First Issue of 2014's ICLQ

The first issue of *International and Comparative Law Quarterly* for 2014 includes several pieces on private international law.

Articles

- Elizabeth B Crawford & Janeen M Carruthers, *Connection and Coherence Between and Among European Instruments in the Private International Law of Obligations*

This article considers points of connection and coherence between and among the Rome I Regulation, the Rome II Regulation, and Regulation 1215, and relevant predecessor instruments. The degree of consistency in aim, design and detail of conflict of laws rules is examined, vertically (between/among consecutive instruments) and horizontally (across cognate instruments). Symbiosis between instruments is explored, as is the interrelationship between choice of court and choice of law. Disadvantaged parties, and the cohesiveness of their treatment under the Regulations, receive particular attention.

- Jack Wass, *The Court's In Personam Jurisdiction in Cases Involving Foreign Land*

The Moçambique rule provides that an English court may not adjudicate on title to foreign immovable property. This article considers the primary exception to that rule: where the court assumes jurisdiction in personam to enforce a contractual or equitable claim concerning foreign immovable property against a defendant subject to the court's personal jurisdiction. It addresses two questions: how should the English court decide whether to assume jurisdiction in relation to foreign land, and if the positions are reversed, should an English court recognize or enforce the order of a foreign court affecting English land? As to the first question, this article argues that the orthodox English approach is anachronistic. English law applies the lex fori exclusively to determine whether an obligation exists which the court has jurisdiction to enforce. Instead, modern conflict of laws principles demand that the court should apply the proper law of the substantive claim in determining whether a sufficient equitable or contractual obligation exists. As to the second question, this article

argues that despite the prevailing view that foreign non-money judgments are not enforceable in England, foreign orders in relation to English land are in principle entitled to recognition in a subsequent action in England by the successful claimant.

Shorter Articles and Notes

- David Kenny, Re Flightlease: *The 'Real and Substantial Connection' Test for Recognition and Enforcement of Foreign Judgments Fails to Take Flight in Ireland*

The common law rules for recognition and enforcement of foreign judgments were radically reformulated by the Canadian Supreme Court in Beals v Saldanha. Few other common law jurisdictions have considered whether or not to follow Canada in this development in private International Law. In 2012, the Irish Supreme Court definitively rejected the Canadian approach. This note examines the judgment in that case, and assesses the reasoning of the Irish Court.

Hague Conference Special Commission on the Service of Process, Evidence and Access to Justice Conventions (Questionnaires)

At its meeting of April 2012 and 2013 the Council on General Affairs of the HCCH agreed for work to be undertaken with a view to preparing a meeting of the Special Commission on the practical operation of the Service of Process, Evidence and Access to Justice Conventions, in May this year. With this aim the Permanent

Bureau has elaborated three questionnaires as a follow up of those prepared in 2008 in view of the previous Special Commision meeting, held in 2009, to ensure that the basic information then gathered is up-to-date. States -both contracting and non-contracting- are requested to answer by **7 March 2014**.

Clik here to see the questionnaires.

International Seminar on Private International Law (Program)

Patricia Orejudo Prieto (Universidad Complutense, Madrid), informs me that the program of the new edition of the International Seminar on Private International Law organized by Prof. Fernández Rozas and Prof. de Miguel Asensio, May 8-9, 2014, is ready. This will be the main speakers and presentations:

Thursday

Hans Van Loon (former General Secretary, the Hague Conference): *Private International law before the World Court: looking back and looking ahead*

Johan Erauw (Ghent University): *New packages for patent disputes across Europe*

Pedro de Miguel Asensio (Complutense University): *El Tribunal Unificado de Patentes y la revisión del Reglamento Bruselas I bis*

Stefania Bariatti (Milan University): *La reforma del Reglamento 1346/2000*

Marta Requejo Isidro (Max Planck Institut for International, European and Regulatory Procedural Law, Luxembourg): *La cooperación en los procedimientos de insolvencia en la propuesta de Reglamento de reforma del Reglamento 1346/2000*

Friday

Dario Moura Vicente (Lisbon University)- *La culpa in contrahendo en el Derecho internacional privado europeo*

Catherine Sargenti (President of ACP Legal) – *La OHADAC y su evolución*

José Carlos Fernández Rozas (Complutense University) – *Ley modelo de la OHADAC de DIPr*

Nathanael Concepción (Funglobe- IGlobal)- *Anteproyecto de Ley de DIPr de la República Dominicana*

Rodolfo Dávalos (La Habana University) – *La armonización del Derecho de sociedades en el ámbito de la OHADAC*

Leonel Péreznieto (Autonomous University of Mexico); Jorge A. Silva (Autonomous University of Ciudad Juárez); Virginia Aguilar (Autonomous University of Mexico): *Codification in Mexico. Ley modelo de Derecho internacional privado de México*

The whole program, including the rest of the speakers and the topics of their papers, can be downloaded here. To register send an email to seminariodiprucm@gmail.com, indicating full name and institution of origin, between 1 February and 30 April 2014.

