Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (3/2008)

Recently, the May/June issue of the German legal journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was released.

It contains the following **articles/case notes (including the reviewed decisions)**:

- ***M. Stürner****:* "Staatenimmunität und Brüssel I-Verordnung – Die zivilprozessuale Behandlung von Entschädigungsklagen wegen Kriegsverbrechen im Europäischen Justizraum" – The English abstract reads as follows:

The article examines the impact of the law of State immunity on the scope of international jurisdiction under the Brussels I Regulation. Recently the appellate court of Florence, Italy, has granted enforceability to a judgment in which the Greek Supreme Court, the Areios Pagos, had awarded damages to descendants of victims of a massacre committed in 1944 by German SS militia in the village of Dístomo, Greece. Both Greek and Italian courts have based their jurisdiction on an exception to State immunity which was held to exist in cases of grave human rights violations. This standpoint, however, does not reflect the present state of public international law, nor does it take into account the intertemporal dimension of public international law rules. Neither under the Brussels I regime, nor under domestic Italian law a judgment which was rendered in violation of customary State immunity rules can be recognized or enforced. The Brussels Regulation has a limited scope of application. It is designed to respect public international law rules of State immunity, not to trump them. The Regulation therefore does not apply in cases where the defendant enjoys immunity from civil jurisdiction.

- ***L. de Lima Pinheiro***: "Competition between legal systems in the European Union and private international law"
  The author discusses the idea of competition between national legal

systems and focuses on two aspects: Competition between legal systems and juridical pluralism and competition between legal systems and freedom of choice. Further, the author outlines the mission of private international law in the existing framework of legal pluralism within the EU by emphasising the importance of private international law in a world characterised by globalisation and legal pluralism which should, in the author's view, be reflected in an essential place of private international law in the teaching of law.

- ***P. Scholz****:*"Die Internationalisierung des deutschen ordre public und ihre Grenzen am Beispiel islamisch geprägten Rechts"
  The author examines the internationalisation of the German public policy clause and argues that human rights guaranteed in European and international law have to be taken into account within the framework of German public policy. Further there is, according to the author, no room for a relativization of the German public policy clause in case of internationally guaranteed human rights. Concerns which are expressed towards a supremacy of German values disregarding foreign legal systems are rebutted by the author in reference to the, for several reasons, only limited application of internationally guaranteed human rights.

- ***M. Heckel****:* "Die fiktive Inlandszustellung auf dem Rückzug – Rückwirkungen des europäischen Zustellungsrechts auf das nationale Recht"
  The author examines the impact of the European provisions of service on national law and argues that internal fictional service is, as a consequence of European law, at the retreat in Europe. Nevertheless, internal fictional service is – according to the author – in principle compatible with European law. It was only the statement of claim which had to be served effectively. In case of a fictional service of a statement of claim, a subsequent judgment in default could neither be recognised nor declared enforceable. In view of the right to be heard, internal fictional service was only admissible if the defendant could take notice of the judicial document.

- ***R. Geimer:*** "Los Desastres de la Guerra und das Brüssel I-System" (ECJ – 15.02.2007 – C-292/05 – *Lechouritou*)
  The author reviews the ECJ's judgment in "Lechouritou" which concerned

an action for compensation brought against Germany by Greek successors of victims of war massacres and agrees with the Court that actions brought for compensation in respect of acts perpetrated by armed forces in the course of warfare do not constitute "civil matters" in terms of Brussels I. Thus, the author concludes that consequences of war and occupation can only be dealt with at the level of international law.

- ***C. Althammer:*** "Die Auslegung der Europäischen Streitgenossenzuständigkeit durch den EuGH – Quelle nationaler Fehlinterpretation?" (ECJ – 11.10.2007 – C-98/06 – *Freeport*) – The English abstract reads as follows:

In the case Freeport/Arnoldsson the European Court of Justice has not rewarded the anticipatory obedience that national courts have paid to the judgement Réunion Européenne. Two claims in one action directed against different defendants and based in one instance on contractual liability and in the other on liability in tort or delict can be regarded as connected (Art. 6 (1), Council Regulation (EC) No 44/2001). In this respect the decision Freeport/Arnoldsson seems correct, although it is criticisable that the ECJ changes his course in such an oblique way. There is no favour done to legal certainty that way. An interpretation of the connection orientated towards the specific case which takes into account the national characteristics is advisable in order to avoid the risk of irreconcilable judgments resulting from separate proceedings. There is no risk of irreconcilable judgments if the proceeding against the anchor defendant is inadmissible. Moreover, the plaintiff must have a conclusive cause of action. Some chance of success seems to be necessary. The possibility of abuse requires an objective handling of the connection. In addition, subjective elements like malice are difficult to prove.

