First, several aspects of fraude à la loi will be scrutinised, as well as its acceptance in both Dutch and European private international law. Furthermore, the aforementioned point 26 of the preamble and its rationale will be focused upon. Finally, the relevance of fraude à la loi for contemporary private international law will be observed, with a special emphasis on the Dutch situation.

- E.C.C. Punselie, 'Verordening wederzijdse erkenning van Beschermingsmaatregelen in burgerlijke zaken', p. 226-228 (overview article)

In this article an overview is given of Regulation (EU) No. 606/2013 of the European Parliament and of the Council of 12 June 2013 on the mutual recognition of protection measures in civil matters and the way this regulation is implemented in the Netherlands. The Regulation provides for a mechanism by which a person at risk of violence can also rely on a protection measure issued against the person causing this risk in his or her home country – a member state of the European Union – when he or she travels or moves to another member state. For that purpose the protected person can achieve a certificate in the issuing member state with which the protection measure is recognised in another member state without any special procedure being required.

- Pauline Kruiniger, ‘Book presentation: Pauline Kruiniger, Islamic Divorces in Europe: Bridging the Gap between European and Islamic Legal Orders, Eleven International Publishing, The Hague 2015’, p. 229-230.

A Dutch-Moroccan woman has been repudiated in Morocco. She remarries a Moroccan man. Then she moves from the Netherlands to Belgium. Although the preceding repudiation had been recognized in the Netherlands, the Belgian authorities refuse to recognize that repudiation. Consequently she is still seen as being married to her former husband in Belgium and cannot bring her latest husband from Morocco to Belgium. There is discontinuity concerning her personal status and thus a limping legal relationship emerges.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2015: Abstracts

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

Jochen Hoffmann, **“Button-click” Confirmation and Cross Border Contract Conclusion**
Section 312j paragraph 3 and 4 of the German Civil Code (BGB) addresses and secures effective consumer protection with regard to the issue of internet-related “cost traps”. Cost traps are websites that are designed to lead to the conclusion of contracts without the consumer’s awareness of an obligation to pay. At the same time this regulation transposes Art. 8 par. 3 of the Consumer Rights Directive into German law. In effect, this provision ensures that an e-commerce contract between a trader and a consumer cannot be concluded if the trader does not ensure that the consumer is made aware, prior to placing his order, that he is assuming an obligation to pay, in connection with internet contracts specifically by using an unambiguously labelled button. Since this regulation is applicable to

all e-commerce contracts it not only applies to “cost traps”, but also to legitimate internet trading. This article addresses the problems arising from the new provision for cross border contracts in the light of the applicable conflict of laws rules.

Jan von Hein, **Authorization Requirements for a Guardian’s Transaction Concerning a Vulnerable Adult’s Immovable Property – Jurisdiction and Conflict of Laws**

The Court of Justice excluded, in Case C-386/12 – Siegfried Janós Schneider, the applicability of the Brussels I-Regulation to a court’s authorization that an adult’s guardian required for a transaction concerning immovable property belonging to the adult (Article 1(2)(a) of the Regulation). In his case note, von Hein agrees with the Court’s ruling because the authorization requirement was the main object of the proceedings. If the necessity to obtain an authorization arises merely as an incidental question in litigation related to property, however, the Regulation, including the forum rei sitae, remains applicable. Moreover, the author analyses which court is competent to rule on granting an authorization to an adult’s guardian for the sale of immovable property and which law is applicable to this question. He looks at this problem both from the point of view of autonomous German PIL and of the Hague Convention on the International Protection of Adults. The article shows that autonomous PIL and the Hague conflicts rules differ considerably and that in the Hague Convention’s framework, authorization requirements are treated in a very differentiated manner.