For further information click here.

Strong on Procedural Choice of Law

Stacie Strong (University of Missouri School of Law) has posted Limits of Procedural Choice of Law on SSRN.

> *Commercial parties have long enjoyed significant autonomy in questions of substantive law. However, litigants do not have anywhere near the same*

amount of freedom to decide procedural matters. Instead, parties in litigation are generally considered to be subject to the procedural law of the forum court.

Although this particular conflict of laws rule has been in place for many years, a number of recent developments have challenged courts and commentators to consider whether and to what extent procedural rules should be considered mandatory in nature. If procedural rules are not mandatory but are instead merely "sticky" defaults, then it may be possible for commercial actors to create private procedural contracts that identify the procedural rules to be used in any litigation that may arise between the parties.

This Article considers the limits of procedural choice of law as both a structural and substantive matter. Structural concerns involve questions of institutional design and the long-term understanding of a sovereign state prerogative over judicial affairs. Structural issues are considered from both a theoretical perspective (including a comparison of consequentialist and deontological models) and a practical perspective (including a discussion of relevant decisions from the Third and Seventh Circuit Courts of Appeals). Substantive concerns focus on matters of individual liberty and the content of fundamental due process rights. These issues are analyzed through analogies to certain non-derogable procedural rights that exist in international commercial arbitration.

This Article addresses a number of challenging questions, including those relating to the proper characterization of different procedural rules (i.e., whether certain procedures are public or private in nature), the core duties of judges and state interests in procedural uniformity and efficiency. Although the discussion focuses primarily on procedural autonomy in international commercial litigation, many of the observations and conclusions are equally applicable in the domestic realm.

The paper is forthcoming in the *Brooklyn Journal of International Law*.

UK Supreme Court Rules on Concept of Habitual Residence of Children

On 14 January 2014, the Supreme Court of the United Kingdom delivered its judgment In the matter of LC (Children) and In the matter of LC (Children) (No 2).

Lord Wilson summarized the principal question raised by the two appeals as follows:

> *Now that it is clear that the test for determining whether a child was habitually resident in a place is whether there was some degree of integration by her (or him) in a social and family environment there, may the court, in making that determination in relation to an adolescent child who has resided, particularly if only for a short time, in a place under the care of one of her parents, have regard to her own state of mind during her period of residence there in relation to the nature and quality of that residence? In my view this is the principal question raised by these appeals.*

The Court issued the following press summary.

BACKGROUND TO THE APPEALS

The appeal relates to the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the Convention") and to section 1(2) of the Child Abduction and Custody Act 1985. It is brought within proceedings issued by a mother (Spanish national living in Spain) against a father (British national living in England) for the summary return of their four children (T' (a girl aged 13), 'L' (a boy aged 11), 'A' (a boy aged 9) and 'N' (a boy aged 5)) from England to Spain. The Convention stipulates that, subject to narrow exceptions, a child wrongfully removed from, or retained outside, his or her place of habitual residence shall promptly be returned to it. The test for determining whether a child is habitually resident in a place is now whether there is some degree of integration by him or her in a social and family environment there.

The principal question in this appeal is whether the courts may, in making a determination of habitual residence in relation to an adolescent child who has resided for a short time in a place under the care of one of his or her parents, have regard to that child's state of mind during the period of residence there. A subsidiary question is whether, in this case, the trial judge erred in exercising his discretion to decline to make the eldest child, T, a party to the proceedings.

The parents met in England and lived in this country throughout their relationship, which ended early in 2012. On 24 July 2012 the mother and the four children, who were all born in the UK, moved to Spain where they then lived with their maternal grandmother. It was agreed that the children would spend Christmas with their father and on 23 December 2012 they returned to England. They were due to return to Spain on 5 January 2013. Shortly before they were due to fly, the two older boys hid the family's passports and they missed the plane. On 21 January 2013 the mother made an application under the Convention for the children's return to Spain. The father applied for T to be joined as a party so that she might be separately represented, which the High Court refused.

The High Court found all four children to be habitually resident in Spain and thus that they had been wrongfully been retained by their father. The judge acknowledged that the eldest, T, objected to being returned to Spain but determined that she should nonetheless be returned along with the three younger children.

