Green Paper on the Free Movement of Public Documents

On December 14th, 2010, the European Commission issued a Green Paper exploring whether the circulation of public documents should be simplified: Less Bureaucracy for Citizens: Promoting Free Movement of Public Documents and Recognition of the Effects of Civil Status Records.

Here are some of the possible reforms discussed by the Green Paper.

Public documents:

> *a) The abolition of administrative formalities for the authentication of public documents*
>
> *The administrative formalities relating to the presentation of public documents, originally based on consular and intergovernmental practices, are still causing problems for European citizens and no longer meet the requirements or correspond to the state of development of contemporary society, in particular in an area of common justice.*
>
> *The need for these formalities, which are not suitable for relations between Member States based on mutual trust or for increased mobility of citizens, can legitimately be questioned.*
> *(…)*
>
> *b) Cooperation between the competent national authorities*
>
> *The abolition of administrative formalities could be accompanied by cooperation between the competent national authorities.*
> *(…)*
>
> *c) Limiting translations of public documents*
>
> *In parallel with the administrative formalities such as legalisation and the apostille, the translation of a public document issued by another Member State is another procedure citizens may have to deal with. Just like the abovementioned administrative formalities, translation also represents a cost in*

terms of time and money.

Optional standard forms, at least for the most common public documents (for example a declaration of the loss or theft of identity papers or a wallet), could be introduced in a number of administrative sectors in order to cope with translation requests and avoid costs.
(…)

d) The European civil status certificate

European driving licences and passports already exist. A European certificate of inheritance has been proposed by the Commission. Thought might be given to introducing a European civil status certificate.

This would exist alongside Member States' national civil status records. It would be optional, not compulsory. Citizens could continue to ask for a national certificate. The European certificate would not therefore replace Member States' civil status certificates.

Civil Status Records:

Several solutions could be considered to ensure recognition of the effects of a civil status record or legal situation connected with civil status created in a Member State other than the one in which it is invoked. In this context, it is important to stress that the EU has no competence to intervene in the substantive family law of Member States. Therefore, the Commission has neither the power nor the intention to propose the drafting of substantive European rules on, for instance, the attribution of surnames in the case of adoption and marriage or to modify the national definition of marriage. The Treaty on the Functioning of the European Union does not provide any legal base for applying such a solution.

Against this background, several practical problems arising in the daily lives of citizens in cross-border situations could be solved by facilitating recognition of the effects of civil status records legally established in other EU Member States. The European Union has three policy options to deal with these problems: assisting national authorities in the quest for practical solutions; automatic recognition and recognition based on the harmonisation of conflict-of

law rules.

The consultation will take place from 14 December 2010 to 30 April 2011.

Many thanks to Bram van der Eem for the tip-off.

Hess: Remarks on Case C-491/10PPU – Andrea Aguirre Pelz

We are grateful to ***Professor Burkhard Hess*** (Heidelberg) for the following remarks on the German preliminary reference in case C- 491/10 PPU (Andrea Aguirre Pelz):

Mutual Recognition and Fundamental Rights

Case C-491/10PPU – Andrea Aguirre Pelz

An important preliminary reference has recently reached the ECJ's dockets: In the case C-491/10PPU the Higher Regional Court of Celle referred to Luxemburg the following questions:

1. Where the judgment to be enforced issued in the Member State of origin contains a serious infringement of fundamental rights, does the court of the Member State of enforcement exceptionally itself enjoy a power to examine the matter, pursuant to an interpretation of Article 42 of the Brussels II^{bis} Regulation in conformity with the Charter on Fundamental Rights?
2. Is the court of the Member State of enforcement obliged to enforce notwithstanding the fact that, according to the case-file, the certificate issued by the court of the Member State of origin under Article 42 of the

Brussels II^{bis} Regulation is clearly inaccurate?

The case addresses fundamental issues of mutual recognition and of mutual trust. As most of the readers of conflict of laws are certainly aware of, the EU-Commission is going to publish its proposals for the amendment of the Regulation Brussels I in the course of this week (on Wednesday). The enlargement of mutual recognition within the Regulation will certainly be one of the core proposals. The ECJ's decision in *Andrea Aguirre Pelz* will undoubtedly influence the discussion on the abolition of exequatur proceedings and the (general) implementation of the principle of mutual recognition under the Regulation Brussels I.

The facts and the legal issues of the case

In this case, a Spanish-German couple which had resided near Bilbao separated in 2007. Their (then) eight years old daughter stayed with the mother; both spouses applied for divorce at the Spanish court and sought the sole parental responsibility for their daughter. In May 2008, the Spanish court transferred the custody to the father and the daughter temporarily moved to the father. The mother returned to Germany. However, after a holiday visit to her mother in summer 2008, Andrea did not return to Spain. The father immediately sought her return to Spain and the 5th court for family matters in Bilbao ordered that Andrea was generally forbidden to leave Spanish soil.[1] An order for the return of Andrea of the same day was not recognized under the Hague Child Abduction Convention in Germany, after Andrea had been heard by the German family court and strongly opposed to her return.[2] In December 2009, the Spanish court gave a judgment on the merits and transferred the custody to the father. The court did not personally hear the mother and the daughter, although both had been summoned, but did not appear in the hearing.[3] However, the Spanish judge had denied the mother's request for granting safe conduct and had not accepted the proposal of her lawyer to hear Andrea by video-conference.[4] The Court of Appeal of Biskaya dismissed the mother's appeal in April 2010 which was based on the insufficient hearing of the child.

Some weeks earlier, in February 2010, the 5th family court of Bilbao had issued a certificate under Article 42 of the Regulation ordering the immediate return of Andrea to her father. According to Article 11 (8) of the Regulation Brussels II^{bis}, German family courts must immediately enforce the return order of the Spanish

court without any recognition proceedings.[5] Nevertheless, the mother filed a new action in the (competent) German family court seeking a declaration that the Spanish decision was unenforceable in Germany, because Andrea and her mother had not been personally heard by the Spanish judge. On appeal, the Higher Regional Court of Celle referred to the ECJ (under Article 267 TFEU) the questions whether it was obliged to enforce the Spanish decision ordering the return of the child of ten years although the child had not get a personal hearing at the court of origin and whether it was bound by a form which seemed to be filled in incorrectly.

According to the referring court, the Spanish court had not sufficiently respected the child's right to be heard – a right which shall protect her family relations and procedural situation under Articles 24 and 47 of the CFR. The necessity of hearing the child and the parent is equally expressed by Article 42 (2) of the Regulation. However, the German court asked the ECJ whether a serious violation of human rights (as guaranteed by the Charta) entails the need of reviewing a judgment of another Member State even in the context of mutual recognition. If the answer of the ECJ is positive, the abolition of exequatur and of the public policy clause (which directly refers to fundamental rights) by Article 42 of the Regulation Brussels will be modified (or even reversed). Thus, the reference of the Higher Regional Court of Celle directly questions the concept of mutual recognition and its underlying assumption that all courts of the Member States fully and equally respect the fundamental rights of the parties.

In addition, the 2nd question equally raises fundamental issues of the application of mutual trust: in practice, mutual recognition operates on the basis of forms which are filled in by the court of the Member State of origin. These forms pursue several functions:[6] firstly, they shall inform the requested court about the enforceable decision and its content. Secondly, they shall reduce the need of translating the decision. Thirdly, and most importantly, they contain factual or legal findings which shall bind the courts and judicial organs in the Member State of enforcement. However, the court of origin is not obliged to give any motivation for its findings – the forms are usually filled out by simple crossing. As a result, the requested court must simply enforce the foreign judgment – any verification does not take place.[7] However, sometimes the forms are not filled out accurately – the 2nd question asks about the binding force of a form which was apparently incorrectly established.

Some preliminary observations:

Although the questions of the Higher Regional Court reflect the uncertainties surrounding the principle of mutual trust in civil matters, some of the legal findings of the referring court may be questioned:

– To start with the second question: it is not entirely clear whether the form was incorrectly filled out. According to Article 42 the child must get an opportunity to be heard (…) having regard to its age or maturity. Thus, the question is whether the summoning of Andrea to the hearing by the court of origin was sufficient to give her an opportunity to be heard. – According to the referring court Article 42 requires a factual hearing and additional efforts of the (foreign) court to organise such a hearing. Although the arguments put forward by the German Court with regard to the interpretation of the necessary hearing of the parties in the light of Articles 24 and 47 of the Charter of Fundamental Rights seem to be pertinent, there is still the question whether the Regulation requires that all procedures of the taking of evidence abroad must be exhausted if the parties do not respond to the request of the court to appear in the competent court. Accordingly, it seems to be doubtful whether the form was filled out incorrectly – at least formally, Andrea had an opportunity to get heard by the Spanish judge.

– On the other hand, the decision of the Spanish court not to grant a guarantee of safe conduct to the mother was certainly unfortunate. However, one is wondering why the Spanish and German judges did not try to communicate directly on these issues – supportive measures for the communication are available at the Central Authorities and from the liaison judges under the Hague Convention on Child Abduction. However, I have not read the decision of the Spanish court and, therefore, I do not know the motivation of the Spanish court not to give such a guarantee to the mother.[8]

– With regard to the first question, the interplay between the proceedings on the merits and those on the immediate return of the child is not entirely clear: The decision on the custody of December 19, 2009 was a decision on the merits which is recognised under Articles 21 and 23 of the Regulation. According to Article 23 b, “a judgment relating to parental responsibility shall not be recognised if it was given (…) without the child having been given an opportunity to be heard.” Thus, this Article explicitly confers to the German court the power to review the foreign judgment with regard to fundamental rights as guaranteed by Articles 24 and 47

CFR. However, the order on the return of Andrea was based on Articles 11 (8) and 42. These Articles provide for immediate relief in the specific case of the unlawful retention of the child. However, the question arises whether the request of Spanish court under Article 42 must be qualified as a request on the enforcement of the judgment on the merits (of December 19, 2009). As this judgment conferred the parental responsibility to the father, the father was equally entitled to request the return of the child. In this respect, the (functional) application of Articles 11 and 42 of the Brussels II^{bis} Regulation for the enforcement of the decision of the merits does not seem to be fully in line with the system of the Regulation.[9]

The proceedings at the ECJ

Although the referring court requested the ordinary procedure (Article 267 TFEU) due to the importance of the referred questions, the President of the ECJ decided that the case should be dealt with in the preliminary urgent procedure. The hearing of the case took place last Monday (6 December). A judgment is expected in the course of the next months. This case will probably entail an important judgment for the future of European law of civil procedure.