- ***A. Borrás:*** "Exclusive" and "Residual" Grounds of Jurisdiction on Divorce in the Brussels II bis Regulation (ECJ – 29.11.2007 – C-68/07 – *Sundelind Lopez*)
  In the reviewed case, the ECJ has held that Artt. 6 and 7 Brussels II *bis* have to be interpreted as meaning that where in divorce proceedings, a responsent is not habitually resident in a Member State and is not a national of a Member State, the courts of a Member State cannot base

their jurisdiction on their national law if the courts of another Member State have jurisdiction under Art. 3 Brussels II *bis*. The author agrees with the ECJ regarding the final ruling, but is nevertheless critical with regard to the arguments brought forward by the Court and submits that the fact that there was no opinion by an Advocate General had a negative effect on the case. In this respect, the author regrets that this will happen more often in the future since the recent amendments of the Protocol on the Statute of the Court of Justice and of the rules of procedure of the Court provide "for an expedited or accelerated procedure and, for references for a preliminary ruling relating to the area of freedom, security and justice, an urgent procedure".

- ***H. Roth****:* "Der Kostenfestsetzungsbeschluss für eine einstweilige Verfügung als Anwendungsfall des Europäischen Vollstreckungstitels für unbestrittene Forderungen" (OLG Stuttgart – 24.05.2007 – 8 W 184/07)
  The author approvingly reviews a decision of the Court of Appeal Stuttgart dealing with the question whether an order for costs for an interim injunction constitutes a "judgment" in terms of the Regulation creating a European Order for uncontested claims. The case concerned the question whether a certification of the order for costs as a European Enforcement Order had to be refused due to the fact that the underlying decision constituted an interim injunction which had not been given in adversarial proceedings. Thus, the case basically raised the question of the interdepence between the order for costs and the underlying decision. Here the court held that it was sufficient if the defendant was granted the right to be heard subsequently to the service of the decision.

- ***D. Henrich:*** "Wirksamkeit einer Auslandsadoption und Rechtsfolgen für die Staatsangehörigkeit" (OVG Hamburg – 19.10.2006 – 3 Bf 275/04)
  In the reviewed decision, the Higher Administrative Court Hamburg had to deal with the question of acquisition of German nationality by adoption and thus with the question which requirements an adoption has to comply with in order to lead to the acquisition of German nationality.

- ***M. Lamsa****:* "Allgemeinbegriffe in der Firma einer inländischen Zweigniederlassung einer EU-Auslandsgesellschaft" (LG Aachen – 10.04.2007 – 44 T 8/07)
  The author critically examines a decision of the Regional Court Aachen

which has held – in view of the freedom of establishment – that the registration of a subsidiary of an English Limited could not be refused even if the trading name does not meet the requirements of German law.

- ***H. Sattler****:* "Staatsgeschenk und Urheberrechte" (BGH – 24.05.2007 – I ZR 42/04) – The English abstract reads as follows:

More than a decade after the fall of the Berlin Wall, the German Bundestag, in the course of a public ceremony in Berlin, donated to the United Nations three sections of the former Wall which had been painted by an Iranian artist without the landowner's assent. The Bundesgerichtshof dismissed the artist's claim for damages. The court found that the donation did not infringe the plaintiff's rights of distribution (§ 17 German Copyright Act), because the parts of the wall were handed over only symbolically in Berlin whereas the actual transfer took place later in New York. The court further held that the painter had no right to be named (§ 13 German Copyright Act) during the Berlin ceremony, since his work was not exhibited at that presentation and had not been signed by the artist. It can be criticized that the court explicitly refused to deal with potential copyright infringements in New York solely due to the fact that the claimant, when stating the facts of his case, had not expressly referred to the applicable US law.

