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

By Céline Camara

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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

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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

French Supreme Courts rules on Personal Scope of Waiver of Immunity of Enforcement

By Vincent Richard

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On March, 5th, 2014, the French Supreme Court for private and criminal matters (*Cour de Cassation*) set aside an enforcement measure carried out by a Swiss company (Romak SA Geneva) against the Republic of Uzbekistan (here).

Facts

In 1996, an Uzbek company (Uzdon) signed a contract with Romak for the delivery of wheat to Uzbekistan. The price agreed was never paid by the Uzbek company and Romak initiated arbitral proceedings in front of the GAFTA. In August 1997, a GAFTA arbitral award ordered Uzdon to pay approximately 10 million dollars to Romak SA Geneva. This award was declared enforceable in France and in November 2009 Romak proceeded to attach a bank account opened by the Republic of Uzbekistan at the Paris branch of HSBC Bank. The Republic of Uzbekistan challenged this attachment in front of a French enforcement court.

Personal Scope of Waiver of Immunity

Uzbekistan claimed that the HSBC bank account under the name Uzbekistan Airways was supplied by air navigation charges and thus covered by enforcement immunity as resulting from public powers activities. The Swiss Company did not contest the origin of the funds but argued that they were not covered by State immunity. This argument was based on the fact that these funds were escrowed in favour of a lending Japanese company in order to guarantee a loan where Uzbekistan clearly waived its immunity.

Unsurprisingly, the enforcement court declared that the waiver of immunity was made solely in favour of the Japanese company for the purpose of the loan and could not be extended to all creditors of Uzbekistan. The Court considered that the funds were covered by Uzbekistan enforcement immunity and the attachment was thus annulled. This decision was confirmed by the Court of Appeal and by the French Supreme Court.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (2/2014)

Recently, the March/April issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

- ***Moritz Renner/Marie Hesselbarth***: "Corporate Control Contracts and the Rome I Regulation"

The article deals with the law applicable to control contracts within a group of corporations in the sense of §§ 291 et seq. AktG. Here, the Rome I Regulation calls for a reassessment of current conflict-of-laws approaches. As the article seeks to show, applying the Rome I Regulation to corporate control contracts demands a contractual qualification of the latter. Interpreting the notions "contractual obligations" and "questions governed by the law of companies" according to EU law methods leads to an extensive definition of the former and a narrow scope of application of the latter provision. Two aspects merit special attention. First, a systematic comparison to the Brussels I Regulation has to be drawn. Under Brussels I, the ECJ has extensively interpreted the term "contractual relation", especially in contrast to company law questions. Secondly, primary EU law, namely the freedom of establishment, demands contractual freedom of choice for corporate control contracts. Domestic law provisions protecting creditors and minority shareholders can be applied as overriding mandatory provisions in the sense of art. 9 Rome I Regulation.

- ***Jürgen Stamm***: "A plea for the abandonment of the European account preservation order – Ten good reasons against its adoption"

The cross-border enforcement of claims shall be facilitated by the adoption of a European account preservation order. In view of the heterogeneous enforcement systems of the EU Member States this undertaking resembles the attempt to introduce a European enforcement law through the back door. In addition, the current draft of a Council Regulation considers neither the constitutional principles nor the system of the Council Regulation (EC) No.

44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The following article illuminates these aspects and makes suggestions to reduce obstacles to the cross-border enforcement of claims in the existing system of Council Regulation (EC) No 44/2001.

- ***Oliver L. Knöfel:*** "A new approach to EU Private International Law for seamen's employment agreements: with special reference to the employer's engaging place of business"

The article reviews a judgment of the European Court of Justice (Fourth Chamber) of 15 December 2011 (C-384/10), relating to the construction of Article 6(2)(b) of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations. Dealing with labour aboard a sea-going vessel, the ECJ ruled that the concept of "the place of business through which the employee was engaged" must be understood as referring exclusively to the place of business which engaged the employee and not to that with which the employee is connected by her actual employment. Thus, the ECJ approaches a modern classic of European conflicts law in employment matters, but unfortunately takes the wrong side in a long-standing controversy between a "contract test" and a "function test". The author analyses the relevant issues of cross-border labour in the transportation sector, explores the decision's background in EU private international law, and discusses its consequences for the coherency and justice of the system of connecting factors in Art. 6 Rome Convention/Art. 8 Rome I Regulation.

