European Parliament's workshop on "Cross-border activities in the EU – Making life easier for citizens"

The papers presented at the European Parliament's workshop "Cross-border activities in the EU – Making life easier for citizens" (PE: 510.003) on 26 February 2015 in Brussels have been uploaded to the Parliament's homepage. The papers have been collected in a single compendium that is available (as a pdf file) here. The volume contains the following presentations (in the order of the workshop's programme):

SESSION I – LESS PAPER WORK FOR MOBILE CITIZENS

Towards a European Code on Private International Law? (*Jan von Hein* and *Giesela Rühl*)

Promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents within and outside the european union (proposal for a regulation, COM(2013) 208) (*Pierre Callé*)

Promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the EU and beyond (*Michael P. Clancy*)

Towards European Model Dispositions for Family and Succession Law? (*Christiane Wendehorst*)

EU Regulation 650/2012 on successions and the creation of a European Certificate of Succession (*Kurt Lechner*)

Regulation (EU) 650/2012/EU 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 (*Eve Põtter*)

SESSION II – CROSS BORDER FAMILIES AND FAMILIES CROSSING BORDERS

The Brussels IIa Regulation: towards a review? (*Hans van Loon*)

Name Law –- Is there a need to legislate? (*Paul Lagarde*)

SESSION III – BUSINESS AND CONSUMER'S CONCERN

Private international law as a regulatory tool for global governance (*Harm*

Schepel)

The European Small Claims Procedure and the new Commission proposal (*Pablo Cortés*)

Mediation as Alternative Dispute Resolution (the functioning of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters) (*Giuseppe De Palo*)

The 2005 Hague Convention on Choice of Court Agreements and the recast of the Brussels I Regulation (*Gottfried Musger*)

Investor Protection and Issuer Confidence after Kolassa

By Matteo Gargantini, Senior Research Fellow MPI Luxembourg

The decision rendered by the ECJ in *Kolassa* (Case C-375/13) offers a good opportunity to assess the European rules on jurisdiction from the point of view of investor protection and issuer confidence. A first comment on *Kolassa* has already been published on this Blog by Professor Matthias Lehmann. In his post, Professor Lehmann mainly focuses on the application of Art. 5(3) Brussels I Regulation to prospectus liability and on the evidence a court needs to consider when the disputed facts are relevant both for establishing jurisdiction and for deciding on the merit (these topics are addressed respectively in the third and the fourth questions referred to the ECJ). Full reference can therefore be made to Professor Lehmann's accurate analysis both for such points and for the description of the relevant facts. This post will instead sketch some general remarks from the perspective of financial markets law (for a more detailed analysis based on the Opinion of the Advocate General in *Kolassa* see Gargantini, Jurisdictional Issues in the Circulation and Holding of (Intermediated) Securities: The Advocate General's Opinion in Kolassa V. Barclays, Rivista di diritto internazionale privato e processuale (2014), 1095).

To better understand the issues raised by *Kolassa*, it is worth considering in more detail the first two questions referred by the Austrian court, namely whether for the purpose of Art. 15 Brussels I Regulation Barclays, the issuing company, and Mr Kolassa, the final investor, are part of a contract, or whether for the purpose of Art. 5(1) Brussels I Regulation the relationship between them can at least be considered contractual. As opposed to the

claim considered by the third question – which only refers to prospectus liability and to "breach of obligations to protect and advise" – the claims dealt with by the first two questions were also based on "the bonds terms and conditions". Hence, it appears that Mr Kolassa was relying not only on prospectus liability, but also on a direct violation of the bond terms, that being the missing payments. Therefore, the clarifications provided by the ECJ on prospectus liability are not the full story. First, nothing prevents investors from filing claims exclusively – or, as Mr Kolassa did, also – on the basis of violation of the bond terms and conditions. Second, it might well be the case that a security offering is carried out with no prospectus being published at all, for example because one of the exemptions set forth by Art. 4 Directive 2003/71/EC (on the prospectus to be published when securities are offered to the public or admitted to trading) applies.