- ***C. F. Nordmeier*** discusses two Portuguese decisions dealing with the question of international jurisdiction of Portuguese courts with regard to actions against German sellers directed at the selling price. ("Internationale Zuständigkeit portugiesischer Gerichte für die Kaufpreisklage gegen deutsche Käufer: Die Bedeutung des INCOTERM für die Bestimmung des Lieferortes nach Art. 5 Nr. 1 lit. b EuGVVO")

  (Tribunal da Relação de Porto, 26.4.2007, Agravo n° 1617/07-3ª Sec., und Supremo Tribunal de Justiça, 23.10.2007, Agravo 07A3119)

- ***W. Siebericchs*** addresses the qualification of the German civil partnership as a marriage which is provided in a note of the Belgium minister of justice ("Qualifikation der deutschen Lebenspartnerschaft als Ehe in Belgien")

- ***C. Mindach*** reports on the development of arbitration in the Kyrgyz Republic ("Zur Entwicklung der Schiedsgerichtsbarkeit in der

Kirgisischen Republik")

- ***H. Krüger/F. Nomer-Ertan*** present the new Turkish rules on private international law ("Neues internationales Privatrecht in der Türkei")

Further, this issue contains the following **materials**:

- The Turkish Statute No. 5718 of 27 November 2007 on private international law and the international law of civil procedure ("Das türkische Gesetz Nr. 5718 vom 27.11.2007 über das internationale Privat- und Zivilverfahrensrecht")
- Statute of the Kyrgyz Republic on the arbitral tribunals of the Kyrgyz Republic of 30 July 2002, Nr. 135 ("Gesetz der Kirgisischen Republik über die Schiedsgerichte in der Kirgisischen Republik – Bischkek, 30.7.2002, Nr. 135")
- Première Commission – Résolution – La substitution et l'équivalence en droit international privé – Institut de Droit International, Session de Santiago 2007 – 27 octobre 2007

As well as the following **information**:

- ***E. Jayme*** on the 73rd Session of the Institute of International Law in Santiago, Chile ("Substitution und Äquivalenz im Internationalen Privatrecht – 73. Tagung des Institut de Droit International in Santiago de Chile")
- ***S. Kratzer*** on the annual conference of the German-Italian Lawyers' Association ("Das neue italienische Verbrauchergesetzbuch – Kodifikation oder Kompilation und Einführung des Familienvertrages ("patto di famiglia") im italienischen Unternehmenserbrecht – Jahrestagung der Deutsch-italienischen Juristenvereinigung in Augsburg")

New Articles for Early 2008

It has been a little while since my last trawl through the law journals, and a few articles and casenotes have been published in the intervening period that private international law enthusiasts may wish to add to their reading list:

J.M. Carruthers, "**De Facto Cohabitation: the International Private Law Dimension**" (2008) 12 *Edinburgh Law Review* 51 – 76.

P. Beaumont & Z. Tang, "**Classification of Delictual Damages – Harding v Wealands and the Rome II Regulation**" (2008) 12 *Edinburgh Law Review* 131 – 136.

G. Ruhl, "**Extending Ingmar to Jurisdiction and Arbitration Clauses: The End of Party Autonomy in Contracts with Commercial Agents?**" (2007) 6 *European Review of Private Law* 891 – 903. An abstract:

> *In the judgment discussed below, the Appeals Court of Munich (OLG München) deals with the question whether jurisdiction and arbitration clauses have to be set aside in the light of the Ingmar decision of the European Court of Justice where they cause a derogation from Articles 17 and 18 of the Commercial Agents Directive. The Court concludes that this question should be answered in the affirmative if it is 'likely' that the designated court or arbitral tribunal will neither apply Articles 17 and 18 nor compensate the commercial agent on different grounds. Thus, the Court advocates that Articles 17 and 18 be given extensive protection. This is, however, problematic because such extensive protection imposes serious restrictions on party autonomy, whereas these restrictions are not required by Community law in general or by the principle of effectiveness in particular. Therefore, it is very much open to doubt whether this decision is in the best interests of the Internal Market.*

F. Bolton & R. Radia, "**Restrictive covenants: foreign jurisdiction clauses**" (2008) 87 *Employment Law Journal* 12 – 14. The abstract:

> *Reviews the Queen's Bench Division judgment in Duarte v Black and Decker Corp and the Court of Appeal decision in Samengo-Turner v J&H Marsh & McLennan (Services) Ltd on whether restrictive covenants were enforceable*

under foreign jurisdiction clauses contained in the long-term incentive plan agreements of UK domiciled employees of multinational companies. Examines the conflict of laws and whether English law applied under the Convention on the Law Applicable to Contractual Obligations 1980 Art.16 and under Regulation 44/2001 Arts.18 and 20.

