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"

French Supreme Court Recognizes Foreign Gay Adoption

Yesterday, the French supreme court for private and criminal matters (*Cour de cassation*) held that an American judgment permitting the adoption of a child by the female partner of the mother was not contrary to French public policy and could be recognized in France.

The women were two doctors living in the United State. They had entered into a domestic partnership. The mother was a American national, while her partner was French. After the child was born, the Superior Court of the county of Dekalb, Georgia, permitted the adoption of the child by the French female partner of the mother in 1999. As a consequence, the birth certificate mentioned that the American woman was the mother, and that the French woman was a parent.

The Paris court of appeal had denied recognition to the judgment. The appeal against their decision is allowed by the *Cour de cassation* which rules that the American judgement is recognised. The French text of the judgment of the *Cour de cassation* can be found here.

This decision is presented as historic by French newspaper *Le Monde*.

European proposals on PIL and its impact on interregional law

The most recent EU Proposals on Private International Law (on the one hand, the Proposal for a Regulation of the European Parliament and of the Council 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, COM(2009) 154 final, and on the other hand, the Proposal for a Council Regulation (EU) implementing enhanced cooperation in the

area of the law applicable to divorce and legal separation, COM(2010) 105 final) have raised some concerns regarding their possible effects in States with more than one legal system of private law, such as Spain and the United Kingdom. To analyse from a Spanish perspective some of the issues that may be triggered by these Proposals, a Workshop organised by the Department of Justice of the Generalitat de Catalunya (the Catalan regional Government) took place in Barcelona on June 8th (see the Program here)

The Workshop started with a brief presentation of the Proposal on successions (by Albert Font, from the Universitat Pompeu Fabra) and the Proposal on divorce and legal separation (by Rafael Arenas, from the Universitat Autònoma de Barcelona), paying special attention to those aspects which are likely to have an impact in Spain, as a consequence of the several private law legal systems which coexist in this country.

The second part of the Workshop was devoted to the presentation of the Working Materials prepared by the Group on Interregional Law of the Observatory on Private Law of Catalonia. These Working Materials are the result of an initial project of elaborating the draft of an Act on Interregional Law, dealing with the determination of the applicable law in intra-Spanish conflicts of private law (a matter currently dealt with by the Preliminary Title of the Spanish Civil Code). Although the draft has so far not been officially presented for its consideration by the Spanish Parliament, these Working Materials can be useful for further discussion on the subject.

For an account of the Workshop and a link to the Working Materials, please click here.

Many thanks to Cristian Oró Martínez, Postdoctoral Researcher at the Universidad Autónoma de Barcelona

COM(2009)154 final in Spanish

Just a brief post to report a "minor" error in the Spanish version of the 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: see art. 27.2 in Spanish

"En particular, la aplicación de una disposición de la ley designada por el presente Reglamento *solo podrá considerarse contraria al orden público del foro si sus disposiciones relativas a la reserva hereditaria son diferentes de las disposiciones vigentes en el foro".*

and compare it with English (French, Italian…) versions:

"In particular, the application of a rule of the law determined by this Regulation *may not be considered to be contrary to the public policy of the forum on the sole ground that its clauses regarding the reserved portion of an estate differ from those in force in the forum".*

But, who knows, may be there is a way to reach a common understanding of the texts.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (3/2010)

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

This issue contains *inter alia* some of the papers presented at the Brussels I Conference in Heidelberg last December. The other papers were published in the previous issue.

Here is the contents:

- ***Paul Oberhammer***: "The Abolition of Exequatur"

The Commission's Report on the reform of the Brussels Regulation points out that "the abolition of the exequatur procedure in all matters covered by the Regulation" is the "main objective of the revision of the Regulation". In this context, the Green Paper raises the following two questions: "Are you of the opinion that in the internal market all judgments in civil and commercial matters should circulate freely, without any intermediate proceedings (abolition of exequatur)? And in that case, are you of the opinion that some safeguards should be maintained in order to allow for such an abolition of exequatur? And in that case, which ones?"4 In the following discussion, I will try to answer these questions. As the problem is multifaceted, I can do so only in a very sketchy fashion.

- ***Andrew Dickinson***: "Provisional Measures in the "Brussels I" Review – Disturbing the Status Quo?"