The first two questions referred to the ECJ raise difficult problems because, in *Kolassa*, not only are the securities bought on the secondary market, with no direct contact between issuer and investor, but they are also held by Mr Kolassa's bank (*direktanlage*) rather than by Mr Kolassa himself. In such a scheme, Mr Kolassa only has a claim against his bank and cannot be regarded as the holder of the securities. The distinction between the problems raised by security circulation, on the one hand, and security holding, on the other, is clearly drawn in the questions referred by the Austrian courts. Both the Opinion of the Advocate General and the ECJ decision deny that Art. 5(1) and Art. 15 apply, but they are unfortunately not as clear as the referring court in discerning the two aspects. Para. 26 of the decision seemingly links the absence of a contract to the fact that Mr Kolassa is not the bearer of the bond. Hence, it could be inferred that the "chain of contracts through which certain rights and obligations of the professional […] are transferred to the consumer" (para. 30) refers to the contracts that compose the holding chain of the securities. However, para. 35 is more elliptical and might also include security circulation when it refers to "an applicant who, as a consumer, has acquired a bearer bond from a third party professional, without a contract having been concluded between that consumer and the issuer of the bond". Likewise, the applicability of Art. 5(1) is excluded on the basis that "a legal obligation freely consented to by Barclays Bank with respect to Mr Kolassa is lacking", it being unclear whether this is linked to the fact that the bonds were purchased on the secondary market or to the fact that *direktanlage*, rather than Mr Kolassa, should be regarded as the bearer of the certificate (para. 40).

Whether the inapplicability of Arts. 5(1) and 15 Brussels I derives from the fact that the bonds are bought from previous purchasers rather than underwritten directly from the issuer or, instead, from the fact that Mr Kolassa is not the holder of the securities is however key to understanding the implications of the decision. If the first explanation prevailed, the consumer protection regime of Art. 15 would not easily apply in securities

offerings whenever – as is often the case – a bank syndicate first underwrote the securities and then resold them to investors at large (so-called "firm commitment syndicate"). At the same time, ruling out a contractual obligation pursuant to Art. 5(1) on similar grounds would imply that issuers might be held liable for violation of the bonds' terms and conditions in any jurisdiction where their investors suffered economic loss according to Art. 5(3). Such a system would exclude retail investor protection with no economic rationale and would paradoxically expose the offering companies to the risk of being sued by professional investors in jurisdictions where they published no prospectus and, consequently, addressed no investor.

Therefore, although the distinction between circulation and holding of securities may not be decisive in *Kolassa*, its implications remain whenever the investor/accountholder is the bearer of the relevant securities. Since *Kolassa* does not provide a conclusive answer to these questions, it might be appropriate to give a narrow reading to the decision, hence considering the intermediated and indirect holding of the securities through *direktanlage* as the reason why Arts. 5(1) and 15 do not apply.

To be sure, even a restrictive reading of *Kolassa*, although preferable, is no panacea. First, it would leave open the question whether the circulation of the securities might still prevent the identification of a contract or even a contractual obligation between issuers and investors pursuant to Arts. 15 and 5 respectively. This would seem to be the case for Art. 15, because ECJ case law usually requires a direct contact between the two parties (see Von Hein, Verstärkung des Kapitalanlegerschutzes: Das Europäische Zivilprozessrecht auf dem Prüfstand, in Eur. Zeitschrift für Wirtschaftsrecht, 2011, 370). A different result may perhaps be reached for Art. 5(1), considering that it might apply in the absence of a direct contact and that the ECJ has stated that conditions incorporated in a security may be transferred along with the security when this is handed over (see e.g. *Coreck*, Case C-387/98), which is exactly the purpose of incorporating a restitution obligation into a bond. Second, linking the applicability of Arts. 5(1) and 15 to the formal qualification of the investor as security holder might easily create a differential treatment of investors that are regarded as mere beneficial owners in countries such as the United Kingdom, where security holding is mainly based on trusts. In this context, the strict interpretation of Art. 15 and the *raison d'être* of the autonomous interpretation of jurisdictional rules come into conflict.