W. Tetley, "**Canadian Maritime Law**" *L.M.C.L.Q.* 2007, 3(Aug) Supp (*International Maritime and Commercial Law Yearbook* 2007), 13-42. The blurb:

Reviews Canadian case law and legislative developments in shipping law in 2005 and 2006, including cases on: (1) carriage of goods by sea; (2) fishing regulations; (3) lease of port facilities; (4) sale of ships; (5) personal injury; (6) recognition and enforcement of foreign judgments; (7) shipping companies' insolvency; (8) collision; and (9) marine insurance.

S. James, "**Decision Time Approaches – Political agreement on Rome I: will the UK opt back in?**" (2008) 23 *Butterworths Journal of International Banking & Financial Law* 8. The abstract:

Assesses the extent to which European Commission proposed amendments to the Draft Regulation on the law applicable to contractual obligations (Rome I) meet the concerns of the UK financial services industry relating to the original proposal. Notes changes relating to discretion and governing law, assignment and consumer contracts.

A. Onetto, "**Enforcement of foreign judgments: a comparative analysis of common law and civil law**" (2008) 23 *Butterworths Journal of International Banking & Financial Law* 36 – 38. The abstract:

Provides an overview of the enforcement of foreign judgments in common law and civil law jurisdictions by reference to a scenario involving the enforcement of an English judgment in the US and Argentina. Reviews the principles and procedures applicable to the recognition and enforcement of foreign judgments in the US and Argentina respectively, including enforcement expenses and legal fees. Includes a table comparing the procedures for the recognition and enforcement of foreign judgments in California, Washington DC and New York.

J. Carp, "**I'm an Englishman working in New York**" (2008) 152 *Solicitors Journal* 16 – 17. The abstract:

> *Reviews case law on issues arising where a national of one country works in another country. Sets out a step by step approach to ascertaining: the law governing the employment contract; the applicability of mandatory labour laws, including cases on unfair dismissal, discrimination, working time, and the transfer of undertakings; which country has jurisdiction; and public policy. Offers practical suggestions for drafting multinational contracts.*

J. Murphy – O'Connor, "**Anarchic and unfair? Common law enforcement of foreign judgments in Ireland**" 2007 2 *Bankers' Law* 41 – 44. Abstract:

> *Discusses the Irish High Court judgment in Re Flightlease (Ireland) Ltd (In Voluntary Liquidation) on whether, in the event that the Swiss courts ordered the return of certain monies paid by a Swiss airline, in liquidation, to an Irish company, also in liquidation, such order would be enforceable in Ireland. Considers whether: (1) the order would be excluded from enforcement under the common law on the basis that it arose from a proceeding in bankruptcy or insolvency; and (2) the order would be recognised on the basis of a "real and substantial connection" test, rather than traditional conflict of laws rules.*

V. Van Den Eeckhout, "**Promoting human rights within the Union: the role of European private international law**" 2008 14 *European Law Journal* 105 – 127. The abstract:

> *This article aims to contribute both to the 'Refgov' project, which is focused on the ambition to find ways of promoting human rights within the EU, but also, more in general and apart from the project, to an improved understanding of the crucial place conflict of law rules occupy in the building of a common Europe—a highly political question behind apparently technical issues. In the study the author deals with the parameters, points of interest, etc in relation to private international law which should be heeded if European Member States 'look at' each other's laws, and—in the context of the 'Refgov' project—if the idea is to exchange 'best practices' or harmonise substantive law, or to harmonise private international law, etc further through a type of open method of coordination. The contribution also shows that private international law*

issues are decisive in respect of every evaluation of the impact of European integration on human rights, both if this integration process takes place through 'negative' harmonisation (for example by falling back on the principle of mutual recognition) and through 'positive' harmonisation.