The Court of Appeal dismissed the appeal against the judge's finding that the children's habitual residence was in Spain. However, the Court of Appeal reversed the judge's decision to return T to Spain finding that, so robust and determined were T's objections, they should be given very considerable weight. The Court of Appeal concluded that the appropriate course was to remit to the judge the question whether it would be intolerable to return the three younger children to Spain in light of the fact that T was not going to go with them. The Court of Appeal dismissed the appeals not only of L and A but also of T against the High Court's failure (in T's case, refusal) to make them parties to the proceedings.

JUDGMENT

The Supreme Court unanimously finds that T's assertions about her state of mind

during her residence in Spain in 2012 are relevant to a determination whether her residence there was habitual. The Supreme Court sets aside the conclusion that T was habitually resident in Spain on 5 January 2013 and remits the issue to the High Court for fresh consideration. The Supreme Court also sets aside the finding of habitual residence in respect of the three younger children so that the issue can be reconsidered in relation to all four children.

The Supreme Court unanimously also concludes that T should have been granted party status and that the Court of Appeal should have allowed her appeal against the judge's refusal of it.

REASONS FOR THE JUDGMENT

- Lord Wilson gives the lead judgment of the Court. Courts are now required, in analysing the habitual residence of a child, to search for some integration of her in a social and family environment [34]. Where a child goes lawfully to reside with a parent in a state in which that parent is habitually resident it will be highly unusual for that child not to acquire habitual residence there too. However, in highly unusual cases there must be room for a different conclusion, and the requirement of some degree of integration provides such room [37].
- No different conclusion will be reached in the case of a young child. Where, however, the child is older, particularly where the child is or has the maturity of an adolescent, and the residence has been of a short duration, the inquiry into her integration in the new environment may warrant attention to be given to a different dimension [37]. Lady Hale, with whom Lord Sumption agrees, would hold that the question whether a child's state of mind is relevant to whether that child has acquired habitual residence in the place he or she is living cannot be restricted only to adolescent children [57]. In her view, the logic making an adolescent's state of mind relevant applies equally to the younger children, although the answer to the factual question may be different in their case [58].
- The Court notes that what can be relevant to whether an older child shares her parent's habitual residence is not the child's "wishes", "views", "intentions" or "decisions" but her state of mind during the period of her residence with that parent [37].
- The Court rejects the suggestion that it should substitute a conclusion

that T remained habitually resident in England on 5 January 2013 [42]. The inquiry into T's state of mind in the High Court had been in relation to her objections to returning to Spain and was not directly concerned with her state of mind during her time there [42 (i)]. In addition, the mother has not had the opportunity to give evidence, nor to make submissions, in response to T's statements to the Cafcass (Children and Family Court Advisory and Support Service) officer regarding her state of mind when in Spain [42 (v)]. Lady Hale expresses grave doubts about whether sending the case back to the High Court for further enquiries into the children's states of mind would be a fruitful exercise [67]. However, in the interest of justice, she concludes that it should nonetheless be sent back [86].

- The majority do not think the state of mind of L or A could alone alter the conclusion about their integration in Spain, but note another significant factor, namely the presence of their older sister, T, in their daily lives [43]. In relation to the habitual residence of the three younger children and in the light of their close sibling bond, the majority query whether T's habitual residence in England (if such it was) might be a counterweight to the significance of the mother's habitual residence in Spain [43]. Lady Hale agrees with this analysis when applied to the youngest child. [65].
- With regard to the subsidiary appeal, the Court notes that an older child in particular may be able to contribute relevant evidence, not easily obtainable from either parent, about her state of mind during the period in question [49]. However, it is considered inappropriate to hear oral evidence from T even as a party. Instead, a witness statement from T; cross-examination of the mother by T's advocate; and the same advocate's closing submissions on behalf of T should suffice to represent her contribution as a party [55].

Kinsch on PIL in Totalitarian

States

Patrick Kinsch (University of Luxembourg) has posted Private International Law in Totalitarian States on SSRN.

> *The study of the private international law of three now-defunct totalitarian, quasi-totalitarian or post-totalitarian European regimes (Fascist Italy, National Socialist Germay and the Soviet Union) shows that the political orientation of these societies had an influence even on private international law.The racial and eugenic laws of National Socialist Germany contained provisions on their international efficiency, and the spirit of the racial laws was perceptible in much of the private international law cases involving Jews. There were some incidences of the Nazi Maßnahmenstaat in Germany; an emphasis on reciprocity and the possibility of retortion in the Soviet Union; in both states a redefinition of the substantive content of public policy; and much rhetoric. All in all though, it is the survival of the techniques of private international law in these states that is striking. These techniques were not abolished, nor did they end up being replaced, in any one of the regimes, by systematic application of the lex fori, by conflict rules using as connecting factors völkisch or racial characteristics in Nazi Germany, or more simply by arbitrariness. The civilising value of private international law could not be totally suppressed, even in totalitarian states.*

The article was published in the *Essays in Honour of Michael Bogdan* (2013).