Astrid Stadler, **A uniform concept of consumer contracts in European civil law and civil procedure law? – About the limits of a comprehensive approach**

In “Vapenik”, the ECJ had to decide whether Article 6 para 1 lit. d of Regulation 805/2004 prevents the confirmation of a judgment by default as a European enforcement order if the judgment was based on a c2c-relation and the plaintiff had not sued the defendant in the Member State where he was domiciled but in the courts where the contractual obligation had to be fulfilled. The question raised was whether Article 6 para 1 lit. d applied only to b2c situations or also to cases in which both parties were consumers. The ECJ denied the application of the provision based on the reasoning that the defendant was not a “weaker party”. This interpretation of the EEO Regulation was deduced from the rationale of “consumer contracts” in the Brussels I Regulation, the Rom I Regulation and

Directive 93/13. The ECJ, however, provided only a very cursory comparison of the underlying policies of consumer protection. Particularly the idea of granting consumers a preferential treatment with respect to international jurisdiction differs from the purpose of consumer protection in substantive law and conflict of laws. With respect to Regulation 805/2004 the ECJ's decision does not adequately balance the interests of the two consumers involved and unnecessarily privileges the plaintiff. It increases the defendant's risk to suffer from a deficient cross-border service of documents without the chance of objecting to the enforcement of the judgment by raising grounds for non-recognition.

Jörg Pirrung, **Brussels IIbis Regulation and Child Abduction: Stones Instead of Bread ? – Urgent preliminary ruling procedure regarding the habitual residence of a child aged between four and six years**

After twelve mostly satisfactory decisions on the interpretation of the Brussels IIbis Regulation with respect to parental responsibility cases, the ECJ has given only conditional answers to the questions referred to it by the Irish Supreme Court. In this case it was not adequate to use the urgent preliminary ruling procedure instead of an expedited procedure. In substance, the Court interprets Articles 2 (11), 11 of the Regulation as meaning that, where a child was removed in accordance with a judgment later overturned by an appeal judgment fixing the child's residence with the parent living in the Member State of origin, the failure to return the child to that State following the latter judgment is wrongful, if it is held that the child was still habitually resident in that State immediately before the retention, taking into account the (subsequent) appeal and that the judgment authorising the removal was (only) provisionally enforceable. If it is held, conversely, that the child was at that time no longer habitually resident in the Member State of origin, a decision dismissing the application for return based on Article 11 is without prejudice to the application of the rules established in Chapter III of the Regulation relating to the recognition and enforcement of judgments given in a Member State. On the whole, the opinion of Advocate General Szpunar stating expressly that the fact that proceedings relating to the child's custody were still pending in the State of origin is not decisive as habitual residence is a factual concept and not depending on whether or not there are legal proceedings, seems more convincing than the judgment itself.

Marianne Andrae, **First decisions of the ECJ to the Interpretation of Article 12(3) Regulation (EC) No 2201/2003, Comment to Cases C 436/13 and C**

656/13
Article 12 (3) of Council Regulation (EC) No 2201/2003 of 27 November 2003 applies to separated matters of parental responsibility. The ECJ classifies this rule as a prorogation of jurisdiction for the holders of parental responsibility. This paper submits several arguments against this judgment. The jurisdiction of the courts is always justified for the particular application and it does not continue after pending proceedings have been brought to a close. This acceptance must be obtained at the time the matter is seized to the courts including the specific issues of the proceeding. An agreement, after the matter was brought to court, does not justify jurisdiction. The tight time requirements must be transferred to the jurisdiction under Article 8 (1) of that regulation. An interpretation whereupon the requirements of the jurisdiction can be fulfilled after pendancy and which orientates to the best interests of the child remains for an amendment of the regulation.

Tobias Helms, **The independent contestability of interlocutory judgments on international jurisdiction in family law cases**
The Stuttgart Higher Regional Court correctly held in its judgment of May 6, 2014 that, contrary to the wording of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG), German courts can pass interlocutory judgments on questions of their international jurisdiction in all family law cases. This conclusion can rightly be reached – in light of the statutory history of the FamFG – by way of an analogous application of Sec. 280 of the Code of Civil Procedure (ZPO).