- ***Herbert Roth***: "Europäischer Rechtskraftbegriff im Zuständigkeitsrecht?"– the English abstract reads as follows:

The European Court of Justice has developed an autonomous conception of substantive res judicata concerning a special question of the international jurisdiction of the courts. The claim dismissing adjudication by first instance courts comprises, inter alia, the prejudicial question of the validity of a choice-of-forum clause, which shall be binding on the Court of recognition in accordance with Art. 33 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The decision must be rejected because the interests of

the parties are not taken into account sufficiently.

- ***Nils Lund***: "Der Rückgriff auf das nationale Recht zur europäisch-autonomen Auslegung normativer Tatbestandsmerkmale in der EuGVVO"– the English abstract reads as follows:

The ECJ's decision discussed in this article concerns two provisions of the Brussels I Regulation. In the first part of its ruling the ECJ has held that the concept of "civil and commercial matters" of Art. 1(1) includes an action for recovery of an amount unduly paid by a public body in compensation of an act of persecution carried out by a totalitarian regime. The second part of the decision, that is concerning Art. 6(1), clarifies that a "close connection" between the claims exists if the defendant's pleas have to be determined on a uniform basis and that the provision does not apply to defendants domiciled outside of the EU. Regarding the approach of the court to the interpretation of the terms "civil and commercial matters" and "close connection", this article concludes that the autonomous construction of the Regulation does in certain cases allow for the recourse on national law.

- ***Reinhold Geimer:*** "Streitbeendigung durch Vergleich in Südafrika"
- ***Jan D. Lüttringhaus: "***Eingriffsnormen im internationalen Unionsprivat- und Prozessrecht: Von Ingmar zu Unamar" – the English abstract reads as follows:

Thirteen years after the landmark Ingmar case, the ECJ has again been asked to define the concept of overriding mandatory provisions and, in particular, to characterise national rules transposing Directive 86/653/EEC on commercial agents. Whereas in Ingmar the parties had chosen the law of a non-EU-Member State that did not provide for a level of protection required by European law, Unamar involves a scenario where the law designated by the parties is the law of a Member State which meets the minimum requirements laid down by Directive 86/653/EEC. The question brought before the ECJ in the case at hand is whether the court of another EU Member State may nonetheless apply its national provision as overriding mandatory rules on the grounds that the protection of a commercial agent under the lex fori goes beyond that provided for by the European Directive. Since the ECJ answers this question in the

affirmative, Unamar may have far-reaching consequences for the system of European private international law.

- ***Dirk Looschelders***: "Continuance or Extinction of Parental Responsibility after a Change of Habitual Residence"

Different legal systems provide very different rules for determining the parental responsibility of non-married parents. Therefore, if the habitual residence of the child changes, the joint responsibility of non-married parents established under the law of the child's former residence state may become extinct under the law of the new residence state. In order to avoid this unreasonable result, Article 16 (3) of the 1996 Hague Convention on the Protection of Children expressly rules that parental responsibility which exists under the law of the state of the child's habitual residence persists after a change of that habitual residence to another state. However, Article 16 (3) is not applied in German courts if the child's habitual residence changed before the Convention came into force in Germany on 1 st January 2011. In such cases, joint parental responsibility appears to cease.

The present decision of the Oberlandesgericht Karlsruhe shows that the problems usually can be solved by a judicial order awarding parental responsibility back to both parents. Nevertheless, with regard to cases of child abduction it is preferable to maintain joint parental responsibility on a continuing basis by limiting changes in the law governing parental care according to Article 21 EGBGB.