The Institute for Private International and Comparative Law at Heidelberg translated the decision of the Higher Regional Court into English. Here is the translation:

Higher Regional Court Celle[a]

Case 18 UF 67/10

Order of September, 30, 2010

Relating to the return of the child: Andrea Aguirre Pelz

Born 31 January 2000.

The Court refers the following questions to the European Court of Justice:

1. Where the judgment to be enforced issued in the Member State of origin contains a serious infringement of fundamental rights, does the court of the Member State of enforcement exceptionally itself enjoy a power to examine the matter, pursuant to an interpretation of Article 42 of the

Brussels II[bis] Regulation in conformity with the Charter on Fundamental Rights?

2. Is the court of the Member State of enforcement obliged to enforce notwithstanding the fact that, according to the case-file, the certificate issued by the court of the Member State of origin under Article 42 of the Brussels II[bis] Regulation is clearly inaccurate?

The present lawsuit relates to the enforcement of a decision of the family court No.5 in Bilbao (Biscay, Spain) which orders the return of the child Andrea from her mother to her father.

I.

The parents married on 25 September 1998 in Erandio (Spain). The marriage produced the now 10,75-year-old daughter Andrea, who was born on 31 January 2000. The child has both the German and the Spanish nationality. The place of residence of the parents was located in Sondka (Spain). Towards the end of 2007, the parents broke up with each other. Upon the father's approval the mother firstly remained alone in the former joint home with the daughter Andrea. Yet, after a short time, considerable disputes arose between the parents. Both parents applied for a divorce in February 2008. In addition, each parent applied for the grant of the sole custody of Andrea.

By its order of 12 May 2008 the family court No.5 in Bilbao (Biscay, Spain) granted the custody of Andrea temporarily to her father. Thereupon Andrea moved in the household of her father. In June 2008, her mother moved to Germany. After Andrea's visit with her mother in the summer holidays of 2008, the mother kept Andrea with herself. Since 15 August 2008 Andrea lives in the household of her mother in Germany. On the same day, the family court No.5 in Bilbao (Biscay, Spain) issued an order which prohibited Andrea to leave Spain.

The father's application for the return of Andrea to Spain was dismissed by the order of the German Court of 1 July 2009. The dismissal was based on Article 13 para.2 Hague Child Abduction Convention. At that time, the hearing of Andrea in court revealed that Andrea strongly objected to the return which her father had applied for. She assertively refused to return to Spain. The court thereupon asked for an expert opinion, which stated that, given her age and maturity, Andrea's opinion should be taken into consideration.

This decision was transmitted by the German Federal Office of Justice[b] on 8 July 2009 under reference to Article 11 para.6 and 7 of the Regulation Brussels II^{bis} to the central authority of Spain, with the request for transmission to the competent Spanish court. In the same month the custody proceedings before the family court No.5 in Bilbao (Biscay, Spain) were continued. The court considered it bidden to ask for another expert opinion as well as a personal hearing of Andrea and scheduled a hearing in Bilbao. At the hearing, neither Andrea nor the mother appeared. Prior to this, the court had refused the mother's application for the grant of safe conduct to her and Andrea during the assessment by an expert and for the time of the hearing in court. It also did not hear Andrea via video conference as explicitly suggested by the mother.

By its judgment of 16 December 2009 the family court No.5 in Bilbao (Biscay, Spain) transferred the sole custody of Andrea to her father. The mother appealed to this decision and argued in particular with the necessity of a hearing of Andrea. The regional court of Biscay which was competent for the appeal explicitly refused the need of a hearing of Andrea personally by a decision of 21 April 2010.

Based on its decision on the custody of 16 December 2009, the family court No.5 in Bilbao (Biscay, Spain) issued a certificate on 5 February 2010 under Article 42 of the Regulation Brussels II. By letter of 26 March 2010 the German Federal Office of Justice transmitted to the district court –family court- of Celle the judgment of the family court No.5 in Bilbao (Biscay, Spain) of 16 December 2009 as well as the certificate under Article 42 of the Regulation Brussels II of 5 February 2010. The central authority pointed out to the family court of Celle, that the order to surrender the child under Section 44 para.2 IntFamRVG (IFLPA)[c] must be enforced ex officio.

The mother for her part filed an application for a declaration that the enforcement order could not be executed and the disallowance of the order to surrender the child of the family court No.5 in Bilbao (Biscay, Spain).

By decision of 28 April 2010 the family court of Celle held that the corresponding judgment of the family court No.5 in Bilbao (Biscay, Spain) is not be recognized and thus not to be enforced, because the family court No.5 in Bilbao (Biscay, Spain) had not heard Andrea prior to its decision.

The father of Andrea, who is (only) at second instance represented by the German

Federal Office of Justice, opposes to this decision through an appeal of 18 June 2010. By way of his objection of 18 June 2010 he requests the removal of the decision of the family court of Celle of 28 April 2010 and the dismissal of the applications of the mother, as well as the enforcement of the decision to surrender Andrea of the family court No.5 in Bilbao (Biscay) ex officio.

II.

The appeal of the father is admissible… On the matter itself the court comes to the provisional conclusion that the appeal is not well-founded, because Andrea has not been duly heard by the Spanish judge. With regard to the case-law of the European Court of Justice referred to by the appellant, two questions arise on the interpretation of the Regulation Brussels II[bis]. These questions are essential for the decision of the case and the Court refers them to the ECJ for the following reasons:

a) The judgment of the family court No.5 in Bilbao (Biscay, Spain) of 16 December 2009 is a judgment requiring the return of the child under Article 11 para.8 Regulation Brussels II[bis]. It is a judgment of the Member State of origin subsequent to an order refusing the return of the child of the enforcing Member State based on Article 13 Hague Child Abduction Convention. For such judgments exists the simplified enforceability from chapter III paragraph 4, therefore under Articles 40 et seq.of the Regulation Brussels II[bis].

Therefore the appeal is to be granted insofar as the court of the enforcing Member State generally does not have an own review power under Article 21 Regulation Brussels II[bis] in cases of return under Article11 para 8 of the Regulation Brussels II[bis] (ECJ 7/11/2008 case C-195/08 PPU *Inga Rinau*; ECJ, 7/1/2010 case C-211/10 PPU *Povse*). In fact, such judgments requiring return are generally enforceable without any declaration of enforceability or possibility of opposing its recognition (Article 42 para.1 of the Regulation Brussels II[bis]). If this principle applies without exceptions, the judgment of the family court of Celle is to be set aside and the enforcement of the judgment requiring the return of the child under Article 42 of the Regulation Brussels II[bis] of 5 February 2010 is to be executed ex officio (Section 44 FamFG[d]) pursuant to the appeal.

The situation would be different if the court of the enforcing Member State had an own power of review in cases of severe violations of fundamental rights. The Senate supports this assumption for the following reasons. Article 24 para.1 of the Charter of Fundamental Rights of the European Union provides that the "views of the child shall be taken into consideration on matters which concern them in accordance with their age and maturity". The family court No.5 in Bilbao (Biscay, Spain) did not detect the current view of Andrea and could therefore not take it into consideration in its custody decision of 16 December 2009.

At the same time the Senate does not misconceive that the family court No.5 in Bilbao (Biscay, Spain) initially tried to obtain the view of Andrea in summer 2009. Yet the efforts in this regard did not suffice in view of the importance of the consideration of the child's view which is especially protected by Article 24 para.1 of the Charter of Fundamental Rights of the European Union. Furthermore, the Senate does not address the issue of whether the mother could be summoned at all to send Andrea to Spain given the criminal proceedings against her and accordingly the travel ban from Spain on Andrea. Any possible default or misconduct of the mother in this matter cannot be imputed to the affected child.

The misconduct of a parent does not release the court from its obligation to take the child's view into consideration pursuant to Article 24 Charter of Fundamental Rights of the European Union. The situation would only be different if the conduct of the parent rendered the detection of the view of the child impossible. However this constellation is not at hand. In fact, the detection of the view of Andrea would have been possible, for example in the course of a video conference which was explicitly offered by the mother. In addition there would have been other possibilities, such as: the conduct of a hearing of the child in the way of mutual legal assistance or a journey of the competent judge to Germany in order to hear Andrea personally. Furthermore it would have been possible to detect the view of the child through the appointment of a temporary representative for the purpose of the proceedings under the terms of Section 158 FamFG. The temporary representative has to discover the interests of the child and to assert them during the proceedings (Section 168 para.4 FamFG). All relief of this kind remained undone and has not been addressed in the judgment. Therefore the personal views of Andrea could not have been taken into consideration in the judgment.

In the opinion of the Senate this violation is insomuch severe that it must entail a review power of the enforcing Member State by way of exception and in order to

interpret Article 42 para.1 of the Regulation Brussels II^{bis} in conformity to the Charter of Fundamental Rights of the European Union.

The omitted hearing is problematic especially in cases of Article11 para.8 Regulation Brussels II^{bis} where the return of the child is rejected under Article13 para.22 HCAC because of unwillingness of the child. The preferential treatment in the enforcement of judgments under Article11 para.8 can only be justified in cases pursuant to Article13 para.2 Hague Child Abduction Convention, when the child has been heard before the decision is given. Only in this constellation the court of the Member State of origin does have the possibility to deal with the unwillingness of the child and its reasons. After all, these reasons were considered of such importance by the court of the enforcing Member State that it refused the return of the child despite the fact that its removal or retention was unlawful. If the court of the Member State of origin wants to deviate from this and wants to miss out the resistance of the child which has been substantial in the Hague Child Abduction Convention-proceedings in the course of the custody decision which it is competent for, it has to hear the current view of the child in advance. The content of the certificate which is issued in context of the simplified enforcement under Article42 para.2 Regulation Brussels II^{bis} also indicates the great significance of the hearing of the child. Within the certificate, the hearing of the child must be duly certified.

Thus, the privileged enforcement without recognition by a court of the enforcing Member State as intended by Article11 para.8 combined with Article 42 Regulation Brussels II^{bis} mandatory requires that the child had the possibility to get heard. In the present case, Andrea did not get this possibility. Accordingly, the senate assumes a violation of Article24 Charter of Fundamental Rights of the European Union as well as a violation of the fundamental principle of the right to be heard.[e]

The Senate agrees with the assertion put forward by the appellant that grounds for non-enforcement which impede the enforcement as such must generally be asserted in the court of the Member State of origin which ordered the enforcement – in the present case in Spain. However, this principle cannot be applied when the enforceable decision itself – as has been argued above – violates fundamental rights. The applicability of the Regulation Brussels II^{bis} cannot result

in an obligation of the court of the enforcing Member State to execute judgments of the Member State of origin that are in breach of fundamental rights.

b) If the courts in the Member State of enforcement do not dispose of such a power of review despite a severe violation of fundamental rights, the question remains whether the enforcing Member State can be bound to a clearly incorrect certificate under Article 42 Regulation Brussels II^{bis}. The certificate at hand of 5 February 2010 which is to be enforced clearly contains incorrect information.