To what extent a different reading of the applicable rules could ensure a better regulatory framework remains to be seen. The Brussels I Regulation does not always seem to leave room for different interpretations, at least in the light of consolidated case law. Art. 15 and its traditional understanding is a clear example. What is sure, from the point of view of securities law, is that the drawbacks of the current system reduce both issuer confidence and

investor protection.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1/2015: Abstracts

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

Heinz-Peter Mansel/Karsten Thorn/Rolf Wagner, ***European conflict of laws 2014: The year of upheaval***
The article provides an overview of developments in Brussels in the field of judicial cooperation in civil and commercial matters from December 2013 until November 2014. It summarizes current projects and new instruments that are presently making their way through the EU legislative process. It also refers to the laws enacted at the national level in Germany as a result of new European instruments. Furthermore, the authors look at areas of law where the EU has made use of its external competence. They discuss both important decisions and pending cases before the ECJ as well as important decisions from German courts pertaining to the subject matter of the article. In addition, the article also looks at current projects and the latest developments at the Hague Conference of Private International Law.

Anatol Dutta, ***The European Succession Regulation: Ten issues in miniature***
Since its adoption in July 2012, the European Succession Regulation has generated a great volume of scholarly writing, although being applicable only from summer 2015 onwards. The following paper shall retrace ten selected issues which have been subject to debate during those first three years, namely (1) the delimitation between the applicable succession law and matrimonial property law, in particular regarding the German lump sum approach as to the participation of the surviving spouse in the gain obtained during marriage, (2) the role of legacies or other attributions which directly transfer ownership in certain objects of the estate from the testator to the legatee or other beneficiaries, in particular in case of a so-called legatum per vindicationem, (3) the localization of joint wills of spouses or registered partners, (4) the scope of the special jurisdictional rules in case of a choice of

law, (5) the admissibility of certain types of testamentary dispositions, (6) the problem of incidental questions in the applicable succession law, (7) the binding effects of a choice of law, (8) the role of national certificates of inheritance under the Regulation, (9) the scope of the duty to accept foreign authentic instruments, and (10) the impact of previous overriding succession-related conventions of the Member States on the European Certificate of Succession.

Peter Mankowski, ***The Deceased's Habitual Residence in Art. 21 (1) Successions Regulation***

Art. 21 (1) Successions Regulation hails the deceased's habitual residence as the dominant connecting factor for objectively determining the applicable law. The European legislator intends to nurture integration and personal mobility within the Internal Market. Habitual residence as connecting factor raises quite some questions, though. Recitals (23) and (24) are only helpful up to a certain extent in this regard. To place particular reliance on the deceased's intentions would be misconceived. To rely on such intentions would generate a bevy of consequential issues, for instance concerning the deceased's mental sanity or other persons' influence. Moving cross-border ordinarily is a deep cut in everybody's personal life and should be a clear warning of possibly ensuing consequences. To assume an alternating habitual residence provides a solution for the tricky cases that someone is living in different places consecutively each year. With regard to cross-border commuters the place where they habitually carry out their work is only relevant for employment purposes but does not determine their habitual residence.

Burkhard Hess/Katharina Raffelsieper, ***The European Account Preservation Order: A long-overdue reform to carry out cross-border enforcement in the European Area of Justice***

This article describes the key elements of Regulation (EC) 655/2014 establishing a European Account Preservation Order adopted in May 2014 and explains its practical implications. This new instrument will facilitate direct cross-border enforcement of monetary claims by allowing creditors to block bank accounts in other EU Member States (with the exception of the UK and Denmark). The Regulation shall be available as an additional alternative to existing national provisional relief. However, it implements the so-called surprise effect in cross-border cases: the blocking effect takes place without any prior notification to the debtor.

At the same time, appropriate safeguards to protect the debtor's rights are in place, such as the obligation of the creditor to compensate the damage caused to the debtor by the seizure if the order is subsequently set aside. The debtor's right to be heard will be safeguarded by a hearing in the Member State of enforcement taking place after the blocking of the account. Finally the livelihood of the debtor is assured by the application of the respective national laws of the Member State of enforcement governing non-attachable

amounts. All in all, the European Account Preservation Order can be qualified a major achievement which will considerably improve cross-border enforcement in the EU. It fills the gap in creditor protection left open by the Brussels I Recast which has unnecessarily abolished the surprise effect of provisional measures in the cross-border context.