Latest Issue of "Praxis des Internationalen Privat- und

Verfahrensrechts" (1/2014)

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

- ***Heinz-Peter Mansel/Karsten Thorn/Rolf Wagner***: "European conflict of laws 2013: Respite from the status quo"

The article provides an overview of developments in Brussels in the field of judicial cooperation in civil and commercial matters from November 2012 until November 2013. It summarizes current projects and new instruments that are presently making their way through the EU legislative process. It also refers to the laws enacted at the national level in Germany as a result of new European instru-ments. Furthermore, the authors look at areas of law where the EU has made use of its external competence. They discuss both important decisions and pending cases before the ECJ as well as important decisions from German courts pertaining to the subject matter of the article. In addition, the article also looks at current projects and the latest developments at the Hague Conference of Private International Law.

- ***Christoph Schoppe***: "The intertemporal provisions regarding choice-of-law clauses under Europeanised inheritance law"

This article examines the practical implications of the intertemporal provisions of the new European Regulation No. 650/2012 on succession and wills in private international law. Its emphasis lies on those rules regarding choice-of-law clauses. Although hardly noticed yet, such provisions can have a significant impact on a testator's estate planning, especially during a transitional period until 15 th August 2015. Thus, firstly, the article analyses risks and opportunities for testators who seek to have the law of their nationality applied. Secondly, it addresses those testators who prefer to apply another law, which will be unavailable to them under the European Regulation after the transitional period has lapsed. As a common ground underlying all practical issues, it is advocated that only a broad interpretation of any intertemporal provision under the Regulation protects the reasonable reliance-interest of testators regarding their estate planning. Thirdly, some practical points are addressed that might prove difficult when the testator did not choose the law

applicable to his estate.

- ***Anatol Dutta***: "The liability of American credit rating agencies in Europe"

The question whether credit rating agencies are liable for flawed ratings is mainly discussed in substantive law. Yet, from a European perspective, the liability of credit rating agencies also raises issues of private international law as the rating market is dominated by the three American agencies Standard & Poor's, Moody's and Fitch Ratings. Hence, it is not necessarily the case that a European liability regime – be it at the Member State level or at the European Union level such as the recently introduced Art. 35a of the European Regulation on Credit Rating Agencies – will adequately encompass the American agencies and their ratings, a question which shall be addressed in the present paper.

- ***Giesela Rühl***: "Causal Link between Targeted Activity and Conclusion of the Contract: On the Scope of Application of Art. 15 et seq. Brussels I – Comment on the Judgment of the Court of Justice of the European Union of 17 October 2013 (Lokman Emrek ./. Vlado Sabranovic)"

On 17 October 2013 the Court of Justice of the European Union (CJEU) handed down its long-awaited decision in Lokman Emrek ./. Vlado Sabranovic. The court held that consumers may sue professionals before their home courts according to Art. 15 (1) lit. c), 16 (1) Brussels I even if there is no causal link between the means used to direct the commercial or professional activity to the consumers' member state and the conclusion of the contract. The case note comments on the judgment and criticizes the CJEU both in view of the reasoning applied and the results reached. It argues that the highest European court disregards the wording of Art. 15 (1) lit. c) Brussels I, the pertaining majority view in the literature as well as the requirement of uniform interpretation of European Union law. More specifically, it argues that the court ignores recital 25 Rome I that makes clear that Art. 6 (1) Rome I – and thus, Art. 15 (1) lit. c) Brussels I – requires a causal connection between targeted activity and conclusion of the contract. The case comment goes on to show that the CJEU also disregards the rationale of Art. 15 (1) lit. c) Brussels I: it allows consumers to sue at home even if they actively – and without motivation by their contracting partner – go abroad to purchase goods and services. The

CJEU, thus, pushes the boundaries of consumer protection beyond what the European legislator had in mind – and beyond what is needed.

- ***Georgia Koutsoukou***: "Einspruch gegen den Europäischen Zahlungsbefehl als rügelose Einlassung?" – the English abstract reads as follows:

In the case Goldbet Sportwetten ./. Massimo Sperindeo, the CJEU had to decide on the applicability of Art. 24 of the Brussels I Regulation to Regulation (EC) No 1896/2006 creating a European order for payment procedure. In its decision, the CJEU ruled that a statement of opposition to a European order for payment does not amount to entering an appearance within the meaning of Article 24 of the Brussels I Regulation. In the Court's view, this rule applies to both a reasoned and an unreasoned statement of opposition. The Court's decision adheres to the main principles of the European order for payment procedure. In this paper, the author illustrates and evaluates the legal reasoning of the decision and concludes that the Court should have elaborated the relationship between the European order for payment procedure and the ordinary civil proceeding in a less abstruse manner.