Persuant to Article 42 para.2a Regulation Brussels II^{bis} the certificate may only be issued if "the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity". Although Andrea was not heard by the family court No.5 in Bilbao (Biscay, Spain) the respective question is affirmed within the certificate (No.11).

The argument of the father (…) that Andrea has had the opportunity to be heard in summer 2009 in consequence of the evidence warrant of the family court No.5 in Bilbao (Biscay, Spain) is not persuasive. Even if one agrees with the statement within the appeal of the father that the mother illegitimately impeded the hearing which was considered necessary and therefore ordered by the family court No.5 in Bilbao (Biscay, Spain), this conduct cannot be attributed to the child. The protective function of Article 24 para.1 of the Charter of Fundamental Rights of the European Union cannot be conditioned on the correct conduct of a parent. This especially applies as it would indeed have been possible -as demonstrated above- that the family court No.5 in Bilbao (Biscay, Spain) detected the current will and view of Andrea despite the possibly illegitimate refusal of her mother to travel to Spain.

III.

Accordingly, the Senate refers to the ECJ the following questions (….see supra at I).

IV.

The senate explicitly does not request the application of the urgent preliminary ruling procedure in the present case. The senate considers both questions on the consultation requirement of the child- especially regarding comparable cases of

return rejections under Article13 para. 2 Hague Child Abduction Convention – as fundamental. The examination of such basic issues should be carried out in the context of a request for a preliminary ruling, at length, and not in an accelerated procedure.

Additional note of the editors:

The file number at the ECJ is C-491/10PPU – the President of the ECJ ordered that the case should be decided in the accelerated procedure. The hearing took place on December 6, 2010. A judgment of the ECJ is expected for January or February 2011.

[a] Translated and adapted for the publication by Katharina Mandery and by Burkhard Hess, all rights reserved.

[b] The Federal Office of Justice is the German Central Authority (Article 53 of Regulation Brussels II^{bis}). It provides for a helpful web site (in English) at: http://www.bundesjustizamt.de/nn_1704226/EN/Topics/Zivilrecht/HKUE/HKUEInhalte/Rechtsvorschriften_20und_20Erl_C3_A4uternde_20Berichte.html.

[c] An English translation is available at: Act to Implement Certain Legal Instruments in the Field of International Family Law, (International Family Law Procedure Act – IFLPA).

[d] Act on Proceedings in Non-Contentious and Familiy Matters of Sep. 1, 2009.

[e] Article 47 Charter of Fundamental Rights.

[1] Any infringement of this order entailed criminal sanctions against the mother.

[2] The German court relied on Article 13 of the Hague Child Abduction Convention. According to this provision, a non-return may be ordered in the best interest of the child.

[3] The Spanish court had ordered the personal appearances of both, mother and the child.

[4] It should be noted that Article 11 (4) of Regulation Brussels IIbis explicitly provides for “adequate arrangements to secure the protection of the child after

his or her return." These measures include the protection of a parent who accompanies the child, *Hess*, Europäisches Zivilprozessrecht (2010), § 7, para 93.

[5] ECJ, 7/11/2008, case C-195/08 PPU, *Inga Rinau*, ECR 2008 I- paras 59 et seq.; EuGH 7/1/2010, case C-211/10 PPU *Povse*, ECR 2010 I- nyp.

[6] *Hess*, Europäisches Zivilprozessrecht, § 3, paras 55 et seq.

[7] As a result, mutual trust operates like a kind of „blind trust", because the requested court has normally no possibility to verify whether the information contained in the form is appropriate.

[8] See *Hess*, Europäisches Zivilprozessrecht (2010), § 7, paras 80 – 82.

[9] It seems that the relationship between Articles 23 b) and Articles 11 (8), 42 of the Regulation is not entirely clear – the Court should take up this case for further clarifications.

Belgian Court Recognizes Californian Surrogacy

In the case of the two men who had contracted with a woman living in California in a case of international surrogate motherhood, a Court of Appeal has recently issued its ruling, reversing in part the decision of the lower court (Court of Appeal of Liège, 1st Chamber, ruling of 6 September 2010, docket No 2010/RQ/20).

As has been indicated, the lower court had denied any recognition to the birth certificates of the twin girls issued by the authorities in California. The lower court had based its reasoning primarily on the violation of the public policy exception, holding that the birth certificates were only the last step in a series of events which started with the surrogacy agreement. The court placed great weight on the fact that this agreement violated basic human dignity in that it put

a price on the life of a child.

In appeal, the Court again reviewed the matter *ab novo*. It found that the first step in the analysis was to review whether the birth certificates could have been issued if the rules of Belgian private international law had been applied. This test is mandated by Article 27 of the Code of Private International Law, which requires that foreign acts, including acts concerning the civil and family status of individuals, comply with the requirements of the law(s) declared applicable by the Belgian rules of private international law. Since both men were Belgian nationals, the Court of Appeal first undertook to determine whether the birth certificates could have been issued applying Belgian law.

The Court proceeded first to review the situation of the parent who was the biological father of the twin girls. It found that under Belgian law, since the surrogate mother was not married, the father could have recognized the children and hence legally become their father. The situation was different for the other man who had 'commissioned' the children, as he was not biologically linked with the children. The Court found that under Belgian law, there was no possibility to establish a legal parentage between a child and two persons of the same sex, outside the specific situation of adoption by same sex couples.

Having found that at least one of the commissioning parents could have established his paternity over the children, had Belgian law been applied, the Court undertook to review the impact on this paternity of the very peculiar circumstances which surrounded the birth of the twin. Specifically the Court examined whether these circumstances, and in particular the existence of a contract between the mother and the commissioning parents, contract which had given rise to the payment of money, did not lead to a violation of public policy.

While it recognized that contracts which directly concern human beings and the human body were void under public policy principles, the Court noted that the public policy reservation called for a nuanced application. Among the principles which could be taken into consideration in the light of the public policy mechanism, the Court singled out the interest of the children, as protected both by international law instrument and the Belgian Constitution. According to the Court, this interest would be unreasonably curtailed if the children, who resided in Belgium, were deprived of any legal link with their biological father, while at the same time they could not legally be considered the children of the mother who

had carried and delivered them. The same could not be said, however, according to the Court, for the legal link between the twin sisters and the other man.

Accordingly, the Court only partially granted the relief sought by the two men. It decided to recognize and give effects to the birth certificates issued in California in so far as they form the basis for the legal link between the sisters and their biological father.

While this ruling may not be the last word in this case, it is quite likely that the other parent will now seek to adopt the children.

Editors' note: Patrick Wautelet is a professor of law at Liege University.

Another twist in surrogacy motherhood saga

Many thanks to Isabel Rodríguez-Uría Suárez

The 5th of October the Spanish Dirección General de los Registros y el Notariado (hereinafter DGRN) has issued an Instruction about the regulation of affiliation registration in cases of surrogate pregnancy in order to protect the best interests of the child and the interests of the women who give birth (see BOE, n. 243, 7.10.2010).

According to the Instruction, a prerequisite is required for the registration of births by surrogate motherhood: it is necessary to produce before the Spanish responsible of the Registro Civil a judicial resolution of the competent Court of the country in which the surrogate pregnancy occurred. The judicial resolution must determine the affiliation of the child. This requisite is demanded in order to control the legal requirements of the surrogate pregnancy contract and to ensure the protection of the best interests of the child and the interests of the pregnant mother.

The foreign court decision raises a question of recognition in Spain. The DGRN

distinguishes between contentious and non-contentious proceedings: on the one hand, contentious foreign decisions must be recognized by *exequatur*; on the other hand, the DGRN gives a set of guidelines for the recognition of non-contentious decisions in affiliation matters. In short, the Spanish officer in charge of the Registro Civil must check: a) the formal validity of the foreign decision b) that the original court had based its international jurisdiction in conditions equivalent to those provided by Spanish law c) the due process respect d) that the interests of the child and the pregnant mother had been guaranteed e) that the foreign decision is a final decision and that the consents given in the contract are irrevocable.

Finally, the Spanish DGRN states that foreign registration certificates do not support affiliation registration in the Registro Civil.

Surrogate motherhood and Spanish homosexual couple (III)

You might remember my last post on surrogate pregnancy, where I informed about a 2009 decision of the Spanish Dirección General de los Registros y el Notariado ordering registration of a birth certificate issued in the USA. The document concerned the parenthood of two children born in San Diego to a surrogate mother and a homosexual Spanish couple; the entry listed the couple as father of the twins. The saga goes on: on Friday, the Tribunal de Primera Instancia No. 15 of Valencia, at the request of the Public Prosecutor, declared the entry null.

In its ruling, the judge states that children are the result of a pregnancy by substitution, which is not allowed by Spanish law; and that their filiation has to be determined by birth. In what is quoted as his own words, «La ley española prohíbe expresamente que la filiación en estos casos no se inscriba a favor de la persona que los ha parido».

With regard to the discrimination statement put forward by the lawyer of the

couple, the judge points out that the children can not be registered as hers not because both parents are men, but because they were born to another person: “This legal consequence would equally apply to a homosexual- male and female-couple, man or woman alone, or a heterosexual couple, because the law does not distinguish gender in such cases”. From the Spanish legal point of view, the crucial fact in order to determine filiation is the giving of birth.

As for the argument that registration must be allowed in the best interests of the children, the court admits it is not irrelevant, but states that “the end does not justify the means, and the Spanish legal system has sufficient instruments to achieve consistency”.

The couple has decided to appeal the ruling before the Audiencia Provincial.

Conference on Cross Border Successions

On 15 October 2010, the European Commission will organise in Brussels a joint conference with the Council of the Notariats of the European Union on cross-border successions. The conference will be an opportunity to discuss different aspects of the Commission proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the introduction of a European Certificate of Succession.

Information on the conference can be found here.

The event is free. ~~There are only a few places left~~.

European Parliament Resolution on Brussels I

On September 7th, the European Parliament adopted a Resolution on the Implementenation and the Review of the Brussels I Regulation.