R. Swallow & R. Hornshaw, "**Jurisdiction clauses in loan agreements: practical considerations for lenders**" (2007) 1 *Bankers' Law* 18 – 22. Abstract:

Assesses the implications for borrowers and lenders of the Commercial Court judgment in JP Morgan Europe Ltd v Primacom AG on whether proceedings brought in Germany challenging the validity a debt facility agreement were to be treated as the first seised under Regulation 44/2001 Art.27 (Brussels I Regulation), despite the fact that the agreement contained an exclusive jurisdiction clause in favour of the English courts. Advises lenders on the drafting of loan agreements to help mitigate the risk of a jurisdiction clause being frustrated. Considers the steps that might be taken by the lender once a dispute has arisen.

A. Dutton, "**Islamic finance and English law**" (2007) 1 *Bankers' Law* 22 – 25. Abstract:

Reviews cases relating to Islamic finance, including: (1) the Commercial Court decision in Islamic Investment Co of the Gulf (Bahamas) Ltd v Symphony Gems NV on whether the defendant was liable to make payments under a Sharia compliant contract governed by English law that would contravene Sharia law; (2) the Court of Appeal ruling in Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd (No.1) interpreting a choice of law clause expressed as English law "subject to the principles" of Sharia law; and (3) the Commercial Court judgment in Riyad Bank v Ahli United Bank (UK) Plc on whether the defendant owed a duty of care to a Sharia compliant fund where it had contracted directly with its parent bank.

J. Burke & A. Ostrovskiy, "**The intermediated securities system: Brussels I breakdown**" (2007) 5 *European Legal Forum* 197 – 205. Abstract:

Presents a hypothetical case study of a dispute arising from a cross-border securities transaction involving parties from the UK, Sweden and Finland to

examine the application of the private international law regime under Regulation 44/2001 Art.5(1) (Brussels I Regulation), the Convention on the Law Applicable to Contractual Obligations 1980 Art.4 (Rome Convention) and the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary. Considers the extent to which commercial developments in the securities industry have outstripped the current conflicts of law rules.

M. Requejo, "**Transnational human rights claims against a state in the European Area of Freedom, Justice and Security: a view on ECJ judgment, 15 February 2007 – C292/05 – Lechouritou, and some recent Regulations**" (2007) 5 *European Legal Forum* 206 – 210. Abstract:

Comments on the European Court of Justice ruling in Lechouritou v Germany (C-292/05) on whether a private action for compensation brought against Germany with respect to human rights abuses committed by its armed forces during its occupation of Greece in the Second World War fell within the scope of the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968 Art.1, thus preventing the defendant from claiming immunity for acts committed during armed conflict. Examines the EC and US jurisprudential context for such private damages claims.

L. Osana, "Brussels I Regulation Article 5(3): German Law Against Restrictions on Competition" (2007) 5 *European Legal Forum* 211 – 212. Abstract:

Summarises the Hamburg Court of Appeal decision in Oberlandesgericht (Hamburg) (1 Kart-U 5/06) on whether the German courts had jurisdiction under Regulation 44/2001 Art.5(3) (Brussels I Regulation) to order a German tour operator not to incite Spanish hotels to refuse to supply contingents to a competitor German tour operator, behaviour that had been found to be anti-competitive.

C. Tate, "**American Forum Non Conveniens in Light of the Hague Convention on Choice of Court Agreements**" (2007) 69 *University of Pittsburgh Law Review* 165 – 187.

E. Costa, "**European Union: litigation – applicable law**" (2008) 19

International Company and Commercial Law Review 7 – 10. Abstract:

> *Traces the history of how both the Convention on the Law Applicable to Contractual Obligations 1980 (Rome I) and Regulation 864/2007 (Rome II) became law. Explains how Rome II regulates disputes involving non-contractual obligations and determines the applicable law. Notes areas where Rome II does not apply, and looks at the specific example of how Rome II would regulate a dispute involving product liability, including the habitual residence test.*

E.T. Lear, "**National Interests, Foreign Injuries, and Federal Forum Non Conveniens**" (2007) 41 *University of California Davis Law Review* 559 – 604 [**Full Text Here**]. Abstract:

> *This Article argues that the federal forum non conveniens doctrine subverts critical national interests in international torts cases. For over a quarter century, federal judges have assumed that foreign injury cases, particularly those filed by foreign plaintiffs, are best litigated abroad. This assumption is incorrect. Foreign injuries caused by multinational corporations who tap the American market implicate significant national interests in compensation and/or deterrence. Federal judges approach the forum non conveniens decision as if it were a species of choice of law, as opposed to a choice of forum question. Analyzing the cases from an adjudicatory perspective reveals that in the case of an American resident plaintiff injured abroad, an adequate alternative forum seldom exists; each time a federal court dismisses such a claim, the American interest in compensation is irrevocably impaired. With respect to deterrence, an analysis focusing properly on adjudicatory factors demonstrates that excluding foreign injury claims, even those brought by foreign plaintiffs, seriously undermines our national interest in deterring corporate malfeasance.*

I am sure that I have missed various articles or case comments published in the last couple of months. If you spot any that are not on this list (or, even better, if you have written one and it is not on this list), please let me know.