- ***Florian Eichel:*** "The application of s. 287 of the German Code of Civil Procedure (investigation and estimation of damages) within the scope of the Rome I and Rome II Regulations"

S. 287 of the German Code of Civil Procedure (dZPO) empowers a court to estimate a damage at its discretion and conviction, when the issue of whether or not damages have occurred is in dispute among the parties. The assessment is based on the court's evaluation of all circumstances. The court, therefore, may decide at its discretion whether or not – and if so, in which scope – any taking of evidence should be ordered as applied for, or whether or not any experts should be heard. Where the law to be applied is foreign law, the

question arises whether a German court may refer to s. 287 dZPO as lex fori or whether s. 287 dZPO has to be classified as substantive law preventing the court from estimating the damage when such a rule is unknown by the lex causae. Recently, two German district courts adopted a different view on this issue and, thus, produced different outcomes of two lawsuits with comparable facts. Whereas this question has been in dispute in the German doctrine of international civil procedure for decades, the Rome I/II Regulations set a new legal reference for this discussion: Due to the fact that s. 287 dZPO concerns both the law of assessment of damages and the law of procedure, not only Article 1(3) of each regulation, but also Article 12(1)(c) Rome I and Article 15(c) Rome II Regulation have to be considered. The essay argues that the application of a rule like s. 287 dZPO is neither affected by Articles 12(1)(c)/15(c) nor by Articles 18/22 Rome I/II Regulation and remains applicable pursuant to their Article 1(3).

- ***Andreas Fötschl***: "No Application of the Lugano Convention for Plaintiffs from Third States – The Decision of the Norwegian Highest Court in Raffels Shipping v. Trico Subsea AS"

The decision of the Norwegian Highest Court on 20 December 2012 deals with the question of whether a Norwegian court has jurisdiction over an international dispute, concerning a ship-broker's commission, between a plaintiff from Singapore and a defendant registered in Norway. This depended upon whether the Norwegian courts should apply the Lugano Convention in a case where the plaintiff is registered in a Third State and the dispute has no connection to the Contracting States, other than the fact that the seat of the defendant is located in the forum. The Norwegian Highest Court refused to apply the Lugano Convention and applied the Norwegian rules on international jurisdiction instead, which include a statutory requirement comparable to the doctrine of forum non conveniens.

- ***Friedrich Niggemann:*** "Eine Entscheidung der Cour de cassation zu Art. 23 EuGVVO – Fehlende Einigung, fehlende Bestimmbarkeit des vereinbarten Gerichts oder Inhaltskontrolle?" – the English abstract reads as follows:

In its decision of 29.9.2012 the French Cour de cassation held that a choice of

forum clause is void which provides for the exclusive jurisdiction of the courts at a bank's seat (Luxembourg), but allows the bank to sue its client at any other jurisdiction. The court found that the clause fails to correspond to the sense and purpose of Art. 23 of the Brussels I Regulation; it only binds the client and contains an element of arbitrary ("un element potestatif") in favor of the bank. Clauses of this kind are frequent in banking contracts and financing transactions. The Cour de cassation uses terminology of French law, which gives rise to the question whether it abides by the principle of autonomous interpretation. Further it appears to introduce into Art. 23 of the Brussels I Regulation an element of appreciation of equal rights of the parties.

- ***Hilmar Krüger:*** "Zur Anerkennung nicht begründeter ausländischer Entscheidungen in der Türkei"
- ***Hilmar Krüger:*** "Zum obligatorischen Gebrauch der türkischen Sprache in Schiedsverträgen"
- ***Florian Heindler:*** "Precedence of the 1996 Hague Child Protection Convention over the Brussels IIbis Regulation when leaving the EU"

The annotated judgement focuses on the question of international jurisdiction for parental responsibility cases. If the habitual residence of a child changes during a pending procedure in Austria, and the new place of habitual residence is in Australia (contracting state to the Hague Convention 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children), Art. 5 no. 2 Hague Convention 1996 shall be applied. Thus, Australian institutions have jurisdiction and contradicting Austrian decisions shall be annulled by Austrian courts. Judgements rendered before the change of the habitual residence remain in force, however, they can be replaced by courts at the child's new place of habitual residence. Contrary to Art. 5 no. 2 Hague Convention 1996, Art. 8 no. 1 Brussels IIa Regulation stipulates jurisdiction of the Member State court "over a child who is habitually resident in that Member State at the time the court is seized" (perpetuatio fori). Neglecting this provision, the Austrian Supreme Court (OGH) applied Art. 5 no. 2 Hague Convention. Hence, the decision of the appellate court had to be set aside, because jurisdiction was denied without establishing at which date the habitual residence in Australia commenced.