The Resolution addresses many issues. On whether to abolish exequatur, the Parliament:

> *2. Calls for the requirement for exequatur to be abolished, but considers that this must be balanced by appropriate safeguards designed to protect the rights of the party against whom enforcement is sought; takes the view therefore that provision must be made for an exceptional procedure available in the Member State in which enforcement is sought; considers that this procedure should be available on the application of the party against whom enforcement is sought to the court indicated in the list in Annex III to the Regulation; takes the view that the grounds for an application under this exceptional procedure should be the following: (a) that recognition is manifestly contrary to public policy in the Member State in which recognition is sought; (b) where the judgment was given in default of appearance, that the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so; (c) that the judgment is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought, and (d) that the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; further considers that an application should be able to be made to a judge even before any steps are taken by way of enforcement and that if that judge rules that the application is based on serious grounds, he or she should refer the matter to the court indicated in the list in Annex III for examination on the basis of the grounds set out above; advocates the addition of a recital in the preamble to the effect that a national court may penalise a vexatious or unreasonable application, inter alia*

, in the order for costs;

3. Encourages the Commission to initiate a public debate on the question of public policy in connection with private international law instruments;

4. Considers that there must be a harmonised procedural time-frame for the exceptional procedure referred to in paragraph 2 so as to ensure that it is conducted as expeditiously as possible, and that it must be ensured that the steps which may be taken by way of enforcement until the time-limit for applying for the exceptional procedure has expired or the exceptional procedure has been concluded are not irreversible; is particularly concerned that a foreign judgment should not be enforced if it has not been properly served on the judgment debtor;

5. Argues not only that there must be a requirement for a certificate of authenticity as a procedural aid so as to guarantee recognition, but also that there should be a standard form for that certificate; considers, to this end, that the certificate provided for in Annex V should be refined, while obviating as far as possible any need for translation;

6. Believes that, in order to save costs, the translation of the decision to be enforced could be limited to the final order (operative part and summary grounds), but that a full translation should be required in the event that an application is made for the exceptional procedure;

Full text of the resolution after the break.

Many thanks to Jan von Hein for the tip-off.

European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/2140(INI))

The European Parliament ,– having regard to Article 81 of the Treaty on the Functioning of the European Union,– having regard to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters(1) (hereinafter "the Brussels I Regulation" or "the Regulation"),– having regard to the Commission's report on the application of that regulation (COM(2009)0174),– having regard to the Commission's Green Paper of 21 April 2009 on the review of the Brussels I Regulation (COM(2009)0175),

– having regard to the Heidelberg Report (JLS/2004/C4/03) on the application of the Brussels I Regulation in the Member States and the responses to the Commission's Green Paper,

– having regard to its resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme(2) , specifically the sections "Greater access to civil justice for citizens and business" and "Building a European judicial culture",

– having regard to the Union's accession to the Hague Conference on private international law on 3 April 2007,

– having regard to the signature, on behalf of the Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements on 1 April 2009,

– having regard to the case law of the Court of Justice, in particular Gambazzi v. DaimlerChrysler Canada (3) , the Lugano opinion(4) , West Tankers (5) , Gasser v. MISAT (6) , Owusu v. Jackson (7) , Shevill (8) ,Owens Bank v. Bracco (9) , Denilauer (10) , St Paul Dairy Industries (11) and Van Uden (12) ;

– having regard to the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters(13) , Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims(14) , Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure(15) , Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure(16) , Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations(17) and Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000(18) ,

– having regard to Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)(19) ,

– having regard to the opinion of the European Economic and Social Committee of 16 December 2009,

– having regard to Rules 48 and 119(2) of its Rules of Procedure,

– having regard to the report of the Committee on Legal Affairs (A7-0219/2010),

A. whereas Regulation No 44/2001, with its predecessor the Brussels Convention, is one of the most successful pieces of EU legislation; whereas it laid the foundations for a European judicial area, has served citizens and business well by promoting legal certainty and predictability of decisions through uniform European rules – supplemented by a substantial body of case-law,– and avoiding parallel proceedings, and is used as a reference and a tool for other instruments,

B. whereas, notwithstanding this, it has been criticised following a number of rulings of the Court of Justice and is in need of modernisation,

C. whereas abolition of exequatur – the Commission's main objective – would expedite the free movement of judicial decisions and form a key milestone in the building of a European judicial area,

D. whereas exequatur is seldom refused: only 1 to 5% of applications are appealed and those appeals are rarely successful; whereas, nonetheless, the time and expense of getting a foreign judgment recognised are hard to justify in the single market and this may be particularly vexatious where a claimant wishes to seek enforcement against a judgment debtor's assets in several jurisdictions,

E. whereas there is no requirement for exequatur in several EU instruments: the European enforcement order, the European payment order, the European small claims procedure and the maintenance obligations regulation(20) ,

F. whereas abolition of exequatur should be effected by providing that a judicial decision qualifying for recognition and enforcement under the Regulation which is enforceable in the Member State in which it was given is enforceable throughout the EU; whereas this should be coupled with an exceptional procedure available to the party against whom enforcement is sought so as to guarantee an adequate right of recourse to the courts of the State of enforcement in the event that that party wishes to contest enforcement on the grounds set out in the Regulation; whereas it will be necessary to ensure that steps taken for enforcement before the expiry of the time-limit for applying for review are not irreversible,

G. whereas the minimum safeguards provided for in Regulation No 44/2001 must be maintained,

H. whereas officials and bailiffs in the receiving Member State must be able to tell that the document of which enforcement is sought is an authentic, final judgment from a national court,

I. whereas arbitration is satisfactorily dealt with by the 1958 New York Convention and the 1961 Geneva Convention on International Commercial Arbitration, to which all Member States are parties, and the exclusion of arbitration from the scope of the Regulation must remain in place,

J. whereas the rules of the New York Convention are minimum rules and the law of the Contracting States may be more favourable to arbitral competence and arbitration awards,

K. whereas, moreover, a rule providing that the courts of the Member State of the seat of the arbitration should have exclusive jurisdiction could give rise to considerable perturbations,

L. whereas it appears from the intense debate raised by the proposal to create an exclusive head of jurisdiction for court proceedings supporting arbitration in the civil courts of the Member States that the Member States have not reached a common position thereon and that it would be counterproductive, having regard to world competition in this area, to try to force their hand,

M. whereas the various national procedural devices developed to protect arbitral jurisdiction (anti-suit injunctions so long as they are in conformity with free movement of persons and fundamental rights, declaration of validity of an arbitration clause, grant of damages for breach of an arbitration clause, the negative effect of the 'Kompetenz-Kompetenz principle', etc.) must continue to be available and the effect of such procedures and the ensuing court decisions in the other Member States must be left to the law of those Member States as was the position prior to the judgment in West Tankers ,

N. whereas party autonomy is of key importance and the application of the lis pendens rule as endorsed by the Court of Justice (e.g. in Gasser) enables choice-of-court clauses to be undermined by abusive "torpedo" actions,

O. whereas third parties may be bound by a choice-of-court agreement (for instance in a bill of lading) to which they have not specifically assented and this may adversely affect their access to justice and be manifestly unfair and whereas, therefore, the effect of choice-of-court agreements in respect of third parties needs to be dealt with in a specific provision of the Regulation,

P. whereas the Green Paper suggests that many problems encountered with the Regulation could be alleviated by improved communications between courts; whereas it would be virtually impossible to legislate on better communication between judges in a private international law instrument, but it can be promoted as part of the creation of a European judicial culture though training and recourse to networks (European Judicial Training Network, European Network of Councils for the Judiciary, Network of the Presidents of the Supreme Courts of the EU, European Judicial Network in Civil and Commercial Matters),

Q. whereas, as regards rights of the personality, there is a need to restrict the possibility for forum shopping by emphasising that, in principle, courts should accept jurisdiction only where a sufficient, substantial or significant link exists with the country in which the action is brought, since this would help strike a better balance between the interests at stake, in particular, between the right to freedom of expression and the rights to reputation and private life; whereas the problem of the applicable law will be considered specifically in a legislative initiative on the Rome II Regulation; whereas, nevertheless, some guidance should be given to national courts in the amended regulation,

R. whereas, as regards provisional measures, the Denilauer case-law should be clarified by making it clear that ex parte measures can be recognised and enforced on the basis of the Regulation provided that the defendant has had the opportunity to contest them,

S. whereas it is unclear to what extent protective orders aimed at obtaining information and evidence are excluded from the scope of Article 31 of the Regulation,

Comprehensive concept for private international law

1. Encourages the Commission to review the interrelationship between the different regulations addressing jurisdiction, enforcement and applicable law; considers that the general aim should be a legal framework which is consistently structured and easily accessible; considers that for this purpose, the terminology in all subject-matters and all the concepts and requirements for similar rules in all subject-matters should be unified and harmonised (e.g. lis pendens , jurisdiction clauses, etc .) and the final aim might be a comprehensive codification of private international law;

Abolition of exequatur

2. Calls for the requirement for exequatur to be abolished, but considers that this must be balanced by appropriate safeguards designed to protect the rights of the party against whom enforcement is sought; takes the view therefore that provision must be made for an exceptional procedure available in the Member State in which enforcement is sought; considers that this procedure should be available on the application of the party against whom enforcement is sought to the court indicated in the list in Annex III to the Regulation; takes the view that the grounds for an application under this exceptional procedure should be the following: (a) that recognition is manifestly contrary to public policy in the Member State in which recognition is sought; (b) where the judgment was given in default of appearance, that the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so; (c) that the judgment is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought, and (d) that the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; further considers that an application should be able to be made to a judge even before any steps are taken by way of enforcement and that if that judge rules that the application is based on serious grounds, he or she should refer the matter to the court indicated in the list in Annex III for examination on the basis of the grounds set out above; advocates the addition of a recital in the preamble to the effect that a national court may penalise a vexatious or unreasonable application, inter alia , in the order for costs;

3. Encourages the Commission to initiate a public debate on the question of public policy in connection with private international law instruments;

4. Considers that there must be a harmonised procedural time-frame for the exceptional procedure referred to in paragraph 2 so as to ensure that it is conducted as expeditiously as possible, and that it must be ensured that the steps which may be taken by way of enforcement until the time-limit for applying for the exceptional procedure has expired or the exceptional procedure has been concluded are not irreversible; is particularly concerned that a foreign judgment should not be enforced if it has not been properly served on the judgment debtor;

5. Argues not only that there must be a requirement for a certificate of authenticity as a procedural aid so as to guarantee recognition, but also that there should be a standard form for that certificate; considers, to this end, that the certificate provided for in Annex V should be refined, while obviating as far as possible any need for translation;