Opinion on first Reference for a Preliminary Ruling on Brussels II bis

On 20 September, *Advocate General Kokott* has delivered her opinion on the first reference for a preliminary ruling on the Brussels II *bis* Regulation (Regulation 2201/2003/EC) – *Applicant C*, C-435/06.

The background of the case is as follows: *Applicant C*. has lived with her two minor children and her husband in Sweden. In February 2005, the competent Swedish authority ordered – due to investigations which had been carried out in beforehand – the immediate taking into custody of both children as well as their placement in a foster family outside the home. These protective measures are regarded as public acts in Finland and Sweden. Before the decision of the acting Swedish authority was approved by the *Länsrätt*, *C.* had moved with her children to Finland. After the approval of the decision by the *Länsrätt*, the Swedish police requested administrative assistance from the Finnish police with regard to the enforcement of the Swedish decision. Subsequently, the Finnish police ordered the immediate taking into custody of the children as well as their committal to the Swedish social authorities. After her action against the acts taken by the Finnish authorities at the *Hallinto-oikeus* had failed, the mother, *C.*, appealed to the highest administrative court in Finland, the *Korkein Hallinto-oikeus,* and claimed first to set aside the decision of the *Hallinto-oikeus,* second to revoke the order made by the police and third to bring back the children to Finland. The *Korkein Hallinto-oikeus,* however, had doubts whether the Brussels II *bis* Regulation was applicable. This was decisive since in case of the applicability of the Regulation, Finnish civil – and not administrative – courts would be competent in this case. Further, rules existing within the framework of an cooperation among the administrative authorities in the Nordic States would be superseded by the Regulation. Consequently, the *Korkein Hallinto-oikeus* referred with decision of 13 October 2006 the following questions to the ECJ for a preliminary ruling:

a) Does Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, (the Brussels 11a Regulation) [2] apply, in a case such as the present, to the enforcement of a public law decision in connection with child welfare, relating to the immediate taking into custody of a child and his or her placement in a foster family outside the home, taken as a single decision, in its entirety;

(b) or solely to that part of the decision relating to placement outside the home in a foster family, having regard to the provision in Article 1(2)(d) of the regulation;

(c) and, in the latter case, is the Brussels IIa Regulation applicable to a decision on placement contained in one on taking into custody, even if the decision on custody itself, on which the placement decision is dependent, is subject to legislation, based on the mutual recognition and enforcement of judgments and administrative decisions, that has been harmonised in cooperation between the Member States concerned? If the answer to

Question 1(a) is in the affirmative, is it possible, given that the Regulation takes no account of the legislation harmonised by the Nordic Council on the recognition and enforcement of public law decisions on custody, as described above, but solely of a corresponding private law convention, nevertheless to apply this harmonised legislation based on the direct recognition and enforcement of administrative decisions as a form of cooperation between administrative authorities to the taking into custody of a child?

If the answer to Question 1(a) is in the affirmative and that to Question 2 is in the negative, does the Brussels IIa Regulation apply temporally to a case, taking account of Articles 72 and 64(2) of the regulation and the abovementioned harmonised Nordic legislation on public law decisions on custody, if in Sweden the administrative authorities took their decision both on immediate taking into custody and on placement with a family on 23.2.2005 and submitted their decision on immediate custody to the administrative court for confirmation on 25.2.2005, and that court accordingly confirmed the decision on 3.3.2005?

Of particular interest is the **first question** referred to the ECJ: With this question, the Finnish referring court basically aims to know whether a decision ordering the immediate taking into custody of a child and his or her placement outside the home falls within the scope of application of Brussels II *bis*. To answer this question, the Advocate General examines two questions: First, can the immediate taking into custody of a child and his or her placement outside home be qualified as measures concerning parental responsibility in terms of the Regulation? And secondly, do they constitute civil matters?