Art. 31 of the Brussels I Regulation provides: "Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter." This provision closely mirrors Art. 24 of the Brussels and Lugano Conventions. Sitting (and, perhaps, partly hidden from view) between the provisions concerning, on the one hand, substantive jurisdiction and, on the other, the recognition and enforcement of judgments, the treatment of provisional measures attracted very little attention in the early history of those Conventions, being fleetingly considered in each of the official reports. That Art. 31 emerged intact from the process leading to the conversion of the Brussels Convention into a Community Regulation at the turn of the century is, however, surprising for the following reasons. First, as the Recitals to the Regulation emphasise, the predominant concern of the Community legislator was to adopt "highly predictable" rules of jurisdiction "founded on the principle

that jurisdiction is generally based on the defendant's domicile". Art. 31 achieves neither objective. The delegation to national rules of jurisdiction (including rules of the kinds prohibited by Art. 3) creates a non-uniform landscape in which it is not possible for litigants to determine on the basis of the Regulation alone whether a particular court is competent to grant provisional measures. Secondly, the Commission itself in its 1997 Proposal for a Council Act establishing a revised Convention on jurisdiction and judgments had suggested replacing Art. 24 with a narrower provision, limiting the exorbitant power to grant provisional including protective measures (as defined) to cases of urgency in which the measure in question would be enforced within the territory of the State granting it. Thirdly, as the Commission noted in the explanatory memorandum accompanying its initial proposal for the Regulation in 1999, the Court of Justice (ECJ) had in the previous year been faced with two important references concerning Art. 24 of the Brussels Convention (Van Uden v. Firma Deco Line and Mietz v. Intership Yachting). In those decisions, the ECJ had recognised Art. 24 as an anomalous provision whose propensity to disturb the scheme established by the Brussels Convention needed to be curtailed. In response, the Court revisited Art. 24's place in the jurisdictional scheme established by the Convention and reshaped it in ways that the Court found to be implicit in its wording and objectives but which are not readily apparent from a study of the text alone. A codification of some aspects, at least, of these rulings therefore appeared desirable. The need for caution in applying Art. 31 of the Regulation and its counterpart in Art. 31 of the Lugano II Convention (the successor instrument to the Lugano Convention) is highlighted by the commentary in the Heidelberg Report on the functioning of the Brussels I Regulation, in the Commission's recent Report and Green Paper on the review of the Regulation and in the Explanatory Report on the Lugano II Convention by Professor Fausto Pocar. Although, for rather unsatisfactory reasons, the text of Art. 31 has been left intact in the Lugano II Convention, its revision is long overdue and this should be one of the objectives of the Brussels I review. By way of background, this article considers, briefly, the ECJ's decisions in Denilauler, Van Uden and Mietz (Section II.) and the proposals advanced by the authors of the Heidelberg Report and the Commission (Sections III. and IV.) before turning to address the issues raised by Art. 31 in its present form and possible solutions (Section V.).

- ***Stephan Rammeloo***: "Chartervertrag cum annexis – Art. 4 Abs. 2, 4 und 5 EVÜ" – the English abstract reads as follows:

October 6, 2009, the ECJ gave interpretative rulings in case C-133/08 on Article 4 of the EC Convention on the Law Applicable to Contractual Obligations (Rome, 1980). The questions in preliminary proceedings centered round the applicable law to a charter-party contract cum annexis in the absence of choice by the parties ("objective proper law test"), the seperability of the contract, and the connecting criteria of Article 4, subsection 4 in relation to subsections 1, 2 and 5. The main proceedings and the essential observations of the ECJ judgment are followed by a critical analysis as well as some considerations on its potential effects on the interpretation of Article 4 (objective proper law test) and Article 5 (contract on the carriage of goods) of EC Regulation 593/2008 which on 27 December 2009 replaced the 1980 Convention.