6. Believes that, in order to save costs, the translation of the decision to be enforced could be limited to the final order (operative part and summary grounds), but that a full translation should be required in the event that an application is made for the exceptional procedure;

Authentic instruments

7. Considers that authentic instruments should not be directly enforceable without any possibility of challenging them before the judicial authorities in the State in which enforcement is sought; takes the view therefore that the exceptional procedure to be introduced should not be limited to cases where enforcement of the instrument is manifestly contrary to public policy in the State addressed since it is possible to conceive of circumstances in which an authentic act could be irreconcilable with an earlier judgment and the validity (as opposed to the authenticity) of an authentic act can be challenged in the courts of the State of origin on grounds of mistake, misrepresentation, etc. even during the course of enforcement;

Scope of the Regulation

8. Considers that maintenance obligations within the scope of Regulation No 4/2009/EC should be excluded from the scope of the Regulation, but reiterates that the final aim should be a comprehensive body of law encompassing all subject-matters;

9. Strongly opposes the (even partial) abolition of the exclusion of arbitration from the scope;

10. Considers that Article 1(2)(d) of the Regulation should make it clear that not only arbitration proceedings, but also judicial procedures ruling on the validity or extent of arbitral competence as a principal issue or as an incidental or preliminary question, are excluded from the scope of the Regulation; further considers that a paragraph should be added to Article 31 providing that a judgment shall not be recognised if, in giving its decision, the court in the Member State of origin has, in deciding a question relating to the validity or extent of an arbitration clause, disregarded a rule of the law of arbitration in the Member State in which enforcement is sought, unless the judgment of that Member State produces the same result as if the law of arbitration of the Member State in which enforcement is sought had been applied;

11. Considers that this should also be clarified in a recital;

Choice of court

12. Advocates, as a solution to the problem of "torpedo actions", releasing the court designated in a choice-of-court agreement from its obligation to stay proceedings under the lis pendens rule; considers that this should be coupled with a requirement for any disputes on jurisdiction to be decided expeditiously as a preliminary issue by the chosen court and backed up by a recital stressing that party autonomy is paramount;

13. Considers that the Regulation should contain a new provision dealing with the opposability of choice-of-court agreements against third parties; takes the view that such provision could provide that a person who is not a party to the contract will be bound by an exclusive choice-of-court agreement concluded in accordance with the Regulation only if: (a) that agreement is contained in a written document or electronic record; (b) that person is given timely and adequate notice of the court where the action is to be brought; (c) in contracts for carriage of goods, the chosen court is (i) the domicile of the carrier; (ii) the place of receipt agreed in the contract of carriage; (iii) the place of delivery agreed in the contract of carriage, or (iv) the port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; considers that it should further be provided that, in all other cases, the third party may bring an action before the court otherwise competent under the Regulation if it appears that holding that party to the chosen forum would be blatantly unfair;

Forum non conveniens

14. Suggests, in order to avoid the type of problem which came to the fore in Owusu v. Jackson , a solution on the lines of Article 15 of Regulation No 2201/2003 so as to allow the courts of a Member State having jurisdiction as to the substance to stay proceedings if they consider that a court of another Member State or of a third country would be better placed to hear the case, or a specific part thereof, thus enabling the parties to bring an application before that court or to enable the court seised to transfer the case to that court with the agreement of the parties; welcomes the corresponding suggestion in the proposal for a regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession(21) ;

Operation of the Regulation in the international legal order

15. Considers, on the one hand, that the question whether the rules of the Regulation should be given reflexive effect has not been sufficiently considered and that it would be premature to take this step without much study, wide-ranging consultations and political debate, in which Parliament should play a leading role, and encourages the Commission to initiate this process; considers, on the other hand, that, in view of the existence of large numbers of bilateral agreements between Member States and third countries, questions of reciprocity and international comity, the problem is a global one and a solution should also be sought in parallel in the Hague Conference through the resumption of negotiations on an international judgments convention; mandates the Commission to use its best endeavours to revive this project, the Holy Grail of private international law; urges the Commission to explore the extent to which the 2007 Lugano Convention(22) could serve as a model and inspiration for such an international judgments convention;

16. Considers in the meantime that the Community rules on exclusive jurisdiction with regard to rights in rem in immovable property or tenancies of immovable property could be extended to proceedings brought in a third State;

17. Advocates amending the Regulation to allow reflexive effect to be given to exclusive choice-of-court clauses in favour of third States" courts;

18. Takes the view that the question of a rule overturning Owens Bank v. Bracco should be the subject of a separate review;

Definition of domicile of natural and legal persons

19. Takes the view that an autonomous European definition (ultimately applicable to all European legal instruments) of the domicile of natural persons would be desirable, in order in particular to avoid situations in which persons may have more than one domicile;

20. Rejects a uniform definition of the domicile of companies within the Brussels I Regulation, since a definition with such far-reaching consequences should be discussed and decided within the scope of a developing European company law;

Interest rates

21. Considers that the Regulation should lay down a rule so as to preclude an enforcing court from declining to give effect to the automatic rules on interest rates of the court of the State of origin and applying instead its national interest rate only from the date of the order authorising enforcement under the exceptional procedure;

Industrial property

22. Considers that, in order to overcome the problem of "torpedo actions", the court second seised should be relieved from the obligation to stay proceedings under the lis pendens rule where the court first seised evidently has no jurisdiction; rejects the idea, however, that claims for negative declaratory relief should be excluded altogether from the first-in-time rule on the ground that such claims can have a legitimate commercial purpose; considers, however, that issues concerning jurisdiction would be best resolved in the context of proposals to create a Unified Patent Litigation System;

23. Considers that the terminological inconsistencies between Regulation No 593/2008 ("Rome I")(23) and Regulation No 44/2001 should be eliminated by including in Article 15(1) of the Brussels I Regulation the definition of "professional" incorporated in Article 6(1) of the Rome I Regulation and by replacing the expression "contract which, for an inclusive price, provides for a combination of travel and accommodation" in Article 15(3) of the Brussels I Regulation by a reference to the Package Travel Directive 90/314/EEC(24) as in Article 6(4)(b) of the Rome I Regulation;

Jurisdiction over individual contracts of employment

24. Calls on the Commission to consider, having regard to the case-law of the Court of Justice, whether a solution affording greater legal certainty and suitable protection for the more vulnerable party might not be found for employees who do not carry out their work in a single Member State (e.g . long distance lorry drivers, flight attendants);

Rights of the personality

25. Believes that the rule in Shevill needs to be qualified; considers, therefore, that, in order to mitigate the alleged tendency of courts in certain jurisdictions to accept territorial jurisdiction where there is only a weak connection with the country in which the action is brought, a recital should be added to clarify that, in principle, the courts of that country should accept jurisdiction only where there is a sufficient, substantial or significant link with that country; considers that this would be helpful in striking a better balance between the interests at stake;

Provisional measures

26. Considers that, in order to ensure better access to justice, orders aimed at obtaining information and evidence or at preserving evidence should be covered by the notion of provisional and protective measures;

27. Believes that the Regulation should establish jurisdiction for such measures at the courts of the Member State where the information or evidence sought is located, in addition to the jurisdiction of the courts having jurisdiction with respect to the substance;

28. Finds that "provisional, including protective measures" should be defined in a recital in the terms used in the St Paul Dairy case;

29. Considers that the distinction drawn in Van Uden, between cases in which the court granting the measure has jurisdiction over the substance of the case and cases in which it does not, should be replaced by a test based on the question of whether measures are sought in support of proceedings issued or to be issued in that Member State or a non-Member State (in which case the restrictions set out in Article 31 should not apply) or in support of proceedings in another Member State (in which case the Article 31 restrictions should apply);

30. Urges that a recital be introduced in order to overcome the difficulties posed by the requirement recognised in Van Uden for a "real connecting link" to the territorial jurisdiction of the Member State court granting such a measure, to make it clear that in deciding whether to grant, renew, modify or discharge a provisional measure granted in support of proceedings in another Member State, Member State courts should take into account all of the circumstances, including (i) any statement by the Member State court seised of the main dispute with respect to the measure in question or measures of the same kind, (ii) whether there is a real connecting link between the measure sought and the territory of the Member State in which it is sought, and (iii) the likely impact of the measure on proceedings pending or to be issued in another Member State;

31. Rejects the Commission's idea that the court seised of the main proceedings should be able to discharge, modify or adapt provisional measures granted by a court from another Member State since this would not be in the spirit of the principle of mutual trust established by the Regulation; considers, moreover, that it is unclear on what basis a court could review a decision made by a court in a different jurisdiction and which law would apply in these circumstances, and that this could give rise to real practical problems, for example with regard to costs;

Collective redress

32. Stresses that the Commission's forthcoming work on collective redress instruments may need to contemplate special jurisdiction rules for collective actions;

Other questions

33. Considers, on account of the special difficulties of private international law, the importance of Union conflicts-of-law legislation for business, citizens and international litigators and the need for a consistent body of case-law, that it is time to set up a special chamber within the Court of Justice to deal with references for preliminary rulings relating to private international law;

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34. Instructs its President to forward this resolution to the Council and the Commission.

Again on Article 20 of Regulation (EC) No 2201/2003

Reference for a preliminary ruling from the Bundesgerichtshof, Germany, in case C- 256/09 was lodged on 10 July 2009 (see V. Gaertner). The ECJ answered a year later; the judgment was published yesterday in OJ, C, 246.

The Facts

The order for reference states that in mid-2005 Ms Purrucker went to Spain to live with Mr Vallés Pérez. She gave premature birth to twins in May 2006. The boy -Merlín- was able to leave hospital in September 2006, whilst the girl -Samira- remained in hospital until March 2007.

Not wanting to be together any more, on 30 January 2007 the parties signed before a notary an agreement concerninginter alia parental responsibility, custody and rights of access to the children. According to Spanish Law the agreement had to be approved by a court in order to be enforceable. In the instant case it was never judicially ratified.

Ms Purrucker returned to Germany with the boy in February 2007; she intended also to bring her daughter to Germany after she left hospital.

Proceedings in Spain. Application for enforcement in Germany

Since Mr Vallés Pérez no longer felt bound by the agreement signed before a notary, he brought proceedings in June 2007 to obtain the granting of provisional measures and, in particular, rights of custody of the children before the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial. After some discussion, the Court confirmed her jurisdiction to rule on the application for provisional measures, and adopted the following urgent provisional measures:

"1. Joint rights of custody of the two children Samira and Merlín Vallés Purrucker are awarded to the father, Mr Guillermo Vallés Pérez; both parents are to retain parental responsibility.