- ***Herbert Roth***: "Mahnverfahren im System des Art. 34 Nr. 2 EuGVVO" – the English abstract reads as follows:

The judgement of the Oberlandesgericht (Higher Regional Court) Düsseldorf confers the requirements concerning the possibility of the defendent to lodge a legal remedy stated in Art. 34 No 2 of the European Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters to decisions in foreign order for payment procedures. Therefore the defendant's pure knowledge of the existence of the payment order in not sufficient. Essential is the knowledge of the content of the payment order as being officially served. However some exceptions are necessary, because the payment order gives no reasons and is issued on the base of a prima facie examination of the merits of the claim. The defendant is not obliged to contest the claim, if it is not clearly identified in the payment order. The refusal of enforcement can be avoided by paying attention to the requirements of § 10 para 1 of the German AVAG (Gesetz zur Ausführung zwischenstaatlicher Verträge und zur Durchführung

von Verordnungen und Abkommen der Europäischen Gemeinschaft auf dem Gebiet der Anerkennung und Vollstreckung in Zivil- und Handelssachen).

- ***Thomas Rauscher***: "Erbstatutswahl im deutsch-italienischen Rechtsverkehr"- the English abstract reads as follows:

From a German court's perspective a choice of the applicable succession law made by an Italian citizen under art. 46 (2) of the Italian Law on Conflicts may only be valid as a result of a renvoi issued by Italian conflict law. An additional choice of law under art. 25 (2) of the German Introductory Law, concerning only real property situated in Germany, makes sense, as the validity of an "Italian" choice of law clause depends on the "de cuius" residence at the time of death. The following article explains which law applies to formal and material problems concerning a choice of law under art. 25 (2). As a result such choice of law is valid, if it complies with German law; formal validity may in addition be governed by any other law applicable under art. 1 Hague Convention of October 5, 1961.

- ***Urs Peter Gruber***: "Die konkludente Rechtswahl im Familienrecht"- the English abstract reads as follows:

Art. 14 EGBGB (general effects of marriage) and Art. 15 EGBGB (matrimonial property regime) grant a limited freedom to choose the applicable law. As a basic rule, the choice of law must be notarially certified. However, if the agreement on the applicable law is not concluded in Germany, it is sufficient if the formal requirements of a marriage contract under the law chosen or of the place of the choice of law are observed.

In recent years, German courts had to deal with cases in which Muslim spouses, who were domiciled in Germany, had married abroad in their country of origin and concluded a marital contract based on Islamic laws. In these circumstances, it was doubtful whether there had been an implicit choice of law leading to a derogation of the otherwise applicable German law and the application of the law of the state in which the marriage had been celebrated.

In most decisions, the courts denied the existence of an implicit choice of law, arguing that the spouses had not been aware of the possibility and/or need to

derogate from the German law. They reasoned that merely acting under the "wrong" law did not amount to an agreement on the applicable law. In a recent decision, the Kammergericht Berlin followed this line of arguments. However, in the author's opinion, the court should have scrutinized the facts of the case much more closely – especially as in the matter at hand, as stipulated by § 26 FamFG, the court had to ascertain the relevant facts ex officio.

- ***Claudia Mayer***: "Inappropriate differentiations in international surrogacy cases"

Determining legal parentage is one of the most urgent questions arising in international surrogacy cases, especially in countries like Germany, where surrogacy is illegal. Infertile couples, who avail themselves of surrogacy abroad, face severe difficulties when trying to have their legal parenthood of the child recognized by German courts or by public authorities, especially when the surrogate mother is married. Recent German court decisions have made apparent the discrepancy in German case law as well as the inconsistency of the current filiation law with higher-ranking principles. In the opinion of the author, allowing for different results with regard to accepting the legal parentage of the intended parents depending on the marital status of the surrogate mother, or depending on whether the status of the intended father or the intended mother (resp. the registered parent) is concerned, is inappropriate and unjustifiable. When the German legal system accepts that the intended father may assume the legal position as father by acknowledgement where the surrogate mother is single despite the fact of an underlying surrogacy arrangement, approving the legal parental status of the intended parents cannot be contrary to the German ordre public, only because the surrogate mother is married or the legal status of the intended mother (or registered partner) is concerned. The author argues that the German prohibition of surrogacy may not be regarded as part of the ordre public. This applies irrespective of whether a procedural recognition of foreign decisions on legal parentage or the application of foreign substantive law, designated by the German conflict of law rules, is at issue. The German ordre public rather demands the approval of the legal parentage of the intended parents, namely in the interest of the welfare of the child.