- ***Hilmar Krüger:*** "Zum Problem der Brautgabe im türkischen Recht"
- ***Tong XUE***: "New Rules from the Supreme People's Court: The first Judicial Interpretation of the Chinese Choice of Law Rules Act"

On 10 December 2012, the Supreme People's Court promulgated the Interpretation on issues concerning the application of the Act of the People's Republic of China on Application of law in Civil Relations with Foreign Contacts, which came into effect as of 7 January 2013. This Interpretation reconstructs the sources of law of Chinese conflict of laws rules and gives a number of detailed regulations on various specific issues, such as preliminary question, mandantory rules, party autonomy, habitual residence and proof of foreign law. Beginning with a short introduction to the background of these judicial rules this article will deliver a detailed insight into these new rules with moderate analysis.

- ***Erik Jayme:*** "Der internationale Rechtsverkehr mit den lusophonen Ländern – Jahrestagung der Deutsch-Lusitanischen Juristenvereinigung in Hamburg"

New Papers on Business and Human Rights

"Business, Human Rights And Children: The Developing International Agenda", by O. Martin-Ortega and R. Wallace, has been published in *The Denning Law Journal* 2013, vol 25, pp 105 – 127. The following excerpt illustrates the contents:

> "The instruments analysed in this article are part of an important trend: the development of a comprehensive response to the risks children's rights face from business activities. Until recently international focus has been somewhat ad hoc and sector-specific. This has been evidenced by the concentration on the regulation of child labour and economic exploitation of children and the consequences of the privatisation of public services on their rights. The

> international legal instruments regulating these spheres placed the responsibility in the fulfilment of the rights of the child exclusively on states. However, both the CRB Principles and General Comment 16 acknowledge a responsibility of business vis-à-vis children's rights beyond that of the state (…). Whilst only states have direct obligations with regards to children's rights, increased recognition of business responsibilities in instruments such as the ones analysed here, contribute to (…) the creation of fertile ground for increased demands on business. This may lead to indirect obligations in international law and the development of direct obligations in national systems.
>
> The CRB Principles and General Comment 16 are also important because they are based on the conception of children as rights bearers. This goes beyond the traditional perception, in the context of business activities, that children are mainly objects of protection from economic exploitation and abuse as members of the labour force or recipients of welfare services."

Still in the domain of business and human rights, another recent (and critical) publication of Prof. Zamora Cabot is worth mentioning – this time on the USSC Daimler decision: "Decisión del Tribunal Supremo de los Estados Unidos en el caso Daimler Ag v. Bauman et al.: Closing the Golden Door" (Papeles *El tiempo de los derechos*, 2014, 2).

To download click here (in Spanish).

New Book on Interregional Enforcement of Judgments

Jie Huang, who is is an Associate Professor of Law and Associate Dean at Shanghai University of International Business and Economics School of Law and Director of China Association of Private International Law, has published Interregional Recognition and Enforcement of Civil and Commercial Judgments – Lessons for China from US and EU Law (Hart publishing).

Judgment recognition and enforcement (JRE) between the US states, between EU Member States, and between mainland China, Hong Kong and Macao, are all forms of 'interregional JRE'. This extensive comparative study of the three most important JRE regimes focuses on what lessons China can draw from the US and the EU in developing a multilateral JRE arrangement for mainland China, Hong Kong and Macao.

Mainland China, Hong Kong and Macao share economic, geographical, cultural, and historical proximity to one another. The policy of 'One Country, Two Systems' also provides a quasi-constitutional regime for the three regions. However, there is no multilateral JRE scheme among them, as there is in the US and the EU; and it is harder to recognise and enforce sister-region judgments in China than in the US and the EU. The book analyses the status quo of JRE in China and explores its insufficiencies; it proposes a multilateral JRE arrangement for Chinese regions to alleviate current JRE difficulties; and it also provides solutions for the macro and micro challenges of establishing a multilateral arrangement, drawing upon the rich literature on JRE regimes found in the US and the EU.