In implementation of this measure, the mother must return the infant son Merlín to his father who is domiciled in Spain. Appropriate measures must be taken to allow the mother to travel with the boy and to visit Samira and Merlín whenever she wishes, and, for that purpose, accommodation, which may serve as a family meeting place, must be placed at her disposal or may be placed at her disposal by a family member or by the trusted person who must be present during the visits for the entire time which the mother spends with the children, it being understood that the accommodation concerned may be that of the father if both parties so agree.

2. Prohibition on leaving Spain with the children without the court's prior approval.

3. Delivery of passports of each of the children to the possession of the parent exercising rights of custody.

4. Any change in the residence of the two children is subject to the prior approval of the court.

5. No maintenance obligation is imposed on the mother".

On 11 January 2008 the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial issued a certificate pursuant to Article 39(1) of Regulation No 2201/2003, certifying that its judgment was enforceable and that notice of it had been served. Immediately after, Mr Vallés Pérez brought in Germany, as a precautionary measure, an action for a declaration that the judgment delivered by the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial was enforceable. Next, he sought the enforcement of that judgment. Consequently, the Amtsgericht Stuttgart, by a decision of 3 July 2008, and the Oberlandesgericht Stuttgart, by a decision on appeal of 22 September 2008, ordered enforcement of the judgment of the Spanish court and warned the mother that she could be fined if she did not comply with the order.

Ms Purrucker challenged the judgment of the Oberlandesgericht Stuttgart of 22 September 2008 before the Bundesgerichtshof on the ground that, under Article 2(4) of Regulation No 2201/2003, the recognition and enforcement of judgments delivered by the courts of other Member States is not applicable to provisional measures within the meaning of Article 20 of that regulation, because they cannot be classed as judgments relating to parental responsibility.

The preliminary question

The Bundesgerichtshof observes that the question whether the provisions laid down in Article 21 et seq. of Regulation No 2201/2003 are also applicable to provisional measures within the meaning of Article 20 of that regulation or only to judgments on the substance is a matter of debate in academic writing which has not been definitively resolved by the case-law. Therefore, he decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

"Do the provisions of Article 21 et seq. of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000 1 (the Brussels IIa Regulation) concerning the recognition and enforcement of decisions of other Member States, in accordance with Article 2(4) of that regulation, also apply to enforceable provisional measures, within the meaning of Article 20 of that regulation, concerning the right to child custody?"

AG's Opinion

Advocate general E. Sharpston delivered a quite long opinion on 20 May 2010. In her view the ECJ should answer as follows:

– Provisional measures adopted by a court of a Member State on the basis of competence derived by that court from the rules on substantive jurisdiction in Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and [in] matters of parental responsibility must be recognised and enforced in other Member States in the same way as any other judgment adopted on the same basis, in accordance with Article 21 et seq. of that Regulation.

– Provisional measures adopted by a court of a Member State on the basis of national law in the circumstances set out in Article 20 of Regulation No 2201/2003 do not have to be recognised or enforced in other Member States in accordance with Article 21 et seq. of the Regulation. That Regulation does not, however, preclude their recognition or enforcement in accordance with procedures derived from national law, in particular those required by multilateral or bilateral conventions to which the Member States concerned are parties.

– A court hearing an application for recognition or non-recognition of a provisional measure, or for a declaration of enforceability, is entitled to ascertain the basis of jurisdiction relied on by the court of origin either from the terms or content of its decision or, if necessary, by communicating with that court directly or through the appropriate central authorities. If, but only if, neither of those means produces a clear and satisfactory result, it should be presumed that jurisdiction was assumed in the circumstances set out in Article 20(1). In the case of provisional decisions on parental responsibility, the same means of communication may be used to verify whether the decision is (still) enforceable in the Member State of origin, if the accuracy of a certificate issued pursuant to Article 39 of Regulation No 2201/2003 is challenged; and, if such communication is unsuccessful, other means of proof may be used, provided that they are adduced in a timely manner.

The judgment

This is the concise ruling of the ECJ:

"The provisions laid down in Article 21 et seq. of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, do not apply to provisional measures, relating to rights of custody, falling within the scope of Article 20 of that regulation."

Some points that deserve consideration

We believe that some points of the ECJ's reasoning invite to reflection:

.- Concerning the scope of Article 20. In paragraph 64 the ECJ establishes which decisions fall within the scope of article 20. Following the Court, it is not only the nature of the measures which may be adopted by the court – provisional, including protective, measures as opposed to judgments on the substance – which determines whether those measures may fall within the scope of Article 20 of the regulation but rather, in particular, the fact that the measures were adopted by a court whose jurisdiction is not based on another provision of that regulation. Realistically, in paragraph 65, the ECJ acknowledges that "it is not always straightforward, from reading a judgment, to make such a classification of a judgment adopted by a court for the purposes of Article 2(1) of Regulation".

.- The meaning of the prohibition of reviewing the assessment of jurisdiction made by a court of a Member State. See paragraph 75, "that prohibition does not preclude the possibility that a court to which a judgment is submitted which does not contain material which unquestionably demonstrates the substantive jurisdiction of the court of origin may determine whether it is evident from that judgment that the court of origin intended to base its jurisdiction on a provision of Regulation No 2201/2003. As stated by the Advocate General in point 139 of her Opinion, to make such a determination is not to review the jurisdiction of the court of origin but merely to ascertain the basis on which that court considered itself competent." I find it difficult not to see this as examining the grounds of jurisdiction -although not in order to make a verdict on the recognition of the foreing judgment.

.- With regard to the system of recognition of the measures adopted under Article 20: "(…) it must be held that, as the Advocate General stated in points 172 to 175 of her Opinion, the system of recognition and enforcement provided for by Regulation No 2201/2003 is not applicable to measures which fall within the scope of Article 20 of that regulation." The ECJ leans on the Borrás Report to the Brussels II Convention, reminding that Article 20(1) of Regulation 2201/2003 has its origins in Article 12 of Regulation No 1347/2000, which is a restatement of Article 12 of the Brussels II convention. The ECJ avoids, however, the differences between both Regulations.

.- On the possibility of recognizing provisional measures taken under Article 20 according to another system of recognition see paragraph 92, "The fact that measures falling within the scope of Article 20 of Regulation No 2201/2003 do not qualify for the system of recognition and enforcement provided for under that regulation does not, however, prevent all recognition or all enforcement of those measures in another Member State, as was stated by the Advocate General in point 176 of her Opinion. Other international instruments or other national legislation may be used, in a way that is compatible with the Regulation." I wish the ECJ had explained this a little bit more.

.- Finally, see the ECJ comments on the domestic system of appeal when used to discuss international jurisdiction. More specifically, the ECJ seems to qualify the Spanish provisions as unsuitable in an international (community) context. To endorse this view the ECJ points out to the primacy of EU law over national law, and reminds the obligation to revise or interpret national law to ensure its

conformity. That gives us Spaniards (at least) something to think about.

Povse v. Alpago. ECJ preliminary ruling on Reg. (EC) No 2201/2003 under the urgent procedure

On 3 May 2010, the Oberster Gerichsthof (Austria) referred to the ECJ for a preliminary ruling five questions concerning Regulation (EC) nº 2210/2003 . At the national court request, the reference was dealt with under the urgent procedure provided for in Article 104b of the Rules of Procedure; the reason for doing so was that contact between the child and her father had been broken, and that a delayed decision on enforcement of the judgment of the Tribunale per i Minorenni di Venezia of 10 July 2009 ordering return of the child to Italy would exacerbate the deterioration of the relationship between father and child, and thereby increase the risk of psychological harm if the child were sent back to Italy.

The ECJ's judgment in case C- 211/10 PPU was pronounced on 1 July 2010; it has been published today (OJ C 234, 28 August 2010).

The facts of the case

Ms Povse and Mr Alpago lived together as an unmarried couple in Vittorio Veneto, Italy, until the end of January 2008 with their daughter Sofia, born 6 December 2006. In accordance with Article 317a of the Italian Civil Code, the parents had joint custody of the child. At the end of January 2008, the couple separated and Ms Povse left the family home taking her daughter Sofia with her. Although the Tribunale per i Minorenni di Venezia (Court for matters concerning

minors in Venice), by a provisional and urgent decision of 8 February 2008 at the father's request, prohibited the mother from leaving Italy with the child, Ms Povse and her daughter travelled in February 2008 to Austria, where they have lived since that date.

On 16 April 2008 Mr Alpago brought an action before the Bezirksgericht Leoben (Austria) to obtain the return of his child to Italy on the basis of Article 12 of the 1980 Hague Convention.

On 23 May 2008 the Tribunale per i Minorenni di Venezia issued a judgment in which it revoked the prohibition on the mother leaving Italy with the child and awarded, provisionally, custody to both parents, while stating that the child could reside, pending final judgment, in Austria with her mother, to whom the court granted authority to make 'decisions of day to day organisation'. In the same provisional judgment, the Italian court ordered the father to share the costs of supporting the child, established conditions and times for the father to have access to the child and instructed an expert report from a social worker in order to determine the nature of the relationship between the child and the two parents.

Notwithstanding that judgment, a report drawn up on 15 May 2009 by the appointed social worker stated that the access permitted to the father by the mother was minimal and insufficient to allow the father's relationship with his daughter to be assessed, particularly with regard to his parental abilities. Accordingly the social worker concerned considered that he (the father) was unable to carry out his task fully and in the interests of the child.

On 3 July 2008 the Bezirksgericht Leoben dismissed Mr Alpago's action of 16 April 2008, but on 1 September 2008 that decision was set aside by the Landesgericht Leoben (Austria) on the ground that Mr Alpago had not been heard in accordance with Article 11(5) of the regulation.

On 21 November 2008 the Bezirksgericht Leoben again dismissed Mr Alpago's action, on the basis of the judgment of Tribunale per i Minorenni di Venezia of 23 May 2008, according to which the child could reside provisionally with her mother.

On 7 January 2009 the Landesgericht Leoben upheld the decision to dismiss Mr Alpago's action on the ground that there was a grave risk of psychological harm

to the child, within the meaning of Article 13(b) of the 1980 Hague Convention.

Ms Povse brought an action before the Bezirksgericht Judenburg (Austria), which had local jurisdiction, requesting that custody of the child be granted to her. On 26 May 2009 that court, without allowing Mr Alpago the opportunity to state his case in accordance with the principle that both parties must be heard, declared that it had jurisdiction on the basis of Article 15(5) of Regulation 2201/2003, and asked the Tribunale per i Minorenni di Venezia to decline its jurisdiction.