- ***Florian Eichel***: "Inhaltskontrolle von AGB-Schiedsklauseln im internationalen Handelsverkehr" – the English abstract reads as follows:

This essay discusses a recent decision of a German Oberlandesgericht (Court of Appeal) which denied enforcement of a US arbitral award on the ground of Art. V (1)(a) New York Convention (NYC). The court deemed a B2B-arbitration clause invalid for substantive unconscionability (s. 307 German Civil Code – BGB). The clause was contained in a Dutch-German franchise form and determined New York as place of arbitration. The essay argues that substantive unconscionability may not simply be based on the remoteness of the place of arbitration from the weaker party's domicile. Rather, in considering the validity of the clause a court should follow a twofold examination: First, it has to consider the formal unconscionability by means of s. 305c (1) BGB. According to this provision, a clause is invalid if it is of a surprising character, i.e. in no way connected to the negotiations or the execution of the contract. The reference to s. 305c (1) BGB is permissible even under the regime of the NYC as the latter only provides formal requirements for the arbitration agreement itself, but not for the procedural agreement in question designating the place of arbitration and the lex arbitri. If the party fails to prove the surprising character, one can in a second step deem the clause unconscionable pursuant to s. 307 BGB. However, this verdict requires a thorough examination as to whether the arbitral procedure in a whole, and not just the place of arbitration,

deprived the defendant of his day in court.

- ***Reinhold Geimer*** on the judgment of the ECJ of 11 June 2009 (C-564/07) as well as the decisions of the German Federal Court of Justice of 5 March 2009 (IX ZB 192/07) and of 20 January 2009 (VIII ZB 47/08): "Einige Facetten des internationalen Zustellungsrechts und anderes mehr im Rückspiegel der neueren Rechtsprechung"
- ***Nina Trunk:*** "Anwendbarkeit der Wanderarbeitnehmerverordnung auf die Haftungsbefreiung bei Arbeitsunfällen" – the English abstract reads as follows:

In its ruling VI ZR 105/07 of 15th July 2008 the German Federal Court of Justice had to decide on a case, where an employee of a dutch employer has been injured in a car accident caused by his driving German colleague on a weekend visit to Germany. The crucial question is, if in this case the German regulations, which determine that the civil liability of the employer and/or its employees is excluded in cases of work accidents, applies or if Dutch law, which does not know a corresponding exclusion of liability, is applicable. This recension deals with the mandatory Character of the provisions of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community and their applicability. In accordance with the decision of the German Federal Court of Justice it comes to the conclusion that concerning the question of exclusion of liability, Dutch law applies and explains why this result is compatible with the freedom of services provided in Art. 49 EU Treaty.

- ***Peter Behrens***: "Anwendung des deutschen Eigenkapitalersatzrechts auf Scheinauslandsgesellschaften" – the English abstract reads as follows:

This is the first decision of a German insolvency court applying the new German legal rules on shareholder loans in case of insolvency of a pseudo-foreign company (i.e. an English private company limited by shares doing business exclusively in Germany). The court based its jurisdiction correctly on Article 3(1)(1) of the European Insolvency Regulation (EIR), because the debtor company's centre of main interests was clearly situated in Germany. The reasoning on the private international law issues was less convincing however.

The court simply applied German law and held the insolvent company's shareholder liable towards the insolvent company for repayment of a sum which the shareholder had received from the company as redemption of a loan granted by the shareholder to the company. The redemption had occurred in 2007 at a time when the company was already insolvent. Until October 2008, the shareholder-creditor's liability towards the company resulted from relevant provisions in the GmbHG (Limited Liability Companies Act). Since November 2008, these provisions are, however, transferred to the Insolvency Act and they now establish the voidability of the redemption of a shareholder-creditor's loan which occurred within one year before the petition for insolvency proceedings was filed. This change of the law may have had an impact upon the highly disputed characterisation of a shareholder-creditor's liability towards an insolvent company. Before November 2008, it could have been characterised as a matter of company law which should be subject to the "proper law" of the company (in this case: English law). Since November 2008, there may be better reasons for a characterisation as a matter of insolvency law. The court preferred the latter characterization for both, the old and the new law, without justifying its position by adequate reasoning and, what is more, without taking any notice of European Union law. According to Article 4(2)(m) EIR, voidability of a transaction is clearly a question of insolvency law, but Article 13 EIR limits the application of Article 4(2)(m) EIR under certain circumstances which may or may not have been present in this case. The court's decision therefore suffers from insufficient reasoning.