- ***Sabine Corneloup***: "Recognition of Russian decisions under French Law"

The judgment of the Cour de cassation deals with two Russian decisions which ordered a guarantor domiciled in France to pay to a Russian bank a debt of over six million euros after insolvency proceedings had been opened in Russia against the Russian principal debtor. Both decisions have been declared enforceable in France and the Cour de cassation confirms that all conditions for their recognition under French Law were fulfilled: international jurisdiction of the Russian court, no violation of substantial or procedural public policy and absence of fraud. The Cour de cassation thus reiterates the in 2007 newly defined conditions for the recognition of foreign decisions. Their application to the present case demonstrates the liberal orientation of French Law.

- ***Baiba Rudevska***: "Recognition and Enforcement of an English Default Judgment in Latvia"

This article deals with the question of recognition and enforcement of an English default judgment in Latvia. On 6 September 2012 the European Court of Justice gave a preliminary ruling in the case of Trade Agency, replying to questions asked by the Senate (Cassation Division) of the Supreme Court of Latvia concerning the interpretation of Article 34, paras. 1 and 2 of the Brussels I Regulation. According to the Latvian civil procedure rules, all the judgments in civil matters must give a reasoning. In this precise case the default judgment of the High Court of Justice of England contained no reasoning at all. Therefore the Senate doubted whether such a judgment could be enforced in Latvia in the first place. Finally, on 13 February 2013 the Senate recognised the English default judgment. However, the order of the Senate contains legal lacunae as to the recognition and enforcement proceedings in this case. Specifically, the Senate had not checked all the relevant circumstances before recognising and enforcing the aforementioned default judgment in Latvia. These relevant circumstances have been analysed at length in this article. The abovementioned error of the Senate might in principle lead to a complaint and a further litigation before the European Court of Human Rights.

- ***Heinz-Peter Mansel***: "Vereinheitlichung des Kollisionsrechts als Hauptaufgabe"

- ***Erik Jayme***: “Mehrstaater im Europäischen Kollisionsrecht”

ECHR Rules on State Immunity for Civil Claims for Torture

On 14 January, the European Court of Human Rights delivered its judgment in *Jones v. United Kingdom*, and issued the following press release.

ECHR upholds House of Lords’ decision that State immunity applies in civil cases involving torture of UK nationals by Saudi Arabian officials abroad but says the matter must be kept under review.

In today’s Chamber judgment in the case of Jones and Others v. the United Kingdom (application nos. 34356/06 and 40528/06), which is not final, the European Court of Human Rights held, by six votes to one , that there had been:

> *no violation of Article 6 § 1 (right of access to court) of the European Convention on Human Rights either as concerned Mr Jones’ claim against the Kingdom of Saudi Arabia or as concerned all four applicants’ claims against named Saudi Arabian officials.*

The case concerned four British nationals who alleged that they had been tortured in Saudi Arabia by Saudi State officials. The applicants complained about the UK courts’ subsequent dismissal for reasons of State immunity of their claims for compensation against Saudi Arabia and its officials.

The Court found that the granting of immunity to Saudi Arabia and its State officials in the applicants’ civil cases had reflected generally recognised current rules of public international law and had not therefore amounted to an unjustified restriction on the applicants’ access to court. In particular, while there was some emerging support at the international level in favour of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials, the weight of authority suggested that the State’s

right to immunity could not be circumvented by suing named officials instead. The House of Lords had considered the applicants' arguments in detail and dismissed them by reference to the relevant international law principles and case-law. However, in light of the current developments in this area of public international law, this was a matter which needed to be kept under review by Contracting States.

Commentaries on the case are already available here, here and here. More details (still from the Press Release) after the jump.

Principal facts

The applicants, Ronald Grant Jones, Alexander Hutton Johnston Mitchell, William James Sampson (now deceased), and Leslie Walker, are British nationals who were born in 1953, 1955, 1959 and 1946 respectively.

The applicants all claim that they were arrested in Riyadh in 2000 or 2001, and subjected to torture while in custody. Medical examinations carried out on returning to the United Kingdom all concluded that the applicants' injuries were consistent with their allegations.

In 2002 Mr Jones brought proceedings against Saudi Arabia's Ministry of Interior and the official who had allegedly tortured him claiming damages. His application was struck out in February 2003 on the grounds that Saudi Arabia and its officials were entitled to State immunity under the State Immunity Act 1978.

A claim by Mr Mitchell, Mr Sampson and Mr Walker against the four State officials that they considered to be responsible for their torture was struck out for the same reason in February 2004.