Christian Kohler, ***A Farewell to the Autonomous Interpretation of the Concept of 'Civil and Commercial Matters' in Article 1 of Regulation Brussels I?***

In Case C-49/12, Sunico, the ECJ held that the concept of "civil and commercial matters" within the meaning of Article 1 of Regulation Brussels I covers an action whereby a public authority of one Member State claims, as against persons resident in another Member State, damages for loss caused by a tortious conspiracy to commit value added tax fraud in the first Member State. The author argues that the judgment is not in line with the ECJ's earlier caselaw on the autonomous interpretation of that concept. As the defendants in Sunico were the real beneficiaries of the sums obtained by means of tax evasion and the damages claimed corresponded to the amount of the VAT not paid, the action was brought in the exercise of the authority's powers and concerned a "revenue matter" within the meaning of Article 1(1) of the Regulation. The author observes a tendency in the ECJ's recent case-law to give too much weight to the law of the Member State of the proceedings when interpreting the concept of "civil and commercial matters". However, a shift towards a "national" rather than an autonomous interpretation of that concept would be detrimental to the uniform application of the Regulation. Although a wide interpretation of the concept is to be approved, the rationale behind the exclusion of matters of public law from the scope of the Regulation remains valid.

Michael Grünberger, ***The Place of an Alleged Infringement of Copyright under the Brussels I-Regulation***

The CJEU held in Pinckney v KDG Mediatech AG that a court has international jurisdiction for a copyright infringement claim according to Art. 5 No. 3 Brussels I regulation, if the member state in which that court is situated protects the copyrights relied on by the plaintiff and the harmful event alleged may occur within the jurisdiction of the court seised. First, the court reaffirmed that jurisdiction in intellectual property rights claims can be allotted based on both, the place where the damage occurred and the place of the event giving rise to it. Second, the CJEU developed a specific approach for non-registered IP rights, merging the classical Shevill doctrine with its solution to IP rights in Wintersteiger. Third, the CJEU rebuffed any attempt to apply any further localization criteria to limit a national court's international jurisdiction in multistate infringements. Fourth, the approach enables the plaintiff to sue one of several supposed perpetrators of the damage in the place where the final damage has occurred even though he or she did not act within the jurisdiction of the court seised.

Christoph Thole, ***Jurisdiction for injuncture relief and contractual penalties***

The judgment in question was linked to two significant problems within the law of international jurisdiction. It concerned a legal action taken by an association and the question of jurisdiction for injuncture relief in cases without adherence to a specific locality. Although the court reaches – in spite of overlooking several aspects – the correct result, the judgment still reveals yet unresolved questions of how to treat agreements on contractual penalties and negative covenants with respect to the place of performance under art. 5 no. 1 Brussels I-Reg. (= art. 7 no. 1 Reg. 1215/2012).

Marta Requejo Isidro, ***On Exequatur and the ECHR: Brussels I Regulation before the ECtHR***

Concerns about the relationship between Article 6 ECHR and the international procedural law instruments of European (Community) source has long been a recurring topic in the legal literature. The issue has been reviewed recently by the ECtHR: concrete aspects of the European system of recognition and exequatur of judgments among EU Member States have been assessed by the Court in light of the so called Bosphorus test and the presumption of equivalence in Povse v. Austria, of 18.6.2013, in the domain of family law; and in the decision we comment on here, Avoti?š v. Latvia, rendered on 25.2.2014, where Regulation Brussels I was applied. Avoti?š v. Latvia is remarkable and must be approved for the tolerance shown by the ECtHR towards existing EU law and its application by the Member States at a very sensitive stage of the relations EU/Strasbourg. However, disappointment cannot be hidden as regards its grounds used by the ECtHR: technically the decision is based on unclear, disputable reasoning, as well as on a rather superficial assessment of the Bosphorus test. It is therefore not surprising that the judgment was adopted by a narrow majority of just four votes against three.

Friedrich Niggemann, ***Foreign precautionary measures to take evidence under the Brussels I-Regulation: New attempts, but still no convincing solution***

The decision of the OLG München of 14.2.2014 is part of the quite heterogeneous case law of the German courts under Art. 31 Regulation 44/2001. Following an expert procedure in France the German party to this procedure started a second procedure with the same object in Munich, which was the agreed place of jurisdiction. The German court refused jurisdiction on the basis of Art. 27 par. 2 Regulation 44/2001. Whereas the result is in line with the decisions of the ECJ, the decision remains nevertheless unconvincing. It considers that the French procedure is not a provisional one under Art. 31, but an ordinary one, which in the court's opinion is apparently necessary to justify the refusal of jurisdiction. However this is contrary to the ECJ's definition of a provisional decision. Moreover the ECJ attributes the consequence of Art. 27 para. 2 Regulation 44/2001 not only to ordinary but

as well to provisional decisions.