Rainer Hüßtege, **Grenzüberschreitende Wohngeldzahlungen**

Wulf-Henning Roth, **Applicable contract law in German-Danish trade**
Given the opt-out of Denmark from the Area of Freedom, Security and Justice, Danish courts do not apply the conflict rules of the Rome I-Regulation, but still the EC Convention on the Law Applicable to Contractual Obligations of 1980 (Rome Convention). As Germany has not yet given notice of a termination of the Rome Convention, it appears to be not beyond doubt whether in settings relating to Denmark German courts have to apply the conflict rules of the Rome I-Regulation, given its call for universal application (Article 2) and in the light of Article 24 (1), whereby the Rome Convention shall ("in the Member States") be deemed replaced by the Rome I-Regulation. In contrast, the OLG Koblenz, pointing to Article 1 (4), holds Article 24 (1) to be inapplicable in the specific case

as Denmark may not be regarded as a “Member State”. The Appellate Court applies the Rome Convention despite the fact that the German legislator has explicitly excluded the direct applicability of the Rome Convention.

Malte Kramme, **Conflict law aspects of the successor’s responsibility for debts of the acquired business, before and after the Rome-Regulations**
The German Federal Court of Justice deals, in its decision of 23 October 2013, with several current questions in the field of private international law. Firstly, the court adopts a position on the question of which conflict rule applies to the liability claim against the successor to a mercantile business carrying on the business under an identical trade-name (section 25 para. 1 sentence 1 German Commercial Code). Furthermore, the court decided which law applies to forfeit and limitation of claims underlying the United Nations Convention on Contracts for the International Sale of Goods. As the court applied the old legal regime prior to the entry into force of the Rome-Regulations, the article focuses on the question of how the case has to be solved under the new legal regime. This analysis shows that the Regulations “Rome I” and “Rome II” do not cover the law of obligations in an exhaustive manner. Remaining gaps need to be filled applying nonunified German private international law.

Dieter Henrich, **Children of Surrogate Mothers: Whose Children?**
The legal parentage of children, born by surrogate mothers and handed over to the intended parents, is a highly debated question. Strictly forbidden in Germany, surrogacy is allowed in other countries. In a case of children born by a surrogate mother in California the German intended fathers (a same sex couple) applied for recognition of the decision of the California court, which established a parent-child relationship between the child and the couple. While the lower courts in Germany denied the application because of incompatibility with German public policy (cf KG IPRax 2014, 72) the Bundesgerichtshof (the Federal Court of Justice) decided in favour of the applicants, but restrained explicitly the recognition on cases of foreign court decisions and to cases, where at least one of the intended parents is the biological parent of the child. So the recognition of foreign birth certificates (e.g. from the Ukraine) is still an open question as well as the recognition of parentage decisions, if neither of the intended parents is a biological parent.

Susanne Lilian Gössl, **Constitutional Protection of ‚Limping‘ Marriages and the ‚Principle of Approximation‘**

The Court decides how to treat a “limping” marriage which is not valid under German law but nevertheless falls in the scope of and is therefore protected by the concept of “marriage” of the German Constitution (Art. 6 para. 1 Basic Law). The article examines how the German status registration law over the last four decades has subsequently been adapted to the needs of cross-border status questions.

Susanne Lilian Gössl, **Adaptation of Status Registration Rules in Cases of ‚Limping‘ Status**

The subject of this article is how to handle the birth registration of a child born by a surrogate mother according to German and Swiss law. Both legal systems are absolutely opposed to surrogacy but also under the obligation to protect the child’s right to know his/her decent. The Swiss Court found a possibility to resolve the resulting legal tension. The author shows that the court’s resolution, an adaptation of the national civil status registry law, is a mechanism which has already been frequently used by German courts in other situations of “limping” status. She proposes to extend that existing jurisprudence to cases of cross-border surrogacy.

