Fourth Issue of 2013'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 2013 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features two articles and one comment.

Paola Ivaldi, Professor at the University of Genoa, examines the issue of environmental protection in the context of European Union law and private international law in **"Unione europea, tutela ambientale e diritto internazionale privato: l'art. 7 del regolamento Roma II"** (European Union, Environmental Protection and Private International Law: Article 7 of the Rome II Regulation; in Italian).

> *Art. 7 of Regulation No 864/2007 (so called Rome II Regulation) provides for a specific conflict of law rule concerning liability for environmental damage, which empowers the person sustaining the damage to choose between the application of the lex loci damni and the application of the lex loci actus. The present article analyses the rationale underpinning the attribution to only one of the parties concerned (the person sustaining the damage) of the unilateral right to choose the law applicable to their relationship, and it concludes that the provision at issue does not purport to alter the equal balance between such parties, as it rather aims at ensuring a high level of environmental protection, both by preventing a race to the bottom of the relevant national legal standards and by discouraging the phenomenon known as environmental dumping. Furthermore, the article compares the specific provision laid down by Art. 7 of the Rome II Regulation with the general conflict of laws rule provided by Art. 4 and Art. 14 of the same instrument, with particular reference to the role played – in the peculiar context of environmental liability – by party autonomy and to the different relevance attributed by such rules to the lex loci damni and to the lex loci actus.*

Anne Röthel, Professor at the Brucerius Law School in Hamburg, discusses party autonomy under the Rome III Regulation in **"Il regolamento Roma III: spunti per una materializzazione dell'autonomia delle parti"** (The Rome III Regulation: Inputs for Concretizing Party Autonomy; in Italian).

> *Regulation (EU) No 1259/2010 of December 20th 2010, the so-called "Rome III" Regulation, lays down uniform conflict-of-laws rules on divorce and legal separation. It represents the first case of enhanced cooperation between (part of) the Member States of the European Union, and it became applicable on June 21st 2012. After reporting the criticism of German legal literature, the author points out that the Regulation, although at first sight only aiming at international private law, finally covers substantial matters such as the scope of autonomy when it comes to divorce and legal separation. Her analysis comprises as a first step a comparative view which underlines the existence of deeply rooted legal and cultural differences in the field of divorce. She also presents statistical data regarding the situation in Germany. In this context she highlights the meaning of the "availability" of divorce in the "conservative" legal systems and in the "liberal" ones, that basically depends on whether marriage is conceived entirely as a legal institution or as well as a contract depending on the autonomy of the parties. Secondly, she focuses on Art. 5 of Regulation No 1259/2010 that allows the spouses to determine the law applicable to divorce and legal separation. In this respect, the Regulation goes farther than the existing national rules of international private law. The author questions therefore the legitimacy of party autonomy within private international law. Finally, she examines the conditions for a valid choice of law. The German legislator decided to impose the form of a public (notarial) act for the choice-of-law agreement. The author questions whether the fulfillment of the formal requirements can sufficiently guarantee by itself that the parties are aware of the impact of their decision. She therefore suggests a further judicial control to take place in order to guarantee autonomous decisions in the light of the fundamental rights and the jurisprudence of German Federal Constitutional Court on agreements in matters of matrimonial property regimes.*

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

Ester Di Napoli, PhD in Law, **"A Place Called Home: il principio di territorialità e la localizzazione dei rapporti familiari nel diritto**

internazionale privato post-moderno" (A Place Called Home: The Principle of Territoriality and the Localization of Family Relations in Post-Modern Private International Law: in Italian).

> *The way in which space is conceived and represented in private international law is changing. This development reflects, on the one hand, the emergence of non-territorial spaces in the legal discourse (the market, the Internet etc.) and, on the other, the acknowledgment, in various forms and subject to different limitations, of the individual's "right to mobility". The interests of States and those of social groups are gradually losing ground to the interests of the individual, the freedom and self-determination of whom is now often likely to be exercised in the form of a choice of law. In the field of family law, European private international law shapes its rules by taking into account the "fluidity" of postmodern society: conflict-of-laws rules become more flexible and "horizontal", while the "myth" of abstract certainty is outweighed by the quest for adaptability and effectiveness.*

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.

Van Den Eeckhout on International Employment Law and European Fundamental Freedoms

Veerle Van Den Eeckhout (Leiden University and University of Antwerp) has posted on SSRN an English version of a paper on international employment law previously published in Dutch in "Tijdschrift Recht en Arbeid" ("TRA", Kluwer, 2009, issue 4).