The applicants appealed the decisions, and their cases were joined. In October 2004 the UK Court of Appeal unanimously found that, though Mr Jones could not sue Saudi Arabia itself, the applicants could pursue their cases against the individually named defendants. However, this decision was overturned by the House of Lords in June 2006, which held that the applicants could not pursue any of their claims on the ground that all of the defendants were entitled to State immunity under international law, which was incorporated into domestic law by the 1978 Act.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (access to court), the applicants complained that the UK courts' granting of immunity in their cases meant that they had been unable to pursue claims for torture either against Saudia Arabia or against named State officials. They alleged that this had amounted to a disproportionate violation of their right of access to court. The applications were lodged with the European Court of Human Rights on 26 July 2006 and 22 September 2006, respectively. The Redress Trust, Amnesty International, the International Centre for the Legal Protection of Human Rights and JUSTICE were given leave to submit written comments.

Judgment was given by a Chamber of seven judges, composed as follows: Ineta Ziemele (Latvia), President, Päivi Hirvelä (Finland), George Nicolaou (Cyprus), Ledi Bianku (Albania), Zdravka Kalaydjieva (Bulgaria), Vincent A. de Gaetano (Malta), Paul Mahoney (the United Kingdom), and also Françoise Elens-Passos, Section Registrar.

Decision of the Court

The Court recalled that everyone had the right under Article 6 § 1 to have any legal dispute relating to his or her civil rights and obligations brought before a court, but that this right of access to court was not absolute. States could impose restrictions on it. However, a restriction had to pursue a legitimate aim, and there had to be a reasonable relationship between the aim and the means employed to pursue it (the restriction must be proportionate).

As to the specific test in State immunity cases, the Court referred to its judgment of 2001 in the similar case of Al-Adsani v. the United Kingdom (no. 35763/97). There, the Grand Chamber had explained that sovereign immunity was a concept of international law under which one State should not be subjected to the jurisdiction of another State and that granting immunity in civil proceedings pursued the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty. That being the case. the decisive question when examining the proportionality of the measure was whether the immunity rule applied by the national court reflected generally recognised rules of public international law on State immunity. In Al-Adsani, which concerned the striking out of a torture claim

against Kuwait, the Court had found it established that there was not, at the time of its judgment in that case, acceptance in international law of the proposition that States were not entitled to immunity in respect of civil claims for damages concerning alleged torture committed outside the State. There had therefore been no violation of Article 6 § 1.

In the applicants' case, the Court accepted that the restriction on access to court as regards the claims against Saudi Arabia and the State officials had pursued the legitimate aim of promoting good relations between nations. It therefore applied the approach to proportionality set out in Al-Adsani. The main issue of the applicants' case was therefore whether the restrictions on access to court arising from State immunity had been in conformity with generally recognised rules of public international law.

As concerned the claim against the Kingdom of Saudi Arabia, the Court had to decide whether it could be said that at the time Mr Jones' claim had been struck out (in 2006) there was, in public international law, an exception to the doctrine of State immunity in civil proceedings where allegations of torture had been made against that State. The Court considered whether there had been an evolution in accepted international standards on immunity in such torture claims lodged against a State since Al-Adsani. For the Court, the conclusive answer to that question was given by the judgment of the International Court of Justice (ICJ) in February 2012 in the case of Germany v. Italy, where the ICJ had rejected the argument that a torture exception to the doctrine of State immunity had by then emerged. The Court therefore concluded that the UK courts' reliance on State immunity to defeat Mr Jones' civil action against Saudi Arabia had not amounted to an unjustified restriction on his access to court. Therefore there had been no violation of Article 6 § 1 as concerned the striking out of Mr Jones' complaint against Saudi Arabia.

As concerned the claims against the State officials, again the sole matter for consideration was whether the grant of immunity to the State officials reflected generally recognised rules of public international law on State immunity. The Court was of the view, after an analysis of national and international case-law and materials, that State immunity in principle offered State officials protection in respect of acts undertaken on behalf of the State in the same way as it protected the State itself; otherwise, State immunity could be circumvented by the suing of named individuals. It then turned to consider whether there was an exception to

this general rule in cases where torture was alleged. It reviewed the position in international law and examined international and national case-law. It noted that there was some emerging support at the international level in favour of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials. However, it concluded that the weight of authority was still to the effect that the State's right to immunity could not be circumvented by suing named officials instead, although it added that further developments could be expected. The House of Lords in the applicants' case had carefully examined all the arguments and the relevant international and comparative law materials and issued a comprehensive judgment with extensive references. That judgment had been found to be highly persuasive by the national courts of other States.

The Court was therefore satisfied that the granting of immunity to State Officials in the applicants' civil cases had reflected generally recognised current rules of public international law and had not therefore amounted to an unjustified restriction on their access to court. Accordingly, there had been no violation of Article 6 § 1 as regards the applicants' claims against named State officials. However, in light of the developments underway in this area of public international law, it added that this was a matter which needed to be kept under review by Contracting States.