- ***Hans Hoyer*** on the judgment of the Higher Regional Court Munich of 5 December 2008 (33 Wx 266/08): "Nachlassverwaltung durch Betreuer im deutsch-österreichischen Rechtsverkehr""
- ***Philipp Sticherling***: "Türkisches Erbrecht und deutscher Erbschein" – the English abstract reads as follows:

The author discusses a decision of the Braunschweig district court (Landgericht) in a proceeding concerning the grant of an inheritance certificate. The bequeather has been an Turkish citizen with movable estate in Germany. The District Court has decided that German courts also have jurisdiction for the grant of the inheritance certificate. According to the decision of the District Court, the estate agreement in the consular agreement of 28 May 1929 between the German Empire and Turkey does not command the

exclusive jurisdiction of Turkish courts for proceedings concerning the grant of inheritance certificates. The decision has been taken under the provisions of the Act on Voluntary Jurisdiction (Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit – FGG) that was in effect until 31 August 2009. With the Act on the Reform of the Act on Voluntary Jurisdiction, as from 1 September 2009 the Act on Proceedings in Family Matters and in Matters of Voluntary Jurisdiction (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit – FamFG) has replaced the Act on Voluntary Jurisdiction. The question of international jurisdiction remains relevant under the new legislation. The author shows the differences between the new procedural rules under the reformed act and the old Act on Voluntary Jurisdiction.

- ***Zeynep Derya Tarman***: "Das neue Staatsangehörigkeitsgesetz in der Türkei" – the English abstract reads as follows:

The article will firstly give an overview of the new Turkish Nationality Act from 29.5.2009, with an emphasis on the reasons for the need of this new Act. Secondly, it will analyze the provisions of the new Turkish Nationality Act pertaining to the acquisition and loss of nationality, and thirdly it will give an insight to the multiple nationality under the new code.

- ***Hakan Albas/Serdar Nart*** on the acquisition of real estate by non-residents in Turkey: "Neues zum Erwerb von Grundstücken durch Ausländer in der Türkei"
- ***Christel Mindach***: "Weiterentwicklung des Zivilrechts und Internationalen Privatrechts in Russland" – the English abstract reads as follows:

The "Web portal of Private International Law of Russia" published a range of documents for further development of civil legislation including private international law of Russian Federation. The initiative goes back to two Decrees of the Russian President No. 1108 and No. 1105, dated July 18th, 2008. These Presidential Decrees obliged the "Council for Codification and Improvement of Civil Legislation" jointly with the "Research Centre for Private Law" both attached the President, to prepare a draft for development of civil legislation up to June 1, 2009. This article gives first information especially about this part of

draft, dealing with amendment of some provisions of private international law.

- ***Sergej Kopylov/Marcus A. Hofmann***: "Das Verfahren vor dem Wirtschaftsgericht (Arbitragegericht) der Russischen Föderation" – the English abstract reads as follows:

This paper deals with a presentation of the proceedings before the national economic court (arbitration court) of the Russian Federation (RF) in the first instance. Frequently, a Russian and a foreign business partner contract under Russian law and agree on a venue in Russia. Especially in times of financial crisis, the contractors are trying – whether because of liquidity or economic reasons – to turn away from the long-term contracts that have often been entered into before the crisis, which is usually only possible by judicial decision. As a result, the European companies that are active in the Russian Federation are commonly sued by their Russian partners. The emphasis of this paper is based on a view from the perspective of the German defendants, describing the process and details of the procedure and explaining a useful approach in cases where a defendant finds himself before the arbitrage court.

- ***Peter Kindler*** on the monograph by Günther H. Roth, Vorgaben der Niederlassungsfreiheit für das Kapitalgesellschaftsrecht. Exigences de la liberté d'établissement pour le droit des sociétés de capitaux, 2010 (including a French translation): "'Cadbury-Schweppes': Eine Nachlese zum internationalen Gesellschaftsrecht"
- ***Heinz-Peter Mansel*** on the 80th birthday of Richard M. Buxbaum: "Richard M. Buxbaum zum 80. Geburtstag"
- ***Erik Jayme/Carl Friedrich Nordmeier*** on the 2009 meeting of the German-Lusitanian lawyers' association in Brasília: "Grenzüberschreitende Dimensionen des Privatrechts – Tagung der Deutsch-Lusitanischen Juristenvereinigung in Brasília"
- ***Zou Guoyong:*** obituary in honour of Han Depei

Issue 2010/1 Nederlands Internationaal Privaatrecht

The first issue of 2010 of the Dutch PIL journal *Nederlands Internationaal Privaatrecht* includes the following contributions:

Xandra Kramer – Editorial (Lissabon, Stockholm, Boek 10 BW en andere IPR-beloften voor 2010), p. 1-2