Alexander R. Markus, **Jurisdiction in Matters Relating to a Contract Under the Brussels/Lugano Regime: Agreements on the Place of Performance of the Obligation in Question and the Principle of Centralisation of Jurisdiction**

According to the Swiss Federal Supreme Court, parties can by agreement only specify the place of performance of the characteristic obligation under article 5(1)(b) of the 2007 Lugano Convention; contractual specifications of the place of performance of non-characteristic obligations are irrelevant in terms of jurisdiction.

Jörn Griebel, **Investment Arbitration Awards in Setting Aside Proceedings in the US – Questions Regarding the Review of Local Remedies Clauses Within Investment Treaties**

National setting aside proceedings are more and more often concerned with investment arbitration awards. This is due to a constant rise of investment arbitration proceedings. Although two thirds of all investment disputes are adjudicated according to the ICSID rules, which provide for a special review mechanism, the remaining awards may be subject to review before national courts. The US Supreme Court decision had to decide on the degree of review in a

dispute concerning local remedies clauses within an investment treaty and the possible impact of such clauses on the consent to arbitrate. The Court held that it had no competence to review the award in respect of such clauses.

Fourth 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 fourth issue of 2014 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features two articles and five comments.

Francesco Salerno, Professor at the University of Ferrara, examines fundamental rights in a private international law – and namely a public policy – perspective in "**I diritti fondamentali della persona straniera nel diritto internazionale privato: una proposta metodologica"** (Fundamental Rights of the Foreigner in Private International Law: A Methodological Proposition; in Italian).

Namely focusing on the role of public policy, this paper examines how personality rights of foreign individuals are ensured under the Italian private international law system. While personality rights are meant to reflect the identity of an individual at a universal level, private international law is aimed at ensuring the continuity of an individual's rights and status across borders. Art. 24 of the Italian Statute on Private International Law (Law No 218/1995) underlies this concern in that it provides, as regards personality rights, for the application of the law of nationality of the individual in question. However, as a result of the fact that personality rights are closely intertwined with human rights, it becomes inevitable to explore the link between the somehow neutral technique traditionally employed by conflict-of-law provisions and the fundamental values

shared within the international community, in particular those values safeguarded by international obligations regarding the protection of human rights. As this paper portrays, the tension between personality rights under an individual's national law and fundamental rights is crucial to Art. 24 of the Italian Statute, as shown, in particular, by the process with which rights are characterized as falling within the scope of the provision: where a given right is perceived as fundamental by the *lex fori*, that right should enjoy protection in the forum regardless of its status according to the law of nationality of the concerned individual (proceedings on sex reassignment provide some significant examples in this respect). This approach embodies a "positive" expression of the notion of public policy: cross-border uniformity is foregone, here, as a means to ensure the primacy of the fundamental policies of the forum. However, as the paper illustrates, the role of public policy in ensuring fundamental rights goes even further: in fact, public policy may also serve as a guide whenever the need arises to adapt the applicable foreign law, should such law fail to provide solutions that are equivalent to those enshrined in the *lex fori*.

Fabrizio Vismara, Associate Professor at the University of Insubria, discusses agreements as to successions and family pacts in **"Patti successori nel regolamento (UE) n. 650/2012 e patti di famiglia: un'interferenza possibile?"** (Agreements as to Succession in Regulation (EU) No 650/2012 and Family Pacts: A Possible Interference?; in Italian).

Law No 55 of 14 February 2006 enacted the regime on family pacts and amended Art 458 of the Italian Civil Code repealing the prohibition against agreements as to succession. This article analyzes the relationship between family agreements and agreements as to succession with reference to the regime enacted by Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. After examining the different solutions with respect to the characterization of family agreements (donation, division, contract), this article highlights how family agreements may be referred to the application of Regulation (EU) No 650/2012 as a form of waiver agreement as to succession. In this respect, family agreements may be governed by Regulation (EU) No 650/2012 and, in particular, by the rules on the determination of the applicable law provided therein.