Engel on a Convention on Cross Border Surrogacy

Martin Engel (University of Munich) has posted Cross-Border Surrogacy: Time for a Convention? on SSRN.

> *As the law of parentage is striving to meet the challenges of new reproductive technologies, dealing with cross-border surrogacies emerges as one of the most pressing topics in international family law. The current legal situation as regards surrogacy is quite diverse – throughout the world but also within*

Europe. Legal diversity has recently made a lot of people engage in so-called "procreative tourism": Coming from a country with a rather strict approach, they commission women in one of the more liberal countries to carry a child for them, and once the baby is born, they try to take it to their home country, thereby obviating the surrogacy ban that prevents them from entrusting a surrogate mother at home. European courts struggle with a coherent approach on how to treat those citizens who went abroad to have a baby. Meanwhile, legal research and the Hague Conference on Private International Law think about a convention in order to ease cross-border recognition of surrogacy.

CJEU Rules on Jurisdiction in Cases of Liability for Defective Products

by Jonas Steinle, LL.M.

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On 16 January 2014 the Court of Justice of the European Union (CJEU) has ruled on the interpretation of Art. 5 para. 3 Brussels I Regulation in cases of liability for defective products (C-45/13 – Andreas Kainz ./. Pantherwerke AG). The Court held that in such cases, the place of the event giving rise to the damage is the place where the product in question was manufactured.

The facts:

The claimant, Mr Kainz, is a resident of Salzburg in Austria. In a shop in Austria,

he bought a bicycle which he rode in Germany, when the fork ends of that bicycle came loose and caused an accident from which Mr Kainz suffered injury. The bicycle had been manufactured by a company based in Germany. After having manufactured the bicycle, this company had shipped the bicycle to a shop in Austria from which Mr Kainz had finally purchased the item.

As a consequence of the suffered injury, Mr Kainz sued the German manufacturing company before the district court (*Landgericht*) in Salzburg. To establish jurisdiction, Mr Kainz argued that the district court in Salzburg had jurisdiction according to Art. 5 para. 3 Brussels I Regulation, since the bicycle had been brought into circulation in Austria and only there was made available to the end user for the first time.

In the following proceedings, the Supreme Court of Austria (*Oberster Gerichtshof*) referred the question to the CJEU for a preliminary ruling, as to where the place of the event giving rise to the damage should be located in a case like the one at hand where the manufacturer of a defect product is sued. The Supreme Court offered three possibilities to the CJEU: (i) the place where the manufacturer is established, (ii) the place where the product is put into circulation and (iii) the place where the product was acquired by the user.

The ruling:

The CJEU decided for the first option and ruled that the place of the event giving rise to the damage must be located at the place where the product in question was manufactured.

To substantiate this ruling, the CJEU relied on two main arguments: First the Court held that it is at the place where the product in question was manufactured where it is most suitable to take evidence for a dispute that arises out of a defect product (para. 27). And secondly, the Court argued that locating the place where the event giving rise to the damage at the manufacturing site provides foreseeability and thereby legal certainty to the parties involved (para. 28).

In the further course of the reasoning, the CJEU also addressed the argument of the claimant, Mr Kainz, who had suggested to locate the place giving rise to the damage at the place where the product had been transferred to the end consumer (which would have led to a *forum actoris* for him). In this context, the CJEU ruled (para. 30 *et seq.*), that Art. 5 para. 3 Brussels I Regulation does not allow to take

into account any such considerations to protect the claimant by determining the place where the harmful event occurred.

The evaluation:

With this ruling, the CJEU has further completed the picture of the application of Art. 5 para. 3 Brussels I Regulation in cases of liability for defective products. In the former case *Zuid Chemie* C-189/08, the Court had already located the place where the damage occurred (*Erfolgsort*) at the "place where the initial damage occurred as a result of the normal use of the product for the purpose for which it was intended." (para. 32). In *Zuid Chemie*, the location of the place giving rise to the damage (*Handlungsort*) had been left open by the Court since the parties of that case had agreed on the fact that this place should be located at the place where the defect product had been manufactured (para. 25). This interpretation has now been confirmed by the CJEU with the case at hand.

Another reason, why the Kainz ruling is interesting, is the statement of the CJEU on the relationship between the Brussels I Regulation and the Rome II Regulation. The Court clarified that these two pieces of legislation are to be interpreted independently, even if the legislator wanted them to be interpreted coherently (see therefore recital 7 of the Rome II Regulation). The interpretation of the Brussels I Regulation must not be influenced by the conception or the wording of the Rome II Regulation if this would be contrary to the scheme and the objectives of the Brussels I Regulation (para. 20).