The paper discusses the relationship between International labour law and European fundamental freedoms, including an analysis from a PIL-perspective of the cases Viking, Laval, Rüffert and C./Luxembourg, and an analysis of the relationship between the Rome Convention, the Rome I Regulation and the Posting Directive. The paper is entitled "International Employment Law Mangled between European Fundamental Freedoms". An extended version (not yet translated into English) of this paper can be found on SSRN (also available here and here) – in this extended version, the relationship between the Rome convention, the Rome I regulation and the Posting Directive is analysed in a more profound way, including also aspects such as: the relationship between the Posting Directive on the one hand, the applicability of the law of the host State on the other hand, the consequences – seen from the perspective of the protection of the employee – of the *non*-applicability of the Posting Directive etc.

The author is grateful to Ms. Emanuela Rotella for the English translation of the paper.

French Book on PIL Legislation Applicable in France

Dean Sandrine Clavel (University of Versailles Saint Quentin en Yvelines) and Estelle Galland (Paris I University) have published a book gathering the essentials of applicable legislation in the field of private international law in France.

The materials include national legislation, European regulations and directives and international conventions.

> *Traditionnellement d'origine nationale et jurisprudentielle, le droit international privé français s'est enrichi, au cours des dernières décennies, de sources supranationales et textuelles ; ce phénomène s'est encore récemment accentué sous l'influence de l'Union européenne. La transformation des sources s'est accompagnée d'une inflation de celles-ci. Et la multiplication des textes, alliée à*

la diversité de leurs origines, a rendu l'accès aux sources du droit international privé particulièrement complexe.

***L'objectif de cet ouvrage est, pour simplifier la tâche des « usagers » du droit international privé**, qu'ils soient **universitaires, étudiants ou praticiens du droit,** de leur offrir un « portail » des sources textuelles du droit international privé français contemporain, tendant à l'exhaustivité sans toutefois y prétendre.*

*Le lecteur y trouvera, le plus souvent en texte intégral, **l'essentiel des règles de conflit de lois et de juridiction, mais aussi des règles matérielles de droit international privé d'origine supranationale et des règles de procédure internationale et d'arbitrage international**, ce aussi bien en matière civile et commerciale qu'en matière familiale, patrimoniale et extrapatrimoniale (à l'exclusion notable des règles régissant la nationalité et la condition des étrangers). L'usage de cet ouvrage se veut simplifié par la mise à disposition d'un index thématique qui permet au lecteur d'embrasser, d'un seul coup d'oeil, l'ensemble des textes régissant une question de droit spécifique (par exemple, l'adoption, le transport aérien ou la propriété industrielle, etc.).*

More information can be found here.

ECJ upholds National Law Precluding Intervention of Consumer Associations in Enforcement Proceedings of an

Arbitration Award

By Anthi Beka, University of Luxembourg

On February 27th, 2014 the Court delivered its ruling in Case C-470/12 *Pohotovost' s.r.o. v Miroslav Vasuta*. The case forms part of the jurisprudential line of the Court on the procedural implications of the Unfair Terms Directive.

The legal issue raised was whether the important role assigned to consumer associations by the Unfair Terms Directive for the protection of consumers should be understood, in conjunction with articles 38 and 47 of the Charter, as precluding national procedural law which does not give standing to consumer associations to intervene in individual disputes involving consumers for the enforcement of a final arbitration award. The Court upholds the compatibility of Slovak procedural law. One more case is currently pending involving the same credit professional, *Pohotovost'*, on the same legal issue (Case C-153/13 *Pohotovost' s.r.o. v Jan Soroka*). In 2010 the Court had also delivered its Order in Case C-76/10 *Pohotovost' s.r.o. v Iveta Korckovska* .

Facts and questions referred

Pohotovost' applied for authorization to enforce a final arbitration award against the consumer. Its application was partially rejected, as far as the default interest and the costs on the recovery of the debt were concerned and upheld for the remaining debt. While the consumer did not appear in the proceedings, a Slovak consumer association sought leave to intervene. It claimed that the enforcement proceedings should be suspended, on grounds of lack of impartiality of the bailiff appointed by the company, but also, on the reason that the court did not properly apply its *ex officio* obligation to protect the consumer, in accordance with the *Pohotovost'* Order (Case C-76/10) and the ruling in Case C-40/08 *Asturcom*. However, intervention of consumer associations at the stage of enforcement was not admissible under national procedural law. It was in this context, that the referring court asked for an interpretation of the Unfair Terms Directive in light also of articles 38 and 47 of the Charter.