Sarah Nietner, ***Fragmentation of the law applicable to succession by way of party autonomy: What will be the impact of the Succession Regulation?***

The present case deals with a succession having cross-border implications. The deceased was a Swedish citizen who had her habitual residence in Germany at the time of her death. In her disposition of property upon death, the deceased had chosen German law to govern her succession with regards to her immovable property located in Germany. The deceased had disinherited her niece, who contests the validity of the will due to lack of testamentary capacity. The Higher Regional Court of Hamm found that the question, whether the deceased had been capable of drawing up her will, is governed by German law with respect to the immovable property located in Germany, whereas Swedish law decides on the question of capacity regarding the other assets. The fragmentation of succession results from the possibility to choose the law governing the succession, which is granted by Art. 25 (2) of the Introductory Act to the German Civil Code. This contribution outlines the decision of the court and examines how the situation will change under the European Regulation on Succession and Wills, which aims to avoid contradictory results due to a fragmentation of succession.

Rolf A. Schütze, ***On providing security for costs of proceedings under Austrian law***

Under Austrian Law a foreign plaintiff in civil litigation is obliged to provide security for costs. The foreign plaintiff is released from such obligation if – inter alia – there is a provision in an international treaty on security for cost or if an Austrian decision on costs can be recognized and enforced in the country of the habitual residence of the plaintiff. According to the ruling of the Austrian Supreme Court, however, the release from the cautio iudicatum solvi on the ground of the possibility to execute cost decisions under national law does not apply if there is an international treaty, even if such treaty – as in the instant case – does not release the plaintiff from the obligation to provide security for costs. Therefore the Court did not examine the issue of enforceability of an Austrian cost decision under the laws of the British Virgin Islands.

Which Court is Competent for Prospectus Liability Cases? The CJEU Rules in Kolassa (Case C-375/13)

by *Matthias Lehmann*, University of Bonn

On 28 January 2015, the CJEU has decided for the first time on the question of jurisdiction over alleged liability for a wrong prospectus. The Kolassa judgment is of paramount importance for the future handling of investor claims. In a nutshell, the CJEU holds that the court at the place where the investor is domiciled and has its damaged bank account is competent to decide on the claim under Art 5(3) Brussels I Regulation (now Art 7(2) Brussels Ia Regulation).

The Facts (as Easy as Possible)

The case concerned an Austrian investor who had bought a certificate from an investment firm in Austria. The certificate had been issued by Barclays UK, which had also distributed an accompanying prospectus, inter alia in Austria. After the value of the certificate had been wiped out completely, the investor brought a claim against Barclays before an Austrian court, alleging that Barclays' prospectus would not have given correct information regarding the way in which the money was to be invested. The Austrian court questioned whether it had jurisdiction to hear the case and submitted a reference for a preliminary ruling.

The Decision (in a Bit more Detail)

The CJEU first rejects to consider prospectus liability as a matter relating to a consumer contract under Art 15 Brussels I Regulation (now Art 17 Brussels Ia Regulation). The Court also rules out a characterization as a contract matter under Art 5(1) Brussels I Regulation (now Art 7(1) Brussels Ia Regulation). This is understandable as the issuer arguably has not freely assumed an obligation towards the investors, at least not with regard to the accurateness of the content of the prospectus. It is astounding, however, that the CJEU refuses a final qualification and asks the Member State tribunal to verify whether there is a contractual obligation or not. The judgment does not provide any guidance on the criteria the national tribunal should use in making such a determination. This is rather unfortunate, given that the term 'contract' must be given an EU autonomous meaning.