J-G Knot – Europees internationaal erfrecht op komst: het voorstel voor een Europese Erfrechtverordening nader belicht (on the Proposal for a European Regulation on Succession and Wills), p. 3-13; here is the English abstract:

> *On 14 October 2009 the European Commission published a proposal for a regulation on succession. This new instrument will harmonise all private international law rules regarding succession, viz. jurisdiction, applicable law and recognition and enforcement, on a European Union level. Furthermore, the Regulation creates a European Certificate of Succession. The rules of this Regulation will, after its entry into force, replace the current Dutch private international rules on succession. The Regulation grants general jurisdiction to the courts (a term which entails judicial as well as non-judicial authorities, such as notaries) of the Member State in which the deceased had his or her last habitual residence. Under certain circumstances it is possible to refer to courts of a Member State whose law has been chosen and who are better placed to hear the case. Courts may also have jurisdiction based on the fact that property of the deceased is located in that Member State, if the last habitual residence of the deceased was not in a Member State. The law applicable to the whole of the succession is that of the Member State of the last habitual residence of the deceased. A testator can also expressly choose the application of the law of his or her nationality to the succession of the estate. In this article the rules of the proposal are examined extensively. Differences between the proposal and the existing Dutch rules on private international law of succession are commented upon. One of the biggest changes will be that the different approach with regard to the devolution and the administration of estates in private international law, as currently employed in the Netherlands, will disappear under the European Regulation. The conclusion reads that, notwithstanding the*

fact that the proposal still needs several improvements, the introduction of a European Succession Regulation will in my opinion contribute to an easier and more effective administration of cross-border successions within Europe.

S.F.G. Rammeloo – Op de valreep… Eenvormige interpretatie door Hof van Justitie EG van artikel 4 EVO (case note on ICF/MIC, ECJ C-133/08), p. 20-26); here is the English abstract:

On 6 October 2009, the ECJ gave an interpretative ruling in case C-133/08 on Article 4 of the EC Convention on the Law Applicable to Contractual Obligations (Rome, 1980). The questions in the preliminary proceedings relate to the applicable law to a charter-party contract cum annexis in the absence of choice by the parties ('objective proper law test'), the seperability of the contract, and the connecting criteria of Article 4, subsection 4 in conjunction with subsections 1, 2 and 5. The main proceedings and the essential observations of the ECJ judgment are followed by a critical analysis as well as some considerations on its potential effects on the interpretation of Article 4 (objective proper law test) and Article 5 (contract on the carriage of goods) of EC Regulation 593/2008 which on 27 December 2009 replaced the 1980 Convention.

L.R. Kiestra – De betekenis van het EVRM voor de internationale gerechtelijke vaststelling van het vaderschap (case note on three Dutch judgments concerning 8 ECHR and the judicial establishment of paternity), p. 27-30; here is the English abstract:

This case note discusses three Dutch cases concerning the meaning of Article 8 ECHR for the judicial establishment of paternity ('gerechtelijke vaststelling van het vaderschap'). All three cases concerned a mother who wanted to establish the paternity of a man over her child(ren). In all three cases a foreign law was applicable to the situation, according to the relevant Dutch choice of law rules ('Wet conflictenrecht afstamming'). Under the applicable foreign laws in the three cases, it was not possible to judicially establish paternity over the child(ren). The Dutch judge had to decide whether this would result in a violation of the ECHR and consequently whether the applicable law had to be set aside on the basis of the public policy exception. In two of the three cases, the judge came to the

conclusion that the normally applicable foreign law had to be set aside, while in one of the cases the judge decided that this was not necessary. This case note discusses the different outcomes in these three cases and examines a number of issues related to the possible impact of the ECHR on private international law. These include whether or not the ECHR can in fact be at all applicable to such private international law matters and the relationship between the public policy exception and the ECHR.

Richard Fentiman – Book presentation: 'International Commercial Litigation', Oxford University Press 2010, p. 31-32.

Trevor Hartley – Book presentation: 'International Commercial Litigation: Text, Cases and Materials on Private International Law', Cambridge University Press 2009, p. 32-33.

Belgian Judgment on Surrogate Motherhood

A lower court sitting in Belgium has recently been faced with a case of international surrogate motherhood. Two men married in Belgium had contracted with a woman living in California, who gave birth to twins in December 2008. One of the men was the biological father of the twins. In accordance with the laws of California, the birth certificate of the twins had been established mentioning the names of the two spouses as fathers. When the parents came back with their twin daughters in Belgium, the local authorities refused to give any effect to the birth certificate, in effect denying the existence of any parent-children relationship. The parents challenged this refusal before the Court of First Instance sitting in Huy.

In an opinion issued on the 22nd of March and yet unpublished, the court denied the request. Noting that what was at stake was not so much the recognition in Belgium of the decision by which the Superior Court in California had authorized,

prior to the birth of the children, that the birth certificates mention the names of the two fathers, but rather the recognition of the birth certificates proper, the court applied the test laid down in Article 27 of the Code of Private International law, under which foreign acts relating to the personal status may only be recognized in Belgium provided they comply with the requirements of the national law which would be applicable to the relationship under Belgian rules. The court focused its ruling on one specific requirement of Article 27, i.e. public policy, mentioning the issue of *fraus legis* only briefly.

The parents had argued that since Belgian law allows the adoption of a child by two persons of the same sex, recognition of the birth certificates could not be held to be contrary to fundamental principles of the Belgian legal order. The court did not follow the parents. It first held that it should consider not only the birth certificates, but also the whole history of the dealings between the parents and the surrogate mother. The court thus examined the contract which had been concluded between the parties and noted that while such contract was invalid as a matter of Belgian law, it was uncertain whether public policy could defeat such a contract validly concluded under foreign law. Turning to two important international conventions in force in Belgium, the court found that the practice of surrogate motherhood raised questions both under the Convention of the Rights of Children and under the European Convention on Human Rights. As to the first Convention, the court relied specifically on Article 7, which grants each child the right to know and be cared for by his or her parents. Turning to Article 3 of the European Convention, the court found that the fact that a surrogate mother is paid for her services is difficult to reconcile with human dignity. The Court also noted that countries which tolerate surrogacy arrangements insist on the absence of commercial motives for such arrangements. The court concluded on this basis that giving effect to the Californian birth certificates would violate fundamental principles and hence be contrary to public policy.

It is not yet known whether this ruling will be appealed. In any case, the parents will have to find an alternative solution to be recognized as such. They could turn to adoption, although this could prove difficult given that they have already had extensive contacts with the children. This is much probably not the last time a court is faced with this issue in Belgium.

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

European Commission Plan for 2010-2014

The European Commission has published yesterday its plan to deliver justice, freedom and security to citizens in the next four years.

Here are 3 of the 10 concrete actions included in the plan which will be of interest for readers of this blog:

> ***4. More legal certainty for international marriages***
>
> *Following an EU proposal to allow international couples to choose which country's law applies to their divorce (IP/10/347, MEMO/10/100), the Commission will make a similar proposal this year on which law will apply when it comes to the division of couples' property during these proceedings (legislative proposal, 2010).*
>
> ***5. Less administrative burdens for citizens***
>
> *Europeans who want to get married, adopt a child or change their civil status should not face additional administrative burdens if they are outside their home country. For example, a Finnish woman who falls in love with a man from the UK would have to submit a certificate of no impediment from the UK to get married. The UK does not provide such documents. To avoid these kinds of situations, the Commission will propose a law for the mutual recognition of certain civil status documents (legislative proposal, 2013).*
>
> ***6. Helping businesses to operate cross-border***
>
> *If companies are to invest and operate cross-border, they need to have trust in Europe's Single Market – especially in today's economic context. At present, companies only recover 37% of cross-border debts while more than 60% of cross-border debts cannot be enforced. To address this problem and stimulate the incentive to do business cross-border, the Commission will propose legislation on a European "attachment" of bank accounts. This measure will*

ensure that money that is owed does not disappear (legislative proposal, 2010).

Legal certainty is crucial for motivating businesses to do commerce across borders. If you know the rules of the country where you would like to do business, you will be much more willing to offer your services/goods rather than studying different 27 regimes. These 27 contractual regimes will remain. The Commission is preparing an additional and optional contract law instrument – something similar to the US Uniform Commercial Code. Companies could then choose to apply this instrument to their contractual relations – no matter in which EU country they have their business (Communication, 2010).

The full text of the Communication of the Commission can be found here.

Thanks to Lea Salvini for the tip-off