However, Mr Alpago had already applied, on 9 April 2009, to the Tribunale per i Minorenni di Venezia, as part of the pending custody proceedings, for an order requiring the return of his child to Italy under Article 11(8) of the regulation. At a hearing arranged before that court on 19 May 2009, Ms Povse declared that she was willing to comply with the programme of meetings between father and daughter drawn up by the social worker. Ms Povse did not disclose her own legal action before the Bezirksgericht Judenburg, which led to the above mentioned decision of 26 May 2009.

On 10 July 2009 the Tribunale per i Minorenni di Venezia declared that it retained jurisdiction since, in its opinion, the conditions governing transfer of jurisdiction as provided for in Article 10 of the Regulation were not satisfied, and held that the inability of the social worker to complete his expert report as instructed by the court was due to the mother’s failure to comply with the schedule which the social worker had drawn up in relation to access.

Moreover, by the same judgment of 10 July 2009, the Tribunale per i Minorenni di Venezia ordered the immediate return of the child to Italy and instructed the social services department of the town of Vittorio Veneto, in the event that the mother returned with the child, to make accommodation available to them and to establish an access schedule for the father. The return order was made on the ground that it was desirable to reestablish contact between the child and her father which had been broken because of the mother’s attitude. For that purpose, the Tribunale per i Minorenni di Venezia issued a certificate under Article 42 of the regulation.

On 25 August 2009 the Bezirksgericht Judenburg issued an interim order, awarding provisional custody of the child to Ms Povse. That court sent a copy of that order by mail to the father in Italy, without any information on his right to

refuse acceptance of service and without any translation. On 23 September 2009 that order became final and enforceable under Austrian law.

On 22 September 2009 Mr Alpago submitted an application to the Bezirksgericht Leoben for enforcement of the judgment of the Tribunale per i Minorenni di Venezia of 10 July 2009 ordering the return of his child to Italy. The Bezirksgericht Leoben dismissed that application on the ground that enforcement of the judgment of the Italian court represented a grave risk of psychological danger to the child. On an appeal brought by Mr Alpago against that decision, the Landesgericht Leoben quashed the decision, on the basis of Case C-195/08 PPU Rinau [2008] ECR I-5271, and ordered return of the child.

Ms Povse brought an appeal against the decision of the Landesgericht Leoben seeking dismissal of the application for enforcement.Having doubts as to the interpretation of the regulation the Oberster Gerichtshof decided to stay proceedings and to refer to the Court five questions for a preliminary ruling.

The questions

'1. Is a "judgment on custody that does not entail the return of the child" within the meaning of Article 10(b)(iv) of [the Regulation] also to be understood as meaning a provisional measure by which "parental decision-making power" and in particular the right to determine the place of residence is awarded to the abducting parent pending the final judgment on custody?

2. Does a return order fall within the scope of Article 11(8) of [the Regulation] only where the court orders return on the basis of a judgment on custody delivered by that court?

3. If Question 1 or 2 is answered in the affirmative:

(a) Can the lack of jurisdiction of the court of origin (Question 1) or the inapplicability of Article 11(8) of [the Regulation] (Question 2) be relied on in the second State as against the enforcement of a judgment in respect of which the court of origin has issued a certificate in accordance with Article 42(2) of [the Regulation]?

(b) Or, in such circumstances, must the opposing party apply for that

certificate to be revoked in the State of origin, thereby allowing enforcement in the second State to be stayed pending the decision in the State of origin?

4. If Questions 1 and 2 or Question 3(a) are/is answered in the negative:

Does a judgment delivered by a court in the second State and regarded as enforceable under the law of that State, by which provisional custody was awarded to the abducting parent, preclude the enforcement of an earlier return order made in the State of origin under Article 11(8) of [the Regulation], in accordance with Article 47(2) of [the Regulation], even if it would not prevent the enforcement of a return order made in the second State under the Hague Convention?

5. If Question 4 is also answered in the negative:

(a) Can the second State refuse to enforce a judgment in respect of which the court of origin has issued a certificate under Article 42(2) of [the regulation] if, since its delivery, the circumstances have changed in such a way that enforcement would now constitute a serious risk to the best interests of the child?

(b) Or must the opposing party invoke that change of circumstances in the State of origin, thereby allowing enforcement in the second State to be stayed pending the judgment in the State of origin?

AG's opinion

The view of Advocate General Sharspton was delivered on 16 June 2010. After a quite long reasoning she concludes that:

'1) A provisional measure awarding custody of a child to the abducting parent pending the final (or lasting) judgment on custody is not a 'judgment on custody that does not entail the return of the child' within the meaning of Article 10(b)(iv) of Council Regulation (EC) No 2201/2003 .

2) A return order falls within the scope of Article 11(8) of Regulation No 2201/2003 irrespective of whether or not the court orders return on the basis of a judgment on custody delivered by that court.

3) Where a judgment certified by a court of a Member State in accordance with Article 42(2) of Regulation No 2201/2003 is challenged on the ground of the lack of jurisdiction of the court of origin or of the inapplicability of Article 11(8) of that regulation, the only possible legal remedy is to appeal against the judgment itself (and not against the certificate) before the courts of that Member State. The courts of the Member State of enforcement have no jurisdiction to refuse or stay enforcement.

4) A judgment delivered by a court in the State of enforcement, awarding provisional custody to the abducting parent, does not preclude the enforcement of an earlier return order made by the State of origin under Article 11(8) of Regulation No 2201/2003.

5) Where a judgment certified by a court of a Member State in accordance with Article 42(2) of Regulation No 2201/2003 is challenged on the ground that its enforcement would constitute a serious risk to the best interests of the child, because the circumstances have changed since that judgment was delivered, the only possible legal remedy is to appeal against the judgment itself (and not against the certificate) before the courts of that Member State. The courts of the Member State of enforcement have no jurisdiction to refuse or stay enforcement.'

The judgment

Quite close to the view of the Advocate General, the ECJ stated that

1. Article 10(b)(iv) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, must be interpreted as meaning that a provisional measure does not constitute a 'judgment on custody that does not entail the return of the child' within the meaning of that provision, and cannot be the basis of a transfer of jurisdiction to the courts of the Member State to which the child has been unlawfully removed.

2. Article 11(8) of Regulation No 2201/2003 must be interpreted as meaning that a judgment of the court with jurisdiction ordering the return of the child falls within the scope of that provision, even if it is not preceded by a final judgment of

that court relating to rights of custody of the child.

3. The second sub-paragraph of Article 47(2) of Regulation No 2201/2003 must be interpreted as meaning that a judgment delivered subsequently by a court in the Member State of enforcement which awards provisional rights of custody and is deemed to be enforceable under the law of that State cannot preclude enforcement of a certified judgment delivered previously by the court which has jurisdiction in the Member State of origin and ordering the return of the child.

4. Enforcement of a certified judgment cannot be refused in the Member State of enforcement because, as a result of a subsequent change of circumstances, it might be seriously detrimental to the best interests of the child. Such a change must be pleaded before the court which has jurisdiction in the Member State of origin, which should also hear any application to suspend enforcement of its judgment.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (4/2010)

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

Here is the contents:

- ***Christoph Thole***: "Anscheinsbeweis und Beweisvereitelung im harmonisierten Europäischen Kollisionsrecht – ein Prüfstein für die Abgrenzung zwischen lex causae und lex fori" – the English abstract reads as follows:

> *The harmonisation of European private international law has been heavily debated. However, the new Rome Regulations (Rome I and II) have not been fully scrutinized with respect to the distinction between procedural law and*

substantive law and its implications for the applicability of the lex fori-principle. This article focuses on two well-known issues of civil procedure law – prima facie evidence and obstruction of evidence. It examines the difficult question of how to deal with these legal institutes in private international law under the regime of the Rome Regulations.

- ***Götz Schulze***: "Moralische Forderungen und das IPR" – the English abstract reads as follows:

Moral claims articulate ethical positions of values which are hardly considered in the judicial discourse. This article first shows the moral implications of judicial claims in the field of the substantive civil law, which can be denominated as "minima moralia" of the civil law. Furthermore, moral claims exist as a social phenomenon. Their characteristic is the indeterminableness in claiming for an intrinsically pursued purpose which is regarded to be a good one. In Private International Law the ethical axiom of mutual recognition obtains a specific meaning. There, recognition refers to the claim of the other for being recognised. Thereby the other in Private International Law can be both, the individual and the state. The claims for identity of states and individuals are shaped by the law. The law of a state has to be acknowledged as a cultural achievement. Therefore, if there is a strong link to the facts, legal ethics demand an application of foreign law as a question of respecting state and individual. Beyond cosmopolitically conceived legal ethics demand to amend the applied law by cultural virtues. The judicial "gateways" for such ethical aspects are the general clauses like the good faith. Thus, the "moral-data"-doctrine of Jayme obtains a legitimation by legal ethics. Furthermore, ethical virtues may gain recognition in non-governmental treaties such as the Washington-Conference-Principles on Nazi-Confiscated Art. For provisions that articulate moral claims without comprehending an enforceable legal consequence Jayme has developed the term "narrative norms". They allow to balance contradicting moral positions and claims by finding a compromise instead of strict all-or-nothing-results. This can be shown on the basis of the ruling in the Sachs-case, which has dealt with the restitution of Nazi-Confiscated art-posters (Kammergericht Berlin on 28 January 2010).

- ***Rolf Wagner/Ulrike Janzen***: "Das Lugano-Übereinkommen vom

30.10.2007" – the English abstract reads as follows:

The revised Lugano Convention has entered into force on 1 January 2010 between the EU, Norway and Denmark. Switzerland will probably join the Convention in 2011. The aim of the Lugano revision was to achieve parallelism between the provisions of Regulation (EC) No. 44/2001 ("Brussels I") and the Lugano Convention, as it had existed between the Lugano Convention of 1988 and the Brussels Convention of 1968. In addition, as the ECJ has decided the Lugano Convention falls entirely within exclusive Community competence, the EU Member States (except Denmark) are no longer Contracting Parties to the Convention. This article explains the history and the concept of the "new" Lugano Convention. Further on it aims at exposing the differences between the "old" and the "new" Lugano Convention as well as the latter's relationship with Regulation No. 44/2001.