In principle, the Court accepts the proposition that prospectus liability is a matter relating to a tort, delict or quasi-delict in the sense of Art 5(3) Brussels I Regulation (now Art 7(2) Brussels Ia Regulation). Using its twin approach to localise the harmful event (see *Mines de potasse*, Case 21/76, aka as "*Bier*"), the Court considers the place of the event giving rise to the damage and the place where the damage occurred.

With regard to the event giving rise to the damage occurred, the CJEU denies that it took place in Austria because all relevant decisions as to the arrangement of the investments and the content of the prospectus had been taken by Barclays in the UK. The Court also highlights that the prospectus had originally been drafted and distributed there. It follows by implication that the place of the causal event is at the seat of Barclays unless the prospectus has originally been drafted and distributed elsewhere.

The most important and interesting part of the judgment concerns the localisation of damage. The CJEU first reminds of its judgment in Kronhofer (C-168/02), where it had ruled out the domicile of the investor *as such* as the place of financial damage. It goes on to say, however, that the courts in the country of the investor's domicile have jurisdiction 'in particular when the loss occurred itself directly in the applicant's bank account held with a bank established in the area of jurisdiction of those courts' (margin no 55).

This reference to the place of the establishment of the bank that manages the damaged account is remarkable. It coincides with what has been said earlier about the location of economic loss (see Lehmann, (2011) 7 Journal of Private International Law 527). One may wonder, though, why the CJEU also refers to the domicile of the investor. Does the Court want to suggest that it plays a role in determining the place of damage? This would be rather surprising. Perhaps the explanation lies in the way the submitting tribunal had framed the preliminary question, which focused entirely on the question whether the investor's domicile can be a basis of jurisdiction. The best way to read the Court's answer is probably that the damage arises at the domicile *only* under the condition that the investor's bank account is located there. Regrettably, the judgment still leaves room for speculation which court would be competent if the bank account from which the investor paid for the securities were located outside his domicile.

Particularly noteworthy are the criteria that the judgment does not mention. The Advocate General had suggested to consider the place of publication of the prospectus as an 'indicator' for where the harmful event occurred (see Conclusions by GA Szpunar of 3 September 2014, para 64 et seq). Similarly, many authors have proposed to look at the market on which the securities have been offered. The CJEU does not even discuss these views. One must understand its silence as rejection.

Furthermore, the judgment may have far reaching implications for conflict of

laws. As is well known, Art 4(1) Rome II Regulation uses the same criterion of the 'place where the damage occurred' that is the second prong of the tort jurisdiction under Art 5(3) Brussels I Regulation (now Art 7(2) Brussels Ia Regulation) in order to determine the applicable tort law. If parallel interpretation still is a goal and Recital 7 of the Rome II Regulation should not be devoid of all meaning, then it seems that the Kolassa ruling must be followed in the area of conflict of laws as well. Yet this would cause a complete dispersal of the law applicable to prospectus liability. An issuer would potentially be liable under the laws of all countries of the world in which investors are domiciled and have bank accounts. Whether and to what extent this result can be avoided by using the escape clause in Art 4(3) Rome II Regulation is doubtful. The better way seems to introduce a special conflicts rule for financial torts (on this issue, see Lehmann, *Revue critique de droit international privé* 2011, 485).

For Those Not Interested in Financial Law

The Court also rules on a point that is of general interest outside the special area of prospectus liability: To which extent does a court have to take evidence in order to determine its jurisdiction? The answer given by the CJEU is somewhat sibylline. On the one hand, it rules that the tribunal seised does not have to enter into a comprehensive taking of evidence at this early stage of the procedure and may 'regard as established … the applicant's assertions' (paras 62 and 63). At the same time, it requires the national tribunal to examine its international jurisdiction 'in the light of all the information available to it, including, where appropriate, the defendant's allegations' (para 64). Can somebody make sense of this, please?

Regulation (EU) nº 606/2013 Applicable (from 11 January 2015)

Regulation (EU) nº 606/2013 of the European Parliament and of the Council, of 12 June 2013, on mutual recognition of protective measures in civil matters, is applicable from yesterday on protection measures ordered on or after that date, irrespective of when proceedings have been instituted.

To the best of my knowledge, in spite of the technical specialties of the

Regulation and of the fact that works on the same topic have also been undertaken at The Hague Conference, this instrument has attracted very little attention so far. In the next future two papers on it will be published, both from the MPI Luxembourg.