The first of these questions can be answered easily with regard to the placement of a child in a foster family or in institutional care, since this measure is explicitly mentioned in Art. 1 (2) (d) Brussels II *bis*. In contrast to that, the immediate taking into custody of a child is not referred to in Art. 1 (2) of the Regulation. However, the Advocate General argues – in accordance with several Member States – that the immediate taking into custody of a child and his or her placement in a foster family or in institutional care were connected very strongly (para. 28). As Art. 1 (1) (b) Brussels II *bis* showed, matters of parental responsibility included not only measures regarding the termination or delegation of parental responsibility, but also measures concerning the excercise of parental responsiblity. Even though the parents did not lose their custody as such in case of an immediate taking into custody or in case of the placement of the child outside home, they could not exercise essential parts of it anymore (para. 30). Consequently, also the immediate taking into custody of a child constitutes, according to the Advocate General, a matter of parental responsibility.

Of particular interest are the Advocate General's remarks with regard to the second problem – namely the question whether these kind of measures can be regarded as civil matters. Regarding this question, the Swedish government argued, protective measures, such as the immediate taking into custody and the placement of a child in a foster family, did not constitute "civil matters" since they were ordered by public authorities acting in the exercise of their public powers (para. 34). Thus, the Swedish government applied the principles of delimitation which have been elaborated by the ECJ with regard to the Brussels Convention – most recently in *Lechouritou* – also with regard to Brussels II *bis*. This point of view is not shared by the Advocate General. She argues that the aims and the history of the Brussels Convention – with regard to which the delimitation between public and civil matters has been developed – did not necessarily

correspond with those of the Brussels II *bis* Regulation. Consequently, the term of "civil matters" had to be interpreted independently with regard to the Brussels II *bis* Regulation (para. 38). Here the Advocate General argues that the restriction or termination of parental responsibility (Art. 1 (1) (b) Brussels II *bis*) are usually ordered by public authorities. Further, the measures explictly mentioned in Art. 1 (2) Brussels II *bis* constituted in general public protective measures. This enumeration would not make any sense, if one regarded those measures not as civil matters because a private party (parents) and a public authority are concerned (paras. 40, 41). Further, also recital No. 5 („[…] this Regulation covers all decisions on parental responsibility, including measures for the protection of the child" […]") showed that the term of "civil matters" had to be interpreted in an extensive way (para. 42). This was also the case if the measure in question is regarded as a public matter in one Member State (para. 44). Consequently, the Advocate General regards decisions on the immediate taking into custody of a child and the placement of a child in a foster family as civil matters which concern parental responsibility and fall therefore within the scope of the Brussels II *bis* Regulation (para. 53).

With regard to the **second question** referred to the ECJ, the Advocate General holds that Finland and Sweden are – insofar as Brussels II *bis* is applicable – restrained from applying derogating national rules (para. 60).

The Opinion is not available in English yet, but can be found in several languages, inter alia in Spanish, German, Italian and French on the ECJ's website.

See also our older post regarding the reference for a preliminary ruling which can be found here.

ECJ: Legal Actions for Compensation for Acts perpetrated

by Armed Forces in the Course of Warfare are no “Civil Matters” in Terms of the Brussels Convention

Today, the European Court of Justice has delivered the judgment in case C-292/05 (*Lechouritou and Others v. Federal Republic of Germany*).

The case concerned an action for compensation based on the Brussels Convention brought by Greek descendants of victims of a massacre perpetrated by German armed forces in 1943 in Greece against the Federal Republic of Germany with regard to financial loss, non-material damage and mental anguish.

The Court of Appeal Patras had referred the following questions to the ECJ:

> *Do actions for compensation which are brought by natural persons against a Contracting State as being liable under civil law for acts or omissions of its armed forces fall within the scope ratione materiae of the Brussels Convention in accordance with Article 1 thereof where those acts or omissions occurred during a military occupation of the plaintiffs' State of domicile following a war of aggression on the part of the defendant, are manifestly contrary to the law of war and may also be considered to be crimes against humanity?*
>
> *Is it compatible with the system of the Brussels Convention for the defendant State to put forward a plea of immunity, with the result, should the answer be in the affirmative, that the very application of the Convention is neutralised, in particular in respect of acts and omissions of the defendant's armed forces which occurred before the Convention entered into force, that is to say during the years 1941-44?*

With regard to the first question, the Court first states that Art. 1 Brussels Convention did not define the meaning or the scope of the concept of "civil and commercial matters" (para. 28) before it is pointed out that this term had to be regarded as "an independent concept" which had to be interpreted by referring "first, to the objectives and scheme of the Brussels Convention and, second to the general principles which stem from the corpus of the national legal systems […]"

(para. 29). Further the Court refers to its case law where it has been held that actions between a public authority and a person governed by private law did not fall within the scope of the Brussels Convention if the public authority is acting in the exercise of its public powers.