In addition to the foregoing, the following comments are also featured:

Michele Nino, Researcher at the University of Salerno, examines State interests in labor disputes in "**State Immunity from Civil Jurisdiction in Labor Disputes: Evolution in International and National Law and Practice"** (in English).

This article examines the evolution of the international rule on State immunity from civil jurisdiction in labor disputes. After having shed light on the notion and content of the international rule at issue, this article examines the relevant international legal instruments (such as the 1972 European Convention on State Immunity and the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property), the national practice of civil law and common law States, as well as the case law of the European Court of Human Rights and of the European Court of Justice. In light of this analysis, this papers illustrates that, although an important trend aimed at promoting in labor disputes stable criteria of jurisdiction of the State of the forum (such as the nationality or the residence of the worker and the place of the execution of the employment relationship), the criterion based on the distinction between *acta jure imperii* and *acta jure gestionis* continues to be applied rather permanently in such disputes. As a result, in the conclusions, solutions are put forth so that the application of such criterion be subject to revision, at national and international levels, and that, as a consequence, an effective protection of workers be guaranteed in labor disputes against the need to safeguard State interests.

Giulia Vallar, Fellow at the University of Milan, addresses the topic of intra-EU investment arbitration in "**L'arbitrabilità delle controversie tra un investitore di uno Stato membro ed un altro Stato membro. Alcune considerazioni a margine del caso *Eureko/Achmea v. The Slovak Republic*"** (Arbitrability of Disputes between an Investor from a Member State and another Member State. Some Remarks on *Eureko/Achmea v. The Slovak Republic*; in Italian).

The present paper deals with one of the issues that has recently been considered within the *Eureko/Achmea v. The Slovak Republic* case, namely the arbitrability of the so called intra-EU BITs disputes. In essence, it focuses on whether the investor of an EU member state can rely on the compromissory clause contained in a BIT that its country of origin had signed with another country that, in turn, at a later time, became an EU member State. To such a question arbitral tribunals

have answered in the positive, while the EU in the negative, without however adopting a normative act in this sense. Throughout the paper, an analysis is conducted of those aspects of international law and of EU law that come into play in relation to the matter at hand. It is submitted that, in the absence of a definite/hard law solution, the way out should consist, for the time being, in applying soft law principles and, in particular, that of comity; nevertheless, the EUCJ and the arbitral tribunals do not appear to be very much keen to act in this sense. EU member states, on their part, are more and more frequently opting for the termination of the relevant BITs, allegedly on the basis of a law and economics analysis. This attitude, however, might produce negative effects on the economy of these states, since investors, seeking the protection of a BIT, could be encouraged to move their seats in third countries.

Giovanna Adinolfi, Associate Professor at the University of Milan, tackles the issue of financial instruments and State immunity from adjudication in **"Sovereign Wealth Funds and State Immunity: Overcoming the Contradiction"** (in English).

The increasing number of sovereign wealth funds (SWFs) and the growth in the value of their assets are among the main current trends in the global financial markets. The governments of recipient States have voiced their concerns, contending that SWFs are financial vehicles used by States to pursue general public aims but acting like private economic agents. The question this contribution tackles is whether SWFs, as "sovereign" investment vehicles, come within the scope of international and national rules on sovereign immunity. This topic will be analyzed from three perspectives. As a starting point, the definition of "foreign State" given by immunity legal regimes will be investigated in order to define in which circumstances SWFs meet it. Next, the issue of SWSs' immunity from adjudication will be ascertained. In this regard, the main point is whether SWFs investments are to be understood as actions engaged in within the exercise of sovereign authority, or as mere commercial activities, over which immunity from judgment on the merits is removed. As it may not be excluded that courts render judgments against SWFs, the rules on immunity from pre-judgement and post-judgement measures of constraint are to be considered, so as to identify the property against which jurisdictional rulings may be enforced for the full satisfaction of the legitimate expectations of judgment creditors. The enquiry mainly focuses on the rules established under the UN and the Council of Europe

conventions; the content and practice under national regimes is also considered, mainly the US Foreign Sovereign Immunities Act and the UK State Immunity Act. The main result is that there is no univocal answer to the question whether rules on sovereign immunity are helpful in overcoming the contradiction between the different but complementary public and private natures of SWFs. The form through which funds have been established and the content of the specific legal regime on the basis of which courts have to judge in their regard are the fundamental variables, and their combination in each case may lead to different results in terms of immunity from both the adjudicative process and enforcement measures.