Click here to access the text of the Regulation; here, for the Commission Implementing Regulation (EU) No 939/2014 of 2 September 2014 establishing the certificates referred to in Articles 5 and 14 of Regulation (EU) No 606/2013 of the European Parliament and of the Council on mutual recognition of protection measures in civil matters.

Update: I'd like to thank Prof. Dutta for his nice email this morning attaching an article of his on the Regulation, the Directive (2011/99/EU) and the German implementing legislation, published January 2015 in FamRZ, 85 ff.

Regulation (EU) No 1329/2014 – Forms in Matters of Successions

The Commission Implementing Regulation (EU) No 1329/2014 of 9 December 2014 establishing the Forms referred to in Regulation (EU) No 650/2012 of the European Parliament and of the Council 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 has been published today.

Click here to access OJ L 359.

Mennesson v. France, ECtHR 26.06.2014

I happened to be in France when I heard the news about the ECtHR finding against France in *Menesson v. France*, on surrogate motherhood. The Court

considered established a violation of Art. 8.1 ECHR as regards the twin daughters of the couple. Here is a resumée of the case (together with a similar one, *Labassee v. France*) as presented in the Press release issued by the Registrar of the Court. The judgment itself can be found here, but only in French.

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

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

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

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

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

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

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

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

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

> *The paper provides an account of the provisions laid down in Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I-bis) to deal with proceedings concurrently pending in a Member State and in a third country (Articles 33 and 34). It begins by discussing the reasons for addressing the issue of extra-European lis pendens and related actions within the law of the European Union. Reference is made, in this connection, to the relevance accorded to third countries' proceedings and the judgments emanating therefrom under the Brussels Convention of 1968 and Regulation (EC) No 44/2001, as evidenced inter alia by the rule providing for the non-recognition of decisions rendered in a Member State if irreconcilable with a prior decision coming from a third country but recognized in the Member State addressed. The paper goes on to analyse the operation of the newly enacted provisions on extra-European lis pendens and related actions, in particular as regards the conditions on which proceedings in a Member State may be stayed; the conditions on which a Member State court should, or could, dismiss the claim before it, once a decision on the merits has been rendered in the third country; the relationship between the rules on extra-European and intra-European lis pendens and related actions in cases where several proceedings on the same cause of actions and between the same parties, or on related actions, have been instituted in two or more Member States and in a third country.*

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

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

answers) with regard to the consistency therewith of the conditions that familial relationships created abroad must satisfy when their recognition is sought pursuant to the relevant provisions currently applicable within the Italian legal system.

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

Sara Tonolo, Associate Professor at the University of Trieste, **"La trascrizione degli atti di nascita derivanti da maternità surrogata: ordine pubblico e interesse del minore"** (The Registration of Birth Certificates Resulting from Surrogacy: Public Policy and Best Interests of the Child; in Italian).

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

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

Georgia Koutsoukou, Research Fellow at the Max Planck Institute

Luxembourg, **"Report on Recent German Case-Law Relating to Private International Law in Civil and Commercial Matters"** (in English).

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

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

Slovenian Supreme Court Rules on Service under Hague Convention

By Jorg Sladic, attorney-at-law and associate professor in Ljubljana.

Summary

In a recent decision (judgement of 19 November 2013 in case III Ips 86/2011) published in March 2014 the Supreme Court of the Republic of Slovenia had to give a ruling in judicial review limited to the points of law of appellate decisions (basically identical to the German *die Revision* and similar to French *la cassation*) on a question of service of documents instituting proceedings (application for payment as debtor's performance of an international sales contract) in Slovenia effected in Belarus on Belarussian defendants according to the Rules of the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The specifics of the Slovenian case are the link between the service of the application instituting proceedings (writ) and the summons to lodge a reply issued by the Slovenian court abroad and a default judgement (without application of Art. 15(2) of the 1965 Hague convention). However, the two issues that will be of importance for international legal community are (i.) the interpretation of the 1965 Hague Convention on service and (ii.) the interpretation of a contractual clause on prorogation of jurisdiction allegedly foreseeing the application of a foreign *lex fori*. The decision can be found on: http://sodnapraksa.si/

Facts

A Slovenian and a Belarussian company had concluded a sales contract on 30 August 2002. The contract contained also the following clause “all disputes by the parties shall be adjudicated before the courts in Ljubljana (*sc.: the capital of Slovenia*) according to the rules of the State of the defendant”. The Slovenian seller had supplied the goods, the Belarussian buyer failed to pay for the goods. The Slovenian seller lodged an application for payment as a way of specific performance of buyer’s obligations before the competent court in Ljubljana. The application had been served in Belarus on the Belarussian defendant in application of the Hague Convention of 1965 by the Belarussian central authority upon the request of the Slovenian court. The defendant did not lodge a reply, the consequence being a default judgement issued by the Slovenian court of first instance. The default judgement was then contested by an appeal. After the dismissal of the appeal by an appellate court an application for judicial review limited to the points of law was lodged by the defendant.

Decision

The Slovenian Supreme court first examined the requirement of duly correct service as a precondition for issuing a default judgement (par. 7 of the judgement) and concluded that Slovenia and Belarus are both contracting parties to the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, therefore no procedural requirement had been infringed by ordering a service on a foreign defendant according to the cited convention. Referring to the Art. 6 of the 1965 Hague Convention the Supremem Court found that Belarussian judicial authorities did not complete the certificate on service according to the said convention (par. 12). However, considering that Slovenian courts did not issue a special request for service. As the 1965 Hague Convention under Art. 5(1) only provides for two ways of service; namely by methods prescribed by the requested state’s internal law for service of documents in domestic actions upon persons who are within its territory (sub-paragraph a), and by a particular method requested by the requesting state (the applicant), unless such a method is incompatible with the law of the state addressed. The interpretation of that provision given by Slovenian Supreme Court is that unless a special method is required by the requesting court (the applicant) then the service abroad is to be performed according to the *lex fori* of the requested or addressed state. If service is performed on a foreign entity according to the *lex fori* of the foreign addressed state, a failure to complete the certificate (on the reverse of the request) has no influence on the whole process of service (par. 13). Perhaps a slightly different approach by the CJEU should be mentioned. Indeed, the CJEU seems to consider that the question whether an application or a document instituting proceedings was duly served on a defendant in default of appearance must be determined in the light of the provisions of the 1965 Hague Convention (CJEU, C-292/10 *de Visser*, par. 54, C-522/03 *Scania Finance France,* par. 30).

The second issue, i.e. an alleged reference to the foreign *lex fori* in the contractual clause on prorogation of jurisdiction has been dealt quite fast. The rules of procedure are always of mandatory nature and belong to the legal order of the court competent for hearing the case and cannot be chosen by the parties. However, even if the parties had agreed on the application of the Belarus procedural law, this would only imply only a partial voidness of the clause on the choice of law and would not have any influence on the choice of substantive law.

French Supreme Court Denies Effect to Foreign Surrogacies On the Ground of Fraude a la Loi

On 19 March 2014, the French Supreme Court for civil and criminal matters *(Cour de cassation*) ruled that an Indian surrogacy would be denied effect in France on the ground that it aimed at strategically avoiding the application of French law (*fraude à la loi*), which forbids surrogacy.

A French male had entered into a surrogacy agreement with an Indian woman in Mumbai. After a child was born, the man attempted to register the child as his (and hers) on French status registries. A French prosecutor challenged the registration. A court of appeal rejected the challenge on the grounds that it was not alleged that the applicant was not the father, and that the birth certificate was legal.

The *Cour de cassation* allowed the appeal of the French prosecution service and ruled that the behaviour of the French national and resident aimed at avoiding the application of French law. The Court held:

> *Attendu qu'en l'état du droit positif, est justifié le refus de transcription d'un acte de naissance fait en pays étranger et rédigé dans les formes usitées dans ce pays lorsque la naissance est l'aboutissement, en fraude à la loi française, d'un processus d'ensemble comportant une convention de gestation pour le compte d'autrui, convention qui, fût-elle licite à l'étranger, est nulle d'une nullité d'ordre public selon les termes des deux premiers textes susvisés*

In 2011, the *Cour de cassation* had denied effect to foreign surrogacies on

the ground that they violated public policy. Since September 2013, the Court has founded its rulings on the strategic behaviour doctrine.