- ***Christian Schmitt***: "Reichweite des ausschließlichen Gerichtsstandes nach Art. 22 Nr. 2 EuGVVO" – the English abstract reads as follows:

This article analyzes the scope of exclusive jurisdiction pursuant to Art. 22 no. 2 of the Brussels I-Regulation („Brussels I"). Besides investigating whether Art. 22 no. 2 of Brussels I is merely applicable to formal organ decisions, it mainly deals with the question whether preliminary questions have to be considered in determining the matter in dispute. The ratio of Art. 22 no. 2 Brussels I is to avoid contradictory decisions about the existence of the company and the effectiveness of its organ's decisions. Taking into consideration this ratio and the established case law by the ECJ which leads to a restrictive interpretation of the provisions of Art. 22 of Brussels I, this article comes to the conclusion that Art. 22 no. 2 of Brussels I is not applicable to cases in which the effectiveness of the organ's decision is merely a preliminary question.

- ***Marius Kohler/Markus Buschbaum***:" Die „Anerkennung" öffentlicher Urkunden? – Kritische Gedanken über einen zweifelhaften Ansatz in der EU-Kollisionsrechtsvereinheitlichung" – the English abstract reads as follows:

On October 14th, 2009 the European Commission presented a proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of

decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession. The proposed Regulation is aimed at unifying and simplifying the rules governing successions, increasing their predictability and providing more effective guarantees for the rights of heirs and/or legatees and other persons linked to the deceased, as well as creditors of the succession. In this context, the proposal is also aimed at guaranteeing that authentic instruments in matters of succession can move freely in the European Union. To this end the European Commission proposes to simply transfer the well-known concept of recognition as is used to enable the cross-border circulation of judicial decisions to authentic instruments. Kohler/Buschbaum seize upon this approach which they criticize as being inapt and even harmful to the objective of strengthening the free circulation of authentic instruments. In particular, it turns out that the approach chosen by the Commission would even serve to circumvent the – harmonised – provisions of Private International Law on validity and legal effects of the legal acts underlying authentic instruments. A French version of the article is available under www.iprax.de.

- ***Paul Oberhammer***: "Im Holz sind Wege: EuGH SCT ./. Alpenblume und der Insolvenztatbestand des Art. 1 Abs. 2 lit. b EuGVVO" – the English abstract reads as follows:

Three decades after the ECJ decision in the case Gourdain ./. Nadler, the ECJ has rendered three decisions relating to the scope of application of the Brussels I Regulation and the Insolvency Regulation with respect to litigation emerging from insolvency proceedings in 2009 (Seagon ./. Deko Marty Belgium, SCT Industri ./. Alpenblume and German Graphics ./. van der Schee). The contribution discusses the procedural history, the relevant issues and future effects of the ECJ's decision SCT Industri ./. Alpenblume in detail.

- ***Moritz Brinkmann***: "Der Aussonderungsstreit im internationalen Insolvenzrecht – Zur Abgrenzung zwischen EuGVVO und EuInsVO" – the English abstract reads as follows:

In German Graphics, a German title retention seller tried to enforce in the Netherlands an order for the adoption of protective measures by a German court against the trustee of the Dutch buyer. On a reference by the Hoge Raad,

the ECJ clarified that Art. 25 II EuInsVO must be interpreted as meaning that the words "provided that that Convention is applicable" imply that it is necessary to determine whether a judgment falls inside the scope of application of the EuGVVO. Thus, the case raised once more the question of the scope of the exception provided for in Art. 1 II lit. b) EuGVVO, this time in a recognition and enforcement context. The court held that a seller's claim based on his reservation of title does not fall under Art. 1 II lit. b) EuGVVO.

In his comment, Moritz Brinkmann argues that the court's reasoning in German Graphics is convincing with respect to title reservation clauses. Here, the seller tries to recover a piece of property that is not part of the buyer's estate. Such a claim is independent of the buyer's insolvency and is not related to the insolvency proceedings. The mere fact that the order has to be enforced against the trustee is irrelevant. Title reserveration clauses, however, must be carefully dinstinguished from situations where the claimant is the owner of the asset in question by virtue of a fiduciary transfer of ownership for security purposes. Under such circumstances tha claim of the secured creditor – who is technically the owner – might nevertheless be characterized as a claim falling under Art. 1 II lit. b) EuGVVO. The author, furthermore, shows the consequences of the ECJ's decision for the validity of choice of court clauses.

- ***Jan von Hein***: "Die Produkthaftung des Zulieferers im Europäischen Internationalen Zivilprozessrecht" – the English abstract reads as follows:

The most recent decision of the ECJ on Article 5 No 3 of the Brussels I-Regulation, Zuid-Chemie v. Philippo's, deals with the interpretation of the provision in a case involving product liability. The ECJ held that the place where the harmful event occurred' designates 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. Jan von Hein agrees with the decision, but criticises the lack of harmonisation of Art. 5 (3) of Brussels I with the new provision on the law applicable to claims for product liability in Article 5 of the Rome II-Regulation. He examines in detail whether and to which extent a harmonious interpretation of the two provisions is possible. He comes to the conclusion that the diverging policies and methodological foundations underlying Art. 5 No. 3 Brussels I, which follows the traditional principle of ubiquity, on the one hand, and Art. 5 Rome II, which is a variation of the cascade system of connecting factors

pioneered by the Hague Convention on Product Liability, on the other, will inevitably lead to scenarios where jurisdiction and the applicable law do not coincide.

- ***Bettina Heiderhoff***: "Einzelheiten zur öffentlichen Zustellung" – the English abstract reads as follows:

The due and timely serving of documents, especially those instituting proceedings (writ of summons), is an essential element of judicial proceedings. However, when the address of the recipient (respondent to the claim) is unknown, most European legal systems allow service by publication. In the two cases at hand, the courts had to deal with the prerequisites of such a service by publication. The German Federal High Court (BGH) decided that service by publication may be excluded when the claimant has not invested enough effort in to discovering the address of the defendant. From a general perspective, this attitude seems convincing as it is important that fictitious forms of service be avoided whenever possible. It seems less convincing, however, that, through the introduction of the requirement of "sufficient effort", the rules on service by publication (and, in particular, foreign rules) are softened and legal certainty and predictability are reduced.

- ***Reinhold Geimer***: "Zurück zum Reichsgericht: Irrelevanz der merger-Theorien – Kein Wahlrecht mehr bei der Vollstreckbarerklärung"

The article analyses a judgment given by the German Federal Court of Justice (BGH, 2 July 2009, IX ZR 152/06) confirming the predominant opinion according to which an exequatur decision given by a third state cannot be declared enforceable in other states. In derogation from a previous judgment (BGH, 27 March 1984 – IX ZR 24/83) according to which the principle of the inadmissibility of double exequatur does not apply in case of the application of the doctrine of merger, the BGH now held that also in these cases there was no reason to derogate from this principle and thus returned to the approach adopted already by the Supreme Court of the German Reich.

- ***Maximilian Seibl***: "Kollisionsrechtliche Probleme im Zusammenhang mit einem Mietwagenunfall im Ausland – Anknüpfungsgrundsätze,

Haftungsbeschränkung und grobe Fahrlässigkeit" – the English abstract reads as follows:

Traffic accidents abroad prove to be one of the most relevant matters in the area of International Tort Law. As the Convention of 4 May 1971 on the law applicable to traffic accidents has not been signed by Germany the question as to which law governs such cases must be answered by the general International Tort Law provisions, i.e. by the Regulation (EC) No. 864/2007 (Rome II) or, in older cases, by Art. 40 EGBGB. The Federal Court of Justice of Germany (BGH) had to decide on a case in which two medical students had spent three months in South Africa together in order to pass practical education required for their studies. During their stay they had commonly rented a car. Both of them had assumed that the insurance modalities in South Africa in case of an accident were comparable to those in Germany, so that they had not contracted private insurance offered by the car rental company. In fact there was only the so-called "South African Road Accident Fund" which offered victims of car accidents compensation to the amount of 25.000 South African Rand (ca. 3.000 e) at that time. Since one of the students was not accustomed to driving on the left, she caused an accident after turning into a National Road resulting in severe injuries to the other. The BGH held that according to Art. 40 (2) EGBGB German law as the lex domicilii communis was applicable in the case. As the application of this rule can lead to a situation where strict liability applies to the keeper of the car while there is no insurance available, there is a controversy in German literature as to whether or not this rule should be applied if rented cars are involved. However, in this case the BGH provided a solution in the area of substantive law by assuming the existence of a tacit nonliability clause, which generally proves to meet the interests of the parties involved better than a modification of the Private International Law provision. In respect to classification the question as to whether or not such a clause can actually be assumed to have been concluded is a question of the law applicable to the contract, which was German law in the case. On the other hand it is up to the applicable tort law to decide as to whether or not such a clause is effective. Since German law, however, was also applicable in respect to tort matters, there was no problem concerning a possible restriction on the effectivity of the tacit clause in the present case. As a result the driver in the case would only have been liable if she had acted with gross negligence. On principle, the standards of conduct derive from local data whose applicability does not

depend on the respective International Tort Law provision. However, in case a lex domicilii communis exists, the standards of conduct in respect to the relation of passengers in the same car must be taken from this law, insofar it makes no difference whether the tortuous act was committed inland or abroad. Since the condition for gross negligence according to German law had not been met in the case, the BGH found for the defendant.

- ***Anna Radjuk***: "Grenzen der Anwendung des ausländischen Rechts in Russland" – the English abstract reads as follows:

In Russia, International Private Law was recently newly codified into the Russian Civil Code. Among others, new provisions with regard to the imperative norms and public policy were implemented. The present article investigates the impact of the imperative norms and public policy on the freedom of choice of law both in theory and practice from the time of the new codification.

- ***Christian Hoppe***: "Englisch als Verfahrenssprache – Möglichkeiten de lege lata und de lege ferenda"

The article presents a current attempt in Germany to admit – in certain cases – English as the language of procedure. Two German states ("Bundesländer"), North Rhine-Westphalia and Hamburg have presented a legislative proposal according to which special chambers for international commercial matters should be introduced which should, according to the proposal, litigate in English.

- ***Erik Jayme/ Carl Friedrich Nordmeier*** on a seminar held on 12 November 2009 at the "Pontifícia Unversidade Católica" in Rio de Janeiro on international maintenance law: "Neue Wege im Internationalen Unterhaltsrecht: Parteiautonomie und Privatisierung des ordre public Seminar in Rio de Janeiro"
- ***Erik Jayme*** on a conference held in Heidelberg on living wills and private international law: "Patientenverfügung und Internationales Privatrecht Tagung im Italienzentrum der Universität Heidelberg"