Laura Carpaneto, Researcher at the University of Genoa, examines the interface of the Brussels II-*bis* Regulation and the European Convention of Human Rights in **"In-Depth Consideration of Family Life v. Immediate Return of the Child in Abduction Proceedings within the EU"** (in English).

The paper focuses on the EU regime on child abduction provided by Regulation No 2201/2003 and, in particular, on its Art. 11(8) expressly providing for the replacement of a Hague non return order by a subsequent judgment (the so called "trumping order") imposing the return of the child made by the courts of the State where the child was habitually resident prior to the wrongful removal or retention. Starting from the analysis of some recent decisions of the European Court of Human Rights, stating that some return orders held by domestic courts in applying the 1980 Hague Convention (*Neulinger and Shuruk v. Switzerland and X v. Latvia*) as well as the Brussels II-*bis* Regulation (*Sneersone and Kampanella v. Italy*) were not in compliance with Art. 8 of ECHR, the paper is aimed at demonstrating the that a too strict "Art. 8 ECHR's test" is capable of undermining the functioning of the Brussels II-*bis* trumping order and that a specific human rights' test for intra-EU child abduction should be carried out. In this light, the paper firstly highlights the added value of the Brussels II-*bis* regime on child abduction compared to the 1980 Hague Convention; it goes on to critically analyze the recent decisions of the European Court of Human Rights on the return orders in child abduction cases, and it finally proposes a possible human rights test capable of protecting the "effet utile" of the EU regime on child abduction.

Matteo Gargantini, Senior Research Fellow at the Max Planck Institute Luxembourg, examines and shares some considerations on the AG's Opinion in

Kolassa in "**Jurisdictional Issues in the Circulation and Holding of (Intermediated) Securities: The Advocate General's Opinion in *Kolassa v. Barclays*"** (in English).

This article addresses the Advocate General's Opinion in *Kolassa v. Barclays* (released on September 3, 2014, in the case C-375/13) from the perspective of financial markets law. The case raises some issues on the establishment of jurisdiction in disputes concerning securities offerings. The article suggests that a restrictive interpretation should be given of the Opinion (as well as of the CJEU decision on the case, which substantially follows the Opinion). On the one hand, the interpretation affirmed by the Advocate general may in fact, if read extensively, rule out the possibility that investors enjoy the protective regime of Brussels I Regulation *vis-à-vis* the issuer if they purchase securities on the secondary market, as it denies the possibility of establishing jurisdiction on the basis of Articles 15 and 16 of the Brussels I Regulation where a consumer has purchased a security not from the issuer but from a third party that has in turn obtained it from the issuer. On the other hand, the Opinion may expose offering companies to the risk of being sued by professional investors in multiple jurisdictions on the basis of tortious liability, even in cases where a prospectus was not published and, therefore, such companies did not intend to conduct any activity in other countries, on the basis that no contractual relationship can be identified in *Kolassa* between the issuer of the certificate and the final investor. Tortious liability, which is admitted by the Opinion, may therefore sometimes be an imperfect substitute for contractual liability. Hence, the article proposes that the Advocate General's (and the CJEU's) reasoning should be narrowly interpreted so as to confine its purview to the issues raised by the holding of certificates through trusts and other similar devices. On the contrary, further reflections are needed before a conclusive position is taken on the effects of circulation of securities under the Brussels I Regulation.

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