The Court agrees with the Advocate General's Opinion that " […] there is no doubt that operations conducted by armed forces are one of the characteristic emanations of State sovereignty […]" (para. 37) and concludes that the present action "[…] does not fall within the scope ratione materiae of the Brussels Convention […]" (para. 39).

Thus, the Court ruled as follows:

> ***On a proper construction of the first sentence of the first paragraph of Article 1 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, 'civil matters' within the meaning of that provision does not cover a legal action brought by natural persons in a Contracting State against another Contracting State for compensation in respect of the loss or damage suffered by the successors of the victims of acts perpetrated by armed forces in the course of warfare in the territory of the first State.***

Compare also our lengthy post on the AG Opinion which can be found here as well as the very comprehensive post at the EU Law Blog which can be viewed here.

Brussels Convention, the Law of War and Crimes Against Humanity

Advocate General Ruiz-Jarabo Colomer has given his Opinion in Case C-292/05 Lechouritou and Others.

The case is concerned with whether claims for compensation which are brought by a number of Greek citizens against a Contracting State (Germany) as being liable under civil law for acts or omissions of its armed forces fall within the scope *ratione materiae* of the Brussels Convention. The following questions were referred to the ECJ by order of the *Efetio Patron* (Court of Appeal, Patras):

> *1. Do actions for compensation which are brought by natural persons against a Contracting State as being liable under civil law for* ***acts or omissions of its armed forces*** *fall within the scope ratione materiae of the Brussels Convention in accordance with Article 1 thereof* ***where those acts or omissions occurred during a military occupation of the plaintiffs' State of domicile following a war of aggression on the part of the defendant, are manifestly contrary to the law of war and may also be considered to be crimes against humanity****?*
>
> *2. Is it compatible with the system of the Brussels Convention for the defendant State to put forward a plea of immunity, with the result, should the answer be in the affirmative, that the very application of the Convention is neutralised, in particular in respect of acts and omissions of the defendant's armed forces which occurred before the Convention entered into force, that is to say during the years 1941-44?*

The Advocate General's answer to the first question referred to the ECJ was that, even if the term “civil and commercial matters” is not defined in the Brussels Convention, it has been held that this term has to be interpreted autonomously and does not include acts *iure imperii*. The Advocate General establishes two criteria which decide whether an act *iure imperii* – which does not fall within the scope of the Brussels Convention – has to be identified as such: Firstly, the official role of the parties involved, and secondly the origin of the claim, i.e. whether the exercise of authority by the administration is exorbitant. In the present case, the

official character of one of the parties was beyond doubt because the action is directed as against a state. Concerning the second criteria, the exercise of exorbitant authority, it has been stated that martial acts constitute a typical example of a state´s authority. Thus, claims directed at the restitution of damages which have been caused by armed forces of one of the war conducting parties are not "civil matters" for the purposes of Art. 1 of the Brussels Convention.

As – according to the Advocate General´s opinion – the first question has to be answered negatively, the second question referred to the ECJ does not have to be dealt with. However, the Advocate General points out that immunity precedes the Brussels Convention since if it is – due to immunity – not possible to file a suit, it is irrelevant which court has jurisdiction. Further, the examination of immunity and its effects on human rights was beyond the Court´s competence.

In the Advocate General's words,

> *...a claim for compensation, which is raised by natural persons against a Contracting State of the Brussels Convention, in order to attain compensation for damage caused by armed forces of another Contracting State during a military occupation, does* ***not*** *fall within the material scope of the Brussels Convention, even if those actions can be regarded as crimes against the humanity (approximate translation from the German text of the judgment, para. 79. An English translation is not available.)*

This post has been written jointly by Martin George and Veronika Gaertner. There is more coverage of the case on the EU Law Blog.