The decision of the Court

Admissibility of the request

Serious doubts were raised as to whether the case was still *pending*. The company had already withdrawn its application for enforcement and appealed against the decision of the reference for preliminary ruling. The national court maintained its request and indicated that the case was still pending. The Court relied on this finding of its "*privileged interlocutor*" (Opinion AG Wahl [37]) and accepted jurisdiction. Reference to a recent Order of the Court in *BNP Paribas* (Case C-564/12) demonstrates the importance attached to the requirement of an **actual existence of a dispute**. The situation in that latter case was again very different from the Hungarian procedural system in *Cartesio* (Case C-210/06) that had been ruled incompatible with the Treaties.

Reasoning on the merits

The Court first reiterates its line of case-law on the obligation of national courts to raise *ex officio* the unfairness of contractual terms as a means to establish an effective balance between the parties and ensure the effectiveness of the protection under the Unfair Terms Directive. Particularly in the context of enforcement of an arbitration award this obligation arises in so far as the national rules of procedure confer on the courts powers to examine the incompatibility of an arbitration award with *national rules of public policy* (par. 42) (which was the case under Slovak law). With regard to the role of consumer associations for the protection of consumers, the Unfair Terms Directive requires that they are given the right to take an action for injunction against the use of unfair terms (*see* Case C-472/10 *Invitel*) (par.43). However this directive contains no provision on the role of consumer associations in individual disputes (par. 45). Thus, the question of a possible right of intervention in such disputes falls upon the national legal order of a Member State in accordance with the principle of procedural autonomy, framed nevertheless by the principles of equivalence and effectiveness (par. 46). The Court was also asked to make an interpretation in light of articles 38 and 47 of the Charter. The reasoning followed is within the spirit of Case C-413/12 *Asociacion de Consumidores Independientes de Castilla y Leon*, where the procedural position of consumer associations was distinguished from that of individual consumers as not characterized by the same imbalance.

With respect first to **article 38 of the Charter**, the Court finds that since the Unfair Terms Directive "*does not expressly provide for a right for consumer protection associations to intervene in individual disputes involving consumers, Article 38 of the Charter cannot, by itself, impose an interpretation of that*

directive which would encompass such a right" (par. 52). This part of the reasoning seems to confirm the qualification of article 38 of the Charter as a **principle** judicially cognisable under the conditions of article 52(5) Charter (Opinion AG Wahl, par.66; *see* Opinion AG Cruz Villalón Case C-176/12 *Association de médiation sociale*). As long as the Unfair Terms Directive – the legislation giving "*specific substantive and direct expression to the content of the principle*" (AG Cruz Villalón, par.63) contained in article 38 Charter – does not establish a right of intervention, such right cannot find a constitutional foundation alone in article 38 Charter.

Quid on article **47 of the Charter** on a right to effective remedy? Reliance on this right is assessed on the one hand for the consumer and on the other hand for the consumer association. As far as the consumer is concerned, the lack of an intervention right of consumer associations does not breach the right to an effective remedy "*to the extent that Directive 93/13 requires that the national court hearing disputes between consumers and sellers or suppliers take positive action unconnected with the actual parties to the contract*" (par. 53). This part of the reasoning appears to elevate the principle of an active judge to a component of effective judicial protection. Intervention of consumer associations is moreover "*not comparable to the legal aid which under Article 47 of the Charter must be made available, in certain cases, to those who lack sufficient resources*" (art. 53).

As far as the consumer association is concerned the refusal to grant it leave to intervene "*does not affect its right to an effective judicial remedy to protect its rights as an association of that kind, including its rights to collective action*" (par.54). Besides, consumer associations can acquire a procedural role in individual proceedings since under national law, they "*may directly represent consumers in any proceedings, including enforcement proceedings, if mandated to do so by the latter*" (par. 55).

In consideration of the above the Court concludes that the Unfair Terms Directive read in conjunction with articles 38 and 47 of the Charter "*must be interpreted as not precluding national legislation which does not allow a consumer protection association to intervene in support of a consumer in proceedings for enforcement, against the latter, of a final arbitration award*".

It needs to be noted that Opinion AG Wahl drew also conclusions from the minimum harmonization character of the Unfair Terms Directive in that it would

in any event not preclude Member States from providing "*supplementary action… to the court's unconnected, positive action required by that directive*" (par.72).

French Court Rules Court of the Child's Initial Habitual Residence Retains Jurisdiction

By Céline Camara

Céline Camara is a research fellow at the Max Planck Institute Luxembourg.

On 5 March 2014 the French Supreme Court for Private and Criminal Matters (*Cour de cassation*) ruled that in child abduction cases, the Court of the initial habitual residence of the child retains jurisdiction to decide over parental responsibility matters pursuant to Article 10 of Regulation 2201/2003 of 27 November 2003 (Brussels IIbis). The decision is available here.

In June 2011, Mr. Y (the French father) filed a request for sole custody of his daughter H (born in France) and for the suspension of Ms. X's (the Belgian mother) right of access in France. The French courts rendered a favourable outcome in July 2011. In the meantime, Mrs. X left France and abducted the child to Belgium after having brought a claim for sole custody before Belgian courts. In August 2011, Mr. Y submitted a request for the child's return under the 1980 Hague Convention. In the absence of any return order, he took it on himself to bring his daughter to France in October 2011. H. was 8 months old and her mother was still breastfeeding her at that time. One month later, Belgian courts granted sole custody to the mother.

In June 2012, Ms. X lodged an appeal to contest the jurisdiction of French courts concerning parental responsibility matters, claiming that French courts do not have jurisdiction because H's habitual residence is in Belgium and that Court of Appeal did not take into consideration the impact of the child's removal from

Belgium by the father.

The Court of Appeal dismissed the appeal although mentioning that the child's removal from Belgium by the left behind parent was "brutal" and "unfortunate".

The *Cour de cassation* decision revolves around Article 10 of Regulation 2201/2003, which holds that the courts of the child's habitual residence before the abduction should retain jurisdiction until the child has acquired a new habitual residence in another Member State and either (a) the (other) person having custodial rights gives their consent or (b) the child has resided in that Member State for at least one year.

According to the *Cour de Cassation* those requirements were not met.

More interesting than the decision itself, is the emphasize the *Cour de Cassation* placed on the fundamental objectives of Brussels IIbis return mechanism by referring to ECJ case law (notably Deticek, C 403/09 PPU and Povse, C 211/10 PPU): Firstly by reaffirming that Regulation 2201/2003 aims at deterring child abductors and secondly by mentioning the objective of prioritizing the return of the child to his initial habitual residence.

While hardly surprising, the decision is nonetheless to be welcomed. Indeed, the child initial habitual residence is the *forum conveniens* to decide on custody issues. In this light, the decision appears to be exemplary and in line with the objectives of Brussels IIbis which is to strengthen the return mechanism set by the Hague Convention 1980 and to deter abductions.

Besides, the strict application of the return mechanism sheds light on the shift of profile of the abductor. The 1980 Hague Convention drafters elaborated the return mechanism based on the fact that the mother used to be the primary caretaker and therefore she would be the first beneficiary of such return mechanisms. Nowadays however, fathers tend to have more custodial rights and 2/3 of cases concerns mother abductors.

The facts of this case accurately reflect the difficult practical consequences of this shift: On the one hand, the powers of the court of habitual residence and the deterring effect of the return mechanism have to remain the primary considerations. On the other hand it has to be acknowledged that the left behind parent's reaction can factually undermine the best interests of the child.

CJEU Rules on Relationship between 5 No. 1 and 3 Brussels I

By Matthias Lehmann, Professor at Martin Luther University, Halle-Wittenberg

On 13 March 2014, the ECJ has rendered a significant decision on the Brussels I Regulation. Brogsitter (Case C-548/12) concerns the complex relationship between contractual and tort claims under Article 5 No 1 and 3 of the Regulation. The new key phrases coined by the ECJ in this regard are the following (emphasis is mine):

"However, the mere fact that one contracting party brings a civil liability claim against the other is not sufficient to consider that the claim concerns 'matters relating to a contract' within the meaning of Article 5(1)(a) of Regulation No 44/2001.

That is the case only where the conduct complained of may be considered a breach of contract, which may be established by ***taking into account the purpose of the contract****.*

That will a priori be the case ***where the interpretation of the contract*** *which links the defendant to the applicant* ***is indispensable to establish the lawful or****, on the contrary****, unlawful nature of the conduct*** *complained of against the former by the latter.*

It is therefore for the referring court to determine whether the purpose of the claims brought by the applicant in the case in the main proceedings is to seek damages, ***the legal basis for which can reasonably be regarded as a breach of the rights and obligations set out in the contract*** *which binds the parties in the main proceedings, which* ***would make its taking into account indispensable in deciding the action****."*

The facts of the underlying case are as follows: Brogsitter, a German watch manufacturer, entered into a contract with a Swiss resident whereby the latter

undertook to design watches on his behalf. The Swiss resident and his French company also developed other watches, which they marketed independently. Brogsitter sued them both in Germany alleging that they had agreed to work exclusively for him. The peculiarity of the case rests on the fact that he did not base his claim on contract law, but rather on the law of torts. Specifically, he invoked a violation of § 18 of the German Act against Unfair Competition (Gesetz gegen unlauteren Wettbewerb – UWG), which prohibits the use of models provided by other persons. In addition, he also claimed that the defendants had disrupted his business and committed fraud and breach of trust. All of these grounds lead to tortuous liability under German law (§ 823 para. 1, 2, § 826 BGB). Nevertheless, the German court wondered whether the claim would fall under Article 5 No 1 Brussels I Regulation given the existence of a contract between the parties.

The ECJ responded cautiously by choosing to leave the ultimate decision concerning the proper categorisation to the national court. It did however offer some insight into the relationship between Article 5 No 1 and 3 of the Regulation. After the usual repetitions about the principle of autonomous interpretation, it made clear that the court must take the purpose of the contract into account. Moreover, it held that a claim must be considered contractual if an interpretation of the agreement is "indispensable" to establishing the legality or illegality of the act and to deciding on the action. It used the term "reasonably" to circumscribe how the national court must carry out the autonomous categorisation. It remains to be seen how these guidelines will be applied by the referring court and in future cases.

European conference on international child abduction, The

Hague 7-10 May 2014

On 7-10 May the International Child Abduction Center of the Netherlands (Centre IKO) will host a conference for family lawyers who work in the field of in international parental child abduction. The event will take place in the Peace Palace in The Hague.

The conference is part of LEPCA (Lawyers in Europe on Parental Child Abduction), a project funded by the European Commission.

Speakers include mr Fred Teeven (Dutch Secretary of State for Security and Justice), mr Christophe Bernasconi (Secretary General of the Hague Conference on Private International Law), mrs Joanna Serdynska (European Commission DG Justice), and mr Lo Voi (Eurojust).

The remainder of the conference will take the form of interactive seminars on various topics of international child abduction by parents.

For further information and the programme see http://www.lepca.eu.

ECHR Rules on Enforcement of Judgments under Brussels I

On 25 February 2014, the European Court of Human Rights ruled in the case of *Avotinš v. Latvia* (application no. 17502/07) that the Brussels I Regulation imposes on Member States a duty to enforce judgments in civil and commercial matters, which triggers the Bosphorus presomption of compatibility of the actions of the enforcing state with the European Convention.

The judgment, which is only available in French, reveals a lack of knowledge of European private intenational law instruments by the members of the court.

The Court rules that the foundation of the Brussels I Regulation is mutual trust.

That's of course correct. It then insists that under the Brussels I Regime, declarations of enforceability are granted almost automatically, after mere formal verification of documents. It thus concludes that under the Regulation, Member States are obliged to enforce foreign judgments, and should thus benefit as requested states from the Bosphorus presumption.

> *49. La Cour relève que, selon le préambule du Règlement de Bruxelles I, ce texte se fonde sur le principe de « confiance réciproque dans la justice » au sein de l'Union, ce qui implique que « la déclaration relative à la force exécutoire d'une décision devrait être délivrée de manière quasi automatique, après un simple contrôle formel des documents fournis, sans qu'il soit possible pour la juridiction de soulever d'office un des motifs de non-exécution prévus par le présent règlement » (paragraphe 24 ci-dessus). À cet égard, la Cour rappelle que l'exécution par l'État de ses obligations juridiques découlant de son adhésion à l'Union européenne relève de l'intérêt général (Bosphorus Hava Yollar Turizm ve Ticaret Anonim irketi précité, §§ 150-151, et Michaud c. France, no 12323/11, § 100, CEDH 2012) ; le sénat de la Cour suprême lettonne se devait donc d'assurer la reconnaissance et l'exécution rapide et effective du jugement chypriote en Lettonie.*
>
> *50. Devant les juridictions lettonnes, le requérant soutenait que la citation de comparaître devant le tribunal de district de Limassol et la demande de la société F.H.Ltd. ne lui avaient pas été correctement communiquées en temps utile, de sorte qu'il n'avait pas pu se défendre ; par conséquent, selon lui, la reconnaissance de ce jugement devait être refusée sur la base de l'article 34, point 2, du Règlement. Dans son arrêt du 31 janvier 2007, le sénat de la Cour suprême a écarté tous ses moyens – et, donc, l'application de l'article 34, point 2, du Règlement – en déclarant que, le requérant « n'ayant pas fait appel du jugement, les arguments de son avocat selon lesquels [il] ne se serait pas vu dûment notifier l'examen de l'affaire par un tribunal étranger, n'ont aucune importance ». Cela correspond en substance à l'interprétation donnée à la disposition susmentionnée par la Cour de justice des Communautés européennes dans l'arrêt Apostolides c. Orams, aux termes duquel « la reconnaissance ou l'exécution d'une décision prononcée par défaut ne peuvent pas être refusées au titre de l'article 34, point 2, du règlement no 44/2001 lorsque le défendeur a pu exercer un recours contre la décision rendue par défaut et que ce recours lui a permis de faire valoir que l'acte introductif*

d'instance ou l'acte équivalent ne lui avait pas été signifié ou notifié en temps utile et de telle manière qu'il puisse se défendre » (paragraphe 28 ci-dessus).

This is the part of the reasoning of the court which is plainly wrong. It fails to discuss the relevance of the public policy exception and the margin of appreciation that it offers to requested states to verify whether the state of origin respected fundamental rights.

PRESS RELEASE

The case concerned the enforcement in Latvia of a judgment delivered in Cyprus concerning the repayment of a debt. The applicant, an investment consultant who had borrowed money from a Cypriot company, complained that the Cypriot court had ordered him to repay his debt under a contract without summoning him properly and without guaranteeing his defence rights.

Like the Senate of the Latvian Supreme Court, the Court noted that the applicant should have appealed against the Cypriot court's judgment. It took the view that the Latvian authorities, which had correctly fulfilled the legal obligations arising from Latvia's status as a member State of the European Union, had sufficiently taken account of Mr Avotinš'

PRINCIPAL FACTS

The applicant, Peteris Avotinš, is a Latvian national who was born in 1954 and lives in the district of Riga (Latvia).

On 4 May 1999 Mr Avotinš and F.H.Ltd., a commercial company registered in Cyprus, signed before a notary a formal acknowledgement of his obligation to repay a debt. Mr Avotinš declared that he had borrowed 100,000 United States dollars from F.H.Ltd. and undertook to repay that amount with interest before 30 June 1999. The document stated that it would be governed "in all respects" by the laws of Cyprus and that Cypriot courts would have jurisdiction to hear all disputes arising from it.

In 2003 F.H.Ltd. sued Mr Avotinš in the court of Limassol (Cyprus), declaring that he had not repaid his debt and seeking an order against him. On 24 May 2004, ruling in his absence, the Cypriot courts ordered Mr Avotinš to repay his debt together with interest and costs and expenses. According to the judgment, the

applicant had been duly informed of the date of the hearing but had not appeared.

On 22 February 2005 F.H.Ltd applied to the court for the district of Latgale (Riga) seeking the recognition and enforcement of the Cypriot judgment of 24 May 2004. The company also called for an interim measure of protection.

On 27 February 2006 the Latvian court ordered the recognition and enforcement of the Cypriot judgment of 24 May 2004 and the registration of a charge against Mr Avotinš' property in the land register.

Mr Avotinš claimed that he had became aware, by chance, on 16 June 2006, of the existence of both the Cypriot judgment and the Latvian court's enforcement order. He did not attempt to challenge the Cypriot judgment before the Cypriot courts but appealed in the Regional Court of Riga against the Latvian enforcement order.

In a final judgment of 31 January 2007 the Senate of the Latvian Supreme Court upheld F.H. Ltd.'s claim, ordering the recognition and enforcement of the Cypriot judgment together with the registration of a charge against the applicant's property in the land register. On the basis of that judgment, the court of Latgale delivered a writ of execution and Mr Avotinš complied by repaying his debt. The registered charge on his property was lifted shortly afterwards.

The applicant complained that by enforcing the judgment of the Cypriot court, which in his view was clearly unlawful as it disregarded his defence rights, the Latvian courts had failed to comply with Article 6 § 1 (right to a fair hearing within a reasonable time).

The application was lodged with the European Court of Human Rights on 20 February 2007.

JUDGMENT

Article 6 § 1

The Court noted that the judgment on the merits had been delivered on 24 May 2004 by the Cypriot court and the Latvian courts had ordered its enforcement in Latvia. Having, by a partial decision on 30 March 2010, declared inadmissible the complaint against Cyprus as being out of time, the Court did not have jurisdiction to decide whether or not the court of Limassol (Cyprus) complied with the

requirements of Article 6 § 1. It was nevertheless for the Court to decide whether, in ordering the enforcement of the Cypriot judgment, the Latvian judges complied with the provisions of Article 6 § 1 of the Convention.

The Court observed that the fulfilment by the State of the legal obligations arising from its membership in the European Union was a matter of general interest. The Senate of the Latvian Supreme Court had a duty to ensure the recognition and the rapid and effective enforcement of the Cypriot judgment in Latvia.

Mr Avotinš had argued before the Latvian courts that the summons to appear before the court of Limassol and the statement of claim by the company F.H.Ltd. had not been properly served on him in a timely manner, with the result that he had not been able to defend himself. Consequently, the Latvian courts should have refused the enforcement of the Cypriot judgment.

The Court observed that, in its final judgment of 31 January 2007, the Senate of the Latvian Supreme Court had declared that Mr Avotinš had not appealed against the Cypriot judgment. Mr Avotinš had indeed not sought to lodge any appeal against the Cypriot court's judgment of 24 May 2004. Mr Avotinš, an investment consultant who had borrowed money from a Cypriot company and had signed a recognition of debt governed by Cypriot law with a clause conferring jurisdiction on the Cypriot courts, had accepted his contractual liability of his own free will: he could have been expected to find out the legal consequences of any non-payment of his debt and the manner in which proceedings would be conducted before the Cypriot courts.

The Court took the view that Mr Avotinš had, as a result of his own actions, forfeited the possibility of pleading ignorance of Cypriot law. It was for him to produce evidence of the inexistence or ineffectiveness of a remedy before the Cypriot courts, but he had not done so either before the Senate of the Latvian Supreme Court or before the European Court of Human Rights.

Having regard to the interest of the Latvian courts in ensuring the fulfilment of the legal obligations arising from Latvia's status as a member State of the European Union, the Court found that the Senate of the Latvian Supreme Court had sufficiently taken account of Mr Avotinš' rights.

There had been no violation of Article 6 § 1 in the present case.

Enhancing Mutual Trust – Codification of the European Conflict of Laws Rules: Some of the EU Commission's Visions for the Future of EU Justice Policy

By Matthias Weller

Prof. Dr. Matthias Weller, Mag.rer.publ., Chair for Civil Law, Civil Procedure and Private International Law, EBS University of Economics and Law; Director of the Research Center for Transnational Commercial Dispute Resolution, EBS Law School

On 11 March 2014 the European Commission presented its vision for the future EU justice policy until 2020. In its Press Release "Towards a true European area of Justice: Strengthening trust, mobility and growth", the Commission identifies three key challenges after the forthcoming end of the European Council's Stockholm Programme on 1 December 2014: Enhancing mutual trust, facilitating mobility and contributing to economic growth. Against the background of the "Assises de la Justice" held in Brussels in November 2013 the Commission, by outlining its own vision of the future EU justice policy, intends to further feed the discussion on the way to the European Council on 24 June 2014. The most comprehensive document is the Communication on the EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union (COM [2014] 144 final of 11 March 2014.

In this document the Commission, after summarizing the development of the European area of freedom, security and justice from Maastricht via Amsterdam and Nice to Lisbon as well as from the European Councils at Tampere via The Hague to Stockholm, further substantiates what it means by the three key challenges identified in its press release:

Firstly, “mutual trust” is evoked as the “bedrock upon which EU justice policy should be built”, namely by “building bridges between the different justice systems”, in particular by mutual recognition. Whereas the European legislator has so far simply postulated a sufficient degree of mutual trust amongst the Member States in order to justify obligations for mutual recognition in respect to the judicial cooperation in civil matters, the European Commission now is acknowledging that mutual trust must be strengthened or even built in the first place – a view that has up to now been taken only in respect to criminal matters. But with only 24% of people trusting their own national justice system for example in Slovenia, or 25% in Slovakia, it appears hardly possible to continue presuming a sufficient level of trust, let alone mutual trust.

In this context, the Commission suggests a new framework to safeguard the rule of law in the European Union. In its Communication to this proposal, the Commission explains that this framework is to operate as a “pre-Article 7 TEU procedure” addressing “systemic threats” to the rule of law consisting of three stages, namely a “rule of law warning” to be issued by the Commission to the respective Member State, a “rule of law recommendation” and on the third level a monitoring of the implementation of the recommendations before resorting to the “nuclear option” of Article 7 TEU that allows under certain conditions the suspension of (mainly voting) rights of Member States under the Treaties. The Commission makes crystal clear that its initiative is not meant to deal with individual breaches of fundamental rights or any miscarriage of justice in a particular case. Infringements of the rule of law other than “systemic” ones are to be taken care of – as before – by the national judicial systems including those provided for by the European Convention on Human Rights.

However, if some national judicial systems are perceived by the public or even evaluated by the Commission under its proposed pre Article 7 TEU procedure not to be sufficiently trustworthy, there is a problem both conceptually for building bridges through mutual recognition to the judicial system of such a Member State as well as for the individual suffering or threatened to suffer from a (non-systemic) violation of the rule of law in his / her particular case. One answer to the individual’s problem obviously is allowing exceptions to mutual recognition, i.e. public policy-clauses. Therefore, if the Commission is now acknowledging that there may be the need to strengthen mutual trust in respect to certain Member States, it would be contradictory to further pursue at the same time limitations or

even deletions of public policy clauses as it was proposed for the Brussels I Recast. Rather, the Commission itself should trust the Member States that they do not misuse public policy exceptions. Mutual trust does not only operate horizontally but also vertically. It is difficult enough for the aggrieved party to argue and prove a case of violation of public policy. An obvious question not raised by the Commission in this context would be whether initiating pre Article 7 proceedings should affect in any way obligations of other Member States to recognize judicial acts from the Member State addressed by the Commission (possibly depending on the nature of observations made by the Commission), for example by reducing the degree of probability for public policy violations that must be shown in order to benefit from this exception of recognition.

Secondly, the Commission wants to enhance mobility of EU citizens, inter alia by further removing obstacles and "practical and legal difficulties" in respect to e.g. cross-border family matters

Thirdly, the Commission intends to promote economic growth. Interestingly, the envisaged "structural reforms … to be pursued so as to ensure that justice systems are capable of delivering swift, reliable and trustworthy justice" appear to be understood as part of that strategy for economic growth rather than primarily as a core element of the rule of law.

Most interestingly, of course, is the Commission's vision on how to address these challenges:

One core element is the "codification of existing laws" which is perceived to "facilitate the knowledge, understanding and the use of legislation, the enhancement of mutual trust as well as consistency and legal certainty while contributing to simplification and the cutting or red tape". The Commission, having adopted since 2000 "a significant number of rules and civil and commercial matters as well as on conflict of laws", suggests that "the EU should examine whether codifications of the existing instruments could be useful, notably in the area of conflict of laws". It seems that the Commission proclaims the idea of codification in particular for the numerous –existing and forthcoming – instruments on the conflict of laws. From a continental perspective this would certainly be strongly welcomed because a codification would provide the chance to remove inconsistencies such as e.g. different rules on choice-of-law agreements in different instruments and would motivate for systematic thinking about

complementing such a codification with rules on general issues like, for example, the handling of preliminary questions or of the characterization or the interpretation of recurrent connecting factors. It would be an interesting question whether not only the Rome instruments but also the Brussels instruments should be part of such a codification. Since the newest instruments contain both jurisdictional rules as well as choice of law-rules, a possible codification should include all European instruments on private international law.

Complementing the codification of European conflict of laws rules would perfectly fit in the second tool by which the Commission envisages to address the challenges for the EU Justice Agenda which is – "complementing" existing EU law where appropriate, so far proposed by the Commission for the service of documents and the taking of evidence.
Last not least, the Commission considers "facilitating citizens' lifes" in all areas where mobile citizens still encounter problems. For example, "related to civil status records, the EU should assess the need for further action such as rules on family names to complement existing proposals to facilitate the acceptance of those public documents which are of particular practical relevance when citizens or business make use of their free movement rights". Is the Commission thinking of codifying the recent case law of the ECJ in *Garcia Avello, Grunkin Paul* and the following judgments? This would again perfectly fit in the tool box for addressing the challenges for the EU Justice Agenda that consists of – codifying and complementing. Why not complementing by codifying? In that case, the question arises how rules on this area of conflict of laws in direct light of the primary rights of the mobile citizens from Articles 20 and 21 TFEU could be formulated. Methodically, the Commission holds all doors open: "Complementing" may include "mutual recognition" as well as "traditional harmonization".

Workshop on vested rights theory

and conference on protection of adults in Ferrara

The Department of Law of the University of Ferrara will host, on 3 April 2014, the fourth Ferrara Workshop on Private International Law (see here and here for previous editions). The invited speaker, Samuel Fulli-Lemaire (Paris II) will give a presentationtitled “The vested rights theory: relevant at last or as useless as ever?”. He will be joined in the discussion by Fabrizio Marongiu Buonaiuti (University of Macerata) and Giulia Rossolillo (University of Pavia).

A conference (in Italian) will be held on 4 April concerning the international protection of vulnerable adults in view of the possible ratification of the Hague Convention of 13 January 2000 by Italy.

The conference will consist of two sessions, chaired by Stefania Bariatti (University of Milan) and Cristina Campiglio (University of Pavia). The first session will provide an illustration of the Convention. The second will address the main issues surrounding its implementation in the Italian legal order and the coordination of uniform and national rules.

Speakers include academics, judges, notaries, lawyers, officials from the Italian Ministries of Justice and Foreign Affairs as well as representatives of ONGs working in the field of disability rights. The conference will be opened by Francesco Azzarello, Ambassador of Italy in theNetherlands.

For further information: pietro.franzina@unife.it