ECJ: Judgment on Art. 15 Brussels I ("Ilsinger")

On 14 May 2009, the ECJ delivered its judgment in case C-180/06 (*Renate Ilsinger v. Martin Dreschers*).

The case basically concerns the question whether legal proceedings by which a consumer seeks an order requiring a mail-order company to award a prize apparently won by him – without the award of that prize depending on an order of goods – are contractual in terms of Art. 15 (1) (c) Brussels I Regulation, if necessary, on condition that the consumer has none the less placed an order.

The Oberlandesgericht Wien (Austria) referred the following questions to the ECJ for a preliminary ruling:

> *Does the provision in Paragraph 5j of the … KSchG …, which entitles certain consumers to claim from undertakings in the courts prizes ostensibly won by them where the undertakings send (or have sent) them prize notifications or other similar communications worded so as to give the impression that they have won a particular prize, constitute, in circumstances where the claiming of that prize was not made conditional upon actually ordering goods or placing a trial order and where no goods were actually ordered but the recipient of the communication is nevertheless seeking to claim the prize, for the purposes of … Regulation … No 44/2001: a contractual, or equivalent, claim under Article 15(1)(c) of Regulation No 44/2001?*
>
> *If the answer to question 1 is in the negative:*
>
> *Does a claim falling under Article 15(1)(c) of Regulation No 44/2001 arise if the claim for payment of the prize was not made conditional upon ordering goods but the recipient of the communication has actually placed an order for goods?'*

The Court held as follows:

> *In a situation such as that at issue in the main proceedings, in which a consumer seeks, in accordance with the legislation of the Member State in which he is domiciled and before the court for the place in which he resides, an*

order requiring a mail-order company established in another Member State to pay a prize which that consumer has apparently won, and

– where that company, with the aim of encouraging that consumer to conclude a contract, sent a letter addressed to him personally of such a kind as to give him the impression that he would be awarded a prize if he requested payment by returning the 'prize claim certificate' attached to that letter,

– but without the award of that prize depending on an order for goods offered for sale by that company or on a trial order, the rules on jurisdiction laid down by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as follows:

– such legal proceedings brought by the consumer are covered by Article 15(1)(c) of that regulation, on condition that the professional vendor has undertaken in law to pay that prize to the consumer;

– where that condition has not been fulfilled, such proceedings are covered by Article 15(1)(c) of Regulation No 44/2001 only if the consumer has in fact placed an order with that professional vendor.

See with regard to this case also our previous post on the AG opinion which can be found here.

Spanish Homosexual Couple and Surrogate Pregnancy (II)

In a previous post I related how a certificate issued in the U.S.A., establishing the parenthood of a baby born in this country to a surrogate mother, had been denied registration in Spain. The interested parties lodged an application for review before the *Dirección General de los Registros y el Notariado* (DGRN); on February 18, 2009, their appeal has been upheld. This post sums up the arguments on

which the Spanish resolution is based.

The DGRN starts selecting the correct methodological approach: the request for registration in Spain of a birth certificate from a foreign authority arouses questions of recognition, and not of conflicts of law; hence art. 81 *Reglamento del Registro Civil* should apply. According with this article, facts can be registered by means of Spanish public documents; public foreign deeds are also accepted, provided they are given force in Spain under the laws or international treaties. A foreign deed has to meet three conditions in order to be suitable for registration in Spain:

.- The deed must be a public one: it has to stem from a public authority and meet the necessary requirements to be considered "full evidence" (i.e., to display privileged evidentiary strength) when used before the courts of the country of origin. Apostille or legalisation are usually called for; so does translation. In the instant case, the Californian certificate of birth and filiation satisfies those conditions.

.- The public authority granting the document has to be equivalent to the Spanish ones; that is, she mut provide with guarantees similar to those required by the Spanish law for entering into public registers. According to the DGRN, the authority responsible for civil registration in California satisfies this requirement.

.- The act contained in the foreign registration certificate must endorse a legality test involving three elements: international jurisdiction of the foreign authority, due process, and compatibility with Spanish ordre public. In the instant case only the third requirement seems questionable. The DGRN devotes the rest of its reasoning to explain why incorporation of the foreign certificate to the Spanish Registro Civil is not contrary to our public policy; why it "does not alter the smooth and peaceful running of the Spanish society". To this end the DGRN develops several points that may be summarized as follows:

1) Registering parenthood of two male subjects in the Spanish Registro Civil does not violate public order, since Spanish law admits paternity of two males in cases of adoption, and adopted children and biological children are equal in the eyes of law.
2) Spanish law allows registration of parenthood of female couples; to deny it in the case of a couple composed of two male individuals would be discriminatory.

3) To deny entry into a Spanish public register of facts concerning parenthood, already inscribed in a foreign register, would go against the best interests of the child as conceived in UN Convention on the Rights of the Child. The DGRN also recalls ECJ case law, such as *Garcia Avello* (C- 148/02) and *Grunkin-Paul* (C-353/06), where the ECJ argues in favour of a unique identity of the child. Later on the DGRN would reintroduce the argument of the child's interest: allowing registration in Spain in the same terms as Californian registration is better than leaving the children without any registration in Spain, and also preferable to having two different entries, one in the U.S. and another one in Spain.
4) In Spanish law, parenthood is not necessarily determined from the genetic linkage of those involved.
5) The interested parties have not acted in fraud of law; they have not tried to change the nationality of children in order to prompt the application of Californian law. The babies, born to a Spanish person, are Spanish.
6) The interested parties have not engaged in forum shopping or any fraudulent attempt to circumvent the application of Spanish mandatory rules. The Californian certificate of registration is not a court decision with res judicata effect. Any party may challenge the content of the birth registration before the courts; if so, the Spanish Courts would establish the paternity of children once and for all.

ERA Conference: Complete agenda spring and summer 2009

ERA Conference: Complete agenda spring and summer 2009

In our previous posts we have informed about the ERA conferences for the spring 2009 titled "Annual Conference on European Insurance Law 2009" and " Cross-Border insolvency proceedings". Here are the rest of the conferences for the spring and summer 2009:

Successions and Wills in a European context, Prague, 20-21 Apr 2009

From the conference website: The Czech Ministry of Justice in the framework of the Czech Presidency of the Council of the EU organizes in cooperation with ERA (Dr Angelika Fuchs) a conference titled ”Successions and Wills in a European context”.

The conference will provide an in-depth discussion of the most topical issues regarding succession and wills in a European context. The draft Regulation on Succession and Wills, expected to be issued soon, will serve as the basis of the discussion. A case-study will be presented. The conference will then address the following highly current issues:

- Scope of the instrument: The Regulation will cover jurisdiction, recognition and choice of law. To what extent should property rights be covered? Will foreign property rights unknown to a legal system (e.g. trust) have to be recognised?
- Choice of law: Will the testator be free to choose the governing law? If yes, will there be restrictions to the freedom to choose? What will be the relationship to the rules of compulsory heirship of the legal system otherwise applicable?
- Choice-of-law rule for succession to movable and immovable property: What is the appro-priate connecting factor? Will there be one rule for movables and immovables? Will there be exceptions to that rule? How will the habitual residence test be defined?
- Relationship to dispositions inter vivos: If, and to what extent, will the Regulation affect the validity of dispositions disposed of inter vivos?
- Registration of wills and European Certificate of Inheritance: Will there be a compulsory or an optional system of registration of wills? What will be the scope of a European Certificate of Inheritance?

Practical Issues of Cross-Border Mediation and Mediation Techniques, Trier, 14-15 May 2009

From the conference website: Dr Angelika Fuchs (ERA) organizes in cooperation with the European Judicial Training Network (EJTN), the Council of the Bars and Law Societies of the European Union (CCBE) and the Council of the Notariats of the European Union (CNUE) a conference titled ” Practical Issues of Cross-Border

Mediation and Mediation Techniques".

This conference will concentrate on practical issues of cross-border mediation:

- Interaction between mediation and civil proceedings, especially the impact of the Directive on certain aspects of mediation in civil and commercial matters in the Member States. Topics include the Directive's scope; cross-border disputes: the inter-State requirement; voluntary or compulsory nature of mediation; mediation's effect on limitation and prescription periods, and recognition and enforcement of mediation agreements.
- Encouraging mediation. The role of the legal professions, especially the cooperation between lawyers, notaries and judges.
- Quality of mediation services. A practical and continuing training of mediators is required: life-long learning is essential. In cross-border situations, co-mediation is particularly important. Quality control mechanisms and the added value of the (voluntary) European Code of Conduct for Mediators will be discussed.
- Mediation procedure. The conference will further concentrate on fundamental minimum procedural guarantees for a fair mediation procedure. The European Code of Conduct for Mediators will be looked at in detail.

The conference will include workshops which will address specific areas such as family mediation and consumer mediation.

Summer Course on European Private Law, Trier, 29 Jun-3 Jul 2009

From the conference website: Dr Angelika Fuchs organizes a Summer Course on European Private Law.

Participants will gain an introduction to the following topics:

- European civil procedure: The summer course will present the status quo of civil procedural law on a European level, including the most recent developments. Special attention will be paid to EC legislation and the case law of the European Court of Justice.

- Private international law, especially the new Rome I & Rome II Regulations on the applicable law in contractual and non-contractual obligations.
- Consumer protection, concerning e.g. unfair commercial practices, e-commerce, consumer rights, product safety, product liability.

This course should prove of particular interest to lawyers who wish to specialise in or acquire an in-depth knowledge of European private law. A general knowledge of EU law is suitable but no previous knowledge or experience of European private law is required to attend the course.

Participants will have the opportunity to prepare in advance through an e-learning course via the ERA website, and to deepen their knowledge through case-studies and workshops during the summer course.

A visit to the European Court of Justice in Luxembourg with the opportunity to attend a hearing is an integral part of the programme.

American Surrogacy and Parenthood in France: Update

In earlier posts, I had reported how the Paris Court of Appeal had accepted to recognize Californian birth certificates after a French couple had resorted to surrogacy in San Diego. Surrogacy is illegal in France.

An appeal was lodged before the French Supreme Court for private and criminal matters (*Cour de cassation*). The *Cour de cassation* delivered its decision on December 17, 2008. It allowed the appeal and set aside the judgment of the Paris Court of Appeal, but did so on purely procedural ground (standing of French prosecutors). The case will have to be relitigated before the same Paris Court of Appeal, with different judges.

Not much to say from a conflict perspective then. The decision, as it is often the

case with judgments from the *Cour de cassation*, is hard to interpret. There is much debate at the moment in France as to whether surrogacy should be allowed. It might be that the solution of the court is a convenient one enabling the judiciary to wait for a political decision. All this, of course, will be at the expense of the children, who might not be told who their parents are before they are teenagers, if not young adults.

The decision of the court can be found here (in French). As French cases are barely understandable, the court also had to make a press release.

ECJ: AG Opinion in "Apostolides"

On Thursday, the Opinion of *Advocate General Kokott* in case C-420/07 (*Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams*) has been published.

I. Background of the Case

The background of the case was as follows:

Mr. Apostolides, a Greek Cypriot, owned land in an area which is now under the control of the Turkish Republic of Northern Cyprus, which is not recognised by any country save Turkey, but has nonetheless *de facto* control over the area. When in 1974 the Turkish army invaded the north of the island, Mr. Apostolides had to flee. In 2002, Mr. and Mrs. Orams – who are British citizens – purchased part of the land which had come into the ownership of Mr. Apostolides. In 2003, Mr. Apostolides was – due to the easing of travel restrictions – able to travel to the Turkish Republic of Northern Cyprus and saw the property. In 2004 he issued a writ naming Mr. and Mrs. Orams as defendants claiming to demolish the villa, the swimming pool and the fence they had built, to deliver Mr. Apostolides free occupation of the land and damages for trespass. Since the time limit for entering an appearance elapsed, a judgment in default of appearance was entered on 9 November 2004. Subsequently, a certificate was obtained in the form prescribed

by Annex V to the Brussels I Regulation. Against the judgment of 9 November 2004, an application was issued on behalf of Mr. and Mrs. Orams that the judgment be set aside. This application to set aside the judgment, however, was dismissed by the District Court at Nicosia on the grounds that Mr. Apostolides had not lost his right to the land and that neither local custom nor the good faith of Mr. and Mrs. Orams constituted a defence.

On the application of Mr. Apostolides to the English High Court, the master ordered in October 2005 that those judgments should be registered in and declared enforceable by the High Court pursuant to the Brussels I Regulation. However, Mr. and Mrs. Orams appealed in order to set aside the registration, *inter alia* on the ground that the Brussels I Regulation was not applicable to the area controlled by the Turkish Republic of Northern Cyprus due to Art. 1 of Protocol 10 to the Treaty of Accession of the Republic of Cyprus to the European Union.

This article reads as follows:

1. The application of the acquis shall be suspended in those areas of the Republic of Cyprus in which the government of the Republic of Cyprus does not exercise effective control. […]

Jack J (Queen´s Bench Division) allowed the appeal on 6 September 2006 by holding *inter alia*

that the effect of the Protocol [10 of the Treaty of Accession of the Republic of Cyprus] is that the acquis, and therefore Regulation No 44/2001, are of no effect in relation to matters which relate to the area controlled by the TRNC [i.e. the Turkish Republic of Northern Cyprus], and that this prevents Mr Apostolides relying on it to seek to enforce the judgments which he has obtained. (para. 30)

Subsequently, Mr. Apostolides lodged an appeal against the judgment of the Queen's Bench Division at the Court of Appeal.

II. Reference for a Preliminary Ruling

The Court of Appeal decided to refer the following questions to the ECJ for a preliminary ruling according to Art. 234 EC-Treaty.

1. Does the suspension of the application of the acquis communautaire in the

northern area [by Article 1(1) of Protocol No 10 of the Act of Accession 2003 of Cyprus to the EU preclude a Member State Court from recognising and enforcing a judgment given by a Court of the Republic of Cyprus sitting in the Government-controlled area relating to land in the northern area, when such recognition and enforcement is sought under Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[1] *("Regulation 44/2001"), which is part of the acquis communautaire'?*

2. Does Article 35(1) of Regulation 44/2001 entitle or bind a Member State court to refuse recognition and enforcement of a judgment given by the Courts of another Member State concerning land in an area of the latter Member State over which the Government of that Member State does not exercise effective control? In particular, does such a judgment conflict with Article 22 of Regulation 44/2001?

3. Can a judgment of a Member State court, sitting in an area of that State over which the Government of that State does exercise effective control, in respect of land in that State in an area over which the Government of that State does not exercise effective control, be denied recognition or enforcement under Article 34(1) of Regulation 44/2001 on the grounds that as a practical matter the judgment cannot be enforced where the land is situated, although the judgment is enforceable in the Government-controlled area of the Member State?

4. Where –

a default judgment has been entered against a defendant;

the defendant then commenced proceedings in the Court of origin to challenge the default judgment; but

his application was unsuccessful following a full and fair hearing on the ground that he had failed to show any arguable defence (which is necessary under national law before such a judgment can be set aside),

can that defendant resist enforcement of the original default judgment or the judgment on the application to set aside under Article 34(2) of Regulation 44/2001, on the ground that he was not served with the document which

instituted the proceedings in sufficient time and in such a way as to enable him to arrange for his defence prior to the entry of the original default judgment? Does it make a difference if the hearing entailed only consideration of the defendant's defence to the claim.

5. In applying the test in Article 34(2) of Regulation 44/2001 of whether the defendant was "served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence" what factors are relevant to the assessment? In particular:

Where service in fact brought the document to the attention of the defendant, is it relevant to consider the actions (or inactions) of the defendant or his lawyers after service took place?

What if any relevance would particular conduct of, or difficulties experienced by, the defendant or his lawyers have?

(c) Is it relevant that the defendant's lawyer could have entered an appearance before judgment in default was entered?

III. Advocate General Kokott's Opinion

Now, Advocate General Kokott suggested that these questions should be answered by the ECJ as follows:

1. The suspension of the application of the acquis communautaire in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control, provided for in Article 1(1) of Protocol No 10 to the Act of Accession of 2003, does not preclude a court of another Member State from recognising and enforcing, on the basis of Regulation No 44/2001, a judgment given by a court of the Republic of Cyprus involving elements with a bearing on the area not controlled by the government of that State.

2. Article 35(1) in conjunction with Article 22(1) of Regulation No 44/2001 does not entitle a Member State court to refuse recognition and enforcement of a judgment given by a court of another Member State concerning land in an area of the latter Member State over which the Government of that Member State

does not exercise effective control.

3. A court of a Member State may not refuse recognition and enforcement of a judgment on the basis of the public policy proviso in Article 34(1) of Regulation No 44/2001 because the judgment, although formally enforceable in the State where it was given, cannot be enforced there for factual reasons.

4. Article 34(2) of Regulation No 44/2001 is to be interpreted as meaning that recognition and enforcement of a default judgment may not be refused by reference to irregularities in the service of the document which instituted the proceedings, if it was possible for the defendant, who initially failed to enter an appearance, to commence proceedings to challenge the default judgment, if the courts of the State where the judgment was given then reviewed the judgment in full and fair proceedings, and if there are no indications that the defendant's right to a fair hearing was infringed in those proceedings.

The reasons given by the AG can be summarised as follows:

1. Impact of Art. 1 (1) Protocol No. 10 on the Application of Brussels I

Regarding the **first question**, i. e. the question whether the suspension of the application of the *acquis communautaire* in the northern area of Cyprus pursuant to Article 1(1) of Protocol No. 10 precludes the recognition and enforcement under the Brussels I Regulation of a judgment relating to claims to the ownership of land situated in that area, the AG first emphasises the difference between the territorial scope and the reference area meaning the area to which judgments of a court of a Member State, which are to be recognised and enforced under the Regulation, may relate (para. 25 et seq.). As the AG states, the reference area is broader than the territorial scope and also covers Non-Member States. The Regulation therefore also applies to proceedings which include a Non-Member-State element (para. 28). In this context, the AG refers to the ECJ's ruling in *Owusu* as well as its *Opinion on the Lugano Convention*.

With regard to the question which effect Protocol No. 10 has on the scope as well as the reference area of Brussels I, the AG clarifies that the suspension of the application of the *acquis communautaire* in those areas of the Republic of Cyprus in which the government of the Republic of Cyprus does not exercise effective control restricts the territorial scope of the Brussels I Regulation which leads to

the result that the recognition and enforcement of a judgment of a court of a Member State in the northern area of Cyprus cannot be based on the Brussels I Regulation. Nor is it possible under the Regulation, for a judgment of a court situated in that area of Cyprus to be recognised and enforced in another Member State (para. 31).

However, according to the AG there is a significant difference between the aforementioned situations and the present case: She states that "the dispute before the Court of Appeal does not involve either of those situations. Rather, it is required to rule on the application for the enforcement in the United Kingdom of a judgment of a court situated in the area controlled by the Government of the Republic of Cyprus. The restriction of the territorial scope of Regulation No 44/2001 by Protocol No 10 does not, therefore, affect the present case" (para. 32). The AG stresses that Article 1(1) of Protocol No. 10 states that the *acquis communautaire* is to be suspended *in* that area and not *in relation* to that area (para. 34).

This point of view is further supported by referring to the case law according to which "exceptions to or derogations from rules laid down by the Treaty must be interpreted restrictively with reference to the Treaty provisions in question and must be limited to what is absolutely necessary." This principle has – in the AG's opinion – to be applied also with regard to secondary legislation, i.e. the Brussels I Regulation (para. 35).

Also political considerations raised by Mrs. and Mr. Orams did not convince the AG: The Orams have argued that the recognition and enforcement of the judgment of the District Court of Nicosia would conflict with the objectives of the Protocol and the relevant UN Resolutions aiming to bring about a comprehensive settlement of the Cyprus problem (para. 43). This argumentation, however, is rejected by the AG in particular by pointing out that the application of the Brussels I Regulation cannot be made dependent on political assessments since this would be detrimental with regard to the principle of legal certainty (para. 48).

Thus, the AG concludes with regard to the first question that "the suspension of the application of the *acquis communautaire* in the areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control, provided for in Article 1 (1) of Protocol No. 10 of the Act of

Accession of 2003, does not preclude a court of another Member State from recognising and enforcing, on the basis of Regulation No. 44/2001, a judgment given by a court of the Republic of Cyprus involving elements with a bearing on the area not controlled by the Government of that State" (para. 53).

2. Scope of the Brussels I Regulation

With regard to the remaining questions, the AG first addresses the preliminary question whether this case falls within the scope of Brussels I at all (para. 55 et seq.). Doubts had been raised in this respect by the European Commission questioning whether this case constitutes a civil and commercial matter in terms of Article 1(1) Brussels I. These doubts are based on the context of the case and therefore the fact that the disputes over land owned by displaced Greek Cypriot refugees have their origin in the military occupation of northern Cyprus (para. 55). The Commission submits that it has to be taken into consideration that a compensation regime has been enacted and that therefore an alternative legal remedy concerning restitution is available which can be construed as a convention in terms of Art. 71 (1) Brussels I stating that the regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments (para. 57).

With regard to this argumentation, the AG first stresses the independent concept of civil and commercial matters and points out (at para. 59) that "only actions between a public authority and a person governed by private law fall outside the scope of the Brussels Convention, and only in so far as that authority is acting in the exercise of public powers". The present case has – according to the AG – to be distinguished from cases such as *Lechouritou* – since here "Mr Apostolides is not making any claims for restitution or compensation against a government authority, but a civil claim for restitution of land and further claims connected with loss of enjoyment of the land against Mr and Mrs Orams" (para. 60). Thus, in the present case "a private applicant is asserting claims governed by private law against other private persons before a civil court, so that, on the basis of all the relevant circumstances, the action is clearly a civil law dispute" (para. 63).

Further, the AG does not agree with the Commission's reasoning according to which the exclusion of civil claims has occurred, as it were, by operation of international law, since the TRNC has enacted compensation legislation

approved, in principle, by the European Court of Human Rights (para. 66 et seq.). According to the AG, the case law of the European Court of Human Rights "gives no indication that the legislation in question validly excludes the prosecution of civil claims under the law of the Republic of Cyprus" (para. 68). Also the Commission's argument based on Art. 71 Brussels I is rejected by the AG by arguing that the requirements of a "convention" in terms of Art. 71 (1) Brussels I are not fulfilled (para. 72).

Thus, the AG concludes that the judgment whose recognition is sought in the main proceedings concerns a civil matter in terms of the Brussels I Regulation and therefore falls within its scope of application (para. 73).

3. Articles 22 (1), 35 (1) Brussels I

The **second question** referred to the Court raises the question whether Artt. 35 (1), 22 (1) Brussels I entitle or bind the court of a Member State to refuse recognition and enforcement of a judgment given by the courts of another Member State concerning land in an area of the latter Member State over which the government of that Member State does not exercise effective control. Mrs. and Mr. Orams argue in this respect that Art. 22 (1) Brussels I has to be interpreted restrictively and does therefore not accord jurisdiction to the courts of the Republic of Cyprus for actions concerning land in the northern area. This assumption is based on the consideration that the thought underlying Art. 22 (1) Brussels I, which is to assign for reasons of proximity exclusive jurisdiction to the court of the place where the property is situated (para. 83), cannot be applied here since the courts of the Republic of Cyprus do not in fact have the advantage of particular proximity due to its lack of effective control over that area (para. 84). This assumption, however, is rejected by the AG whereby she leaves the question whether that view is correct open since – according to her opinion – Art. 22 (1) Brussels I could only be infringed if – instead of the courts of the Republic of Cyprus – the courts of another Member State were to have jurisdiction by virtue of the place where the property is situated. This is, however, not the case (para. 85).

4. Public Policy – Art. 34 (1) Brussels I

The **third question** referred to the Court aims to ascertain whether the factual non-enforceability of a judgment in the State where it was given can be regarded

as manifestly contrary to public policy in terms of Art. 34 (1) Brussels I (para. 95). This is answered in the negative by the AG by stating *inter alia* that "since the enforceability of the foreign judgment in the State of origin as a condition for a declaration of enforceability by the courts of another Member State is laid down definitively in Article 38 (1) of the regulation, the same condition cannot be taken up with a different meaning in the context of the public policy proviso" (para. 100). Further, the AG discusses also the submission brought forward by the Commission and the Orams as to whether the recognition and enforcement of the judgment of the District Court of Nicosia contravenes international public policy since it may undermine the efforts to find a solution to the Cyprus problem (para. 101). With regard to this problem, the AG first points out that this question has not been considered by the referring court and that, in principle, the Court is bound by the subject matter of the reference (para. 102). However, in case the Court should find it appropriate to discuss this question, the AG argues *inter alia* that "the requirements and appeals contained in the Security Council resolutions on Cyprus are in any case much too general to permit the inference of a specific obligation not to recognise any judgment given by a court of the Republic of Cyprus relating to property rights in land situated in northern Cyprus" (para. 111). Thus, according to the AG, a court of a Member State cannot refuse the recognition and enforcement of a judgment on the basis of Art. 34 (1) Brussels I on the grounds that the judgment cannot be enforced for factual reasons in the State where it was given.

5. Irregularities of Service – Art. 34 (2) Brussels I

With the **fourth question**, the referring court asks whether the recognition of a default judgment can be refused according to Art. 34 (2) Brussels I on account of irregularities in the service of the document instituting the proceedings when the judgment has been reviewed in proceedings instituted by the defendant to challenge it (para. 113). Here, the AG stresses that under Art. 34 (2) Brussels I the decisive factor is whether the rights of the defence are respected (para. 117). Since in the present case Mrs. and Mr. Orams had the opportunity to challenge the default judgment of the District Court of Nicosia, recognition and enforcement cannot -according to the AG – be refused on the basis of irregularities in the service of the writ (para. 120).

See with regard to this case also our previous post on the reference.

Spanish homosexual couple and surrogate pregnancy

While some countries, like the U.S.A., accept surrogate pregnancy among permitted techniques of assisted reproduction, Spanish law considers it illegal. That is why a certificate issued in the U.S.A. establishing the parenthood of a baby born in this country to a surrogate mother would not be registered in Spain; accordingly the baby would not have Spanish nationality; and consequently, he would need a visa to come to Spain.

This apparently neutral facts may not describe a theoretical situation but correspond whit a quite real one. A Spanish homosexual married couple from Valencia decided to try surrogate pregnancy after several failed attempts of international adoption; as for a national adoption, they feared they would not be awarded the “certificado de idoneidad” due to their homosexual condition. They therefore moved to the USA looking for better chances. Today, the intended parents and (their?) two twin babies born in the USA to a surrogate mother are the major figures of a complicated situation. The couple is in the U.S. since the Spanish embassy has denied the babies the visa to enter Spain. So far, the twins bear American nationality to prevent them from being stateless.

According to press reports, the couple has ruled out the option of returning to Spain by registering the babies as born to a Spanish female mother; they want them to be acknowledged as their children, and them to be granted the Spanish nationality. Faced with the Spanish refusal they might decide to remain (to exile?) in the U.S.A., where they have been offered a residence permit. They have warned the Spanish government that they will start a legal battle both in the U.S.A. and before the European Court of Human Rights, claiming violation of the Declaration of the Rights of the Child. Considering the importance of their aim, how much it is worth; but also knowing how exhausting such processes will be, we can only wish them courage and luck.

ECJ: Judgment in Case “Grunkin and Paul”

Today, the ECJ delivered its judgment in case C-353/06 (*Grunkin and Paul*) which has been awaited with high interest.

As reported in previous posts, the background of the case is as follows: The case concerns a child who was born in Denmark having, as well as his parents, only German nationality. The child was registered in Denmark – in accordance with Danish law – under the compound surname *Grunkin-Paul* combining the name of his father (*Grunkin*) and the name of his mother (*Paul*), who did not use a common married name. After moving to Germany, German authorities refused to recognise the surname of the child as it had been determined in Denmark, since according to German private international law (Art.10 EGBGB) the name of a person is subject to the law of his/her nationality, i.e. in this case German law, and according to German law (§ 1617 BGB) parents who do not share a married name shall choose *either* the father’s or the mother’s surname to be the child’s surname.

The Local Court *(Amtsgericht) Niebüll* which was called to designate the parent having the right to choose the child’s surname, sought a preliminary ruling of the ECJ on the compatibility of Art.10 EGBGB with Articles 12 and 18 EC-Treaty. However, the ECJ held that it had no jurisdiction to answer the question referred since the referring court acted in an administrative rather than in a judicial capacity (judgment of 27 April 2006, C-96/04). In the following, the parents applied again – without success – to have their son registered with the surname *Grunkin-Paul*. The parents’ challenge to this refusal was heard, by virtue of German procedural law, by the *Amtsgericht Flensburg*. The *Amtsgericht Flensburg* held that it was precluded from instructing the registrar to register the applicants’ son under this name by German law. However, since the court had doubts as to whether it amounts to a violation of Articles 12 and 18 EC-Treaty to ask a citizen of the European Union to use different names in different Member States, the court referred with decision of 16th August 2006 (69 III 11/06) the

following questions to the ECJ for a **preliminary ruling:**

> *In light of the prohibition on discrimination set out in Article 12 of the EC Treaty and having regard to the right to the freedom of movement for every citizen of the Union laid down by Article 18 of the EC Treaty, is the provision on the conflict of laws contained in Article 10 of the EGBGB valid, in so far as it provides that the right to bear a name is governed by nationality alone?*

Thus, the referring court essentially asked whether Artt. 12, 18 EC preclude authorities of a Member State from refusing to recognise a surname which has been determined and registered in a second Member State in which the person – who has only the nationality of the first Member State – was born and has been resident.

The **Court** now **answered** the question referred by the *Amtsgericht Flensburg* as follows:

> ***In circumstances such as those of the case in the main proceedings, Article 18 EC precludes the authorities of a Member State, in applying national law, from refusing to recognise a child's surname, as determined and registered in a second Member State in which the child – who, like his parents, has only the nationality of the first Member State – was born and has been resident since birth.***

In its reasoning, the Court first (para. 16) states that the case falls within the **scope of the EC-Treaty**. The Court stresses that even though the rules governing a person's surname fall within the competence of the Member States, the latter have to, when exercising their competence, comply with Community law (unless the case concerns an internal situation without any link with Community law).

In the following, the Court holds with regard to **Art. 12 EC**, that the child is not discriminated against on grounds of nationality (para. 19 et seq.).

However, with regard to **Art. 18 EC**, the Court states that "[h]aving to use a surname, in the Member State of which the person concerned is a national, that is different from that conferred and registered in the Member State of birth and residence is liable to hamper the exercise of the right, established in Article 18

EC, to move and reside freely within the territory of the Member States." (para. 22)

The Court refers in this context to its judgment in *Garcia Avello* and sets forth that – also in the present case – **serious inconveniences** may be caused due to the discrepancy in surnames (para. 23 et seq.). Thus, according to the Court "[…] every time the child concerned has to prove his identity in Denmark, the Member State in which he was born and has been resident since birth, he risks having to dispel doubts concerning his identity and suspicions of misrepresentation caused by the difference between the surname he has always used on a day-to-day basis, which appears in the registers of the Danish authorities and on all official documents issued in his regard in Denmark, such as, inter alia, his birth certificate, and the name in his German passport." (para. 26)

This **obstacle to free movement** could only be **justified** if it was based on "objective considerations and was proportionate to the legitimate aim pursued" (para. 29). **This is, however, according to the Court, not the case.** Thus, the Court does not regard the arguments brought forward by the German Government such as, inter alia, that the connecting factor of nationality constituted "an objective criterion which makes it possible to determine a person's surname with certainty and continuity" (para. 30) as sufficient. Rather the Court states that "[n]one of the grounds put forward in support of the connecting factor of nationality for determination of a person's surname, however legitimate those grounds may be in themselves, warrants having such importance attached to it as to justify […] a refusal by the competent authorities of a Member State to recognise the surname of a child as already determined and registered in another Member State in which that child was born and has been resident since birth." (para. 31)

See with regard to this case also our previous post on Advocate General Sharpston's opinion which can be found here as well as our post on the referring decision of the Amtsgericht Flensburg which can be found here and the post on the first judgment in this case (then known as Standesamt Stadt Niebüll) which can be found here.

Incorporation of 2000 Hague Convention in English Law

I reported earlier on the entry into force of the 2000 Hague Convention on the International Protection of Adults.

An interesting issue is the application of the Convention in England and Wales. The United Kingdom ratified the Convention, but only for Scotland. However, in the English *Mental Capacity Act* 2005, it is provided that the Convention applies in England and Wales.

Richard Frimston was able to clarify the situation in the following comment:

> *The Ministry of Justice have clarified the position. The United Kingdom has under Article 55 declared that its ratification only extends to Scotland. This is so notwithstanding the fact that section 63 of the Mental Capacity Act 2005 (the Act) specifically states that Schedule 3 of the Act gives effect in England and Wales to Convention XXXV (in so far as the Act does not otherwise do so), and makes related provision as to the private international law of England and Wales.*
>
> *SI 2007/1897 makes it clear that both section 63 and Schedule 3 have taken effect from 1 October 2007 save that by paragraph 35 of the Schedule to the Act, paragraphs 8 [jurisdiction in relation to non residents], 9 [jurisdiction in relation to convention countries], 19(2) and 19(5) [protective measures made by convention countries], Part 5 [co-operation with convention countries], and paragraph 30 [Article 38 certificates given by convention countries] only come into force, when Convention XXXV itself enters into force under Article 57.*
>
> *However this does not mean that England & Wales has ratified. The existing declaration under Article 55 still operates and although Convention XXXV is effective in England & Wales, England & Wales has not yet actually ratified the Convention.*

Paragraphs 8, 9, 19(2) and 19(5), Part 5, and paragraph 30 however are not limited to coming into force solely when England & Wales ratifies, but only when Convention XXXV itself enters into force. Therefore these provisions will also come into force in England & Wales on January 1 2009. Convention XXXV therefore will have full effect in England & Wales from January 1 2009, but for the purposes of the law in Scotland, France or Germany, England & Wales has not ratified.

The UK Ministry of Justice has made it clear that "England & Wales is committed to extending Convention XXXV as soon as possible. The work for this is under way".

Schedule 3 does of course now set out the private international law in England & Wales and therefore in addition to setting out the rules for jurisdiction and recognition in England & Wales Schedule 3 also sets out the applicable law and therefore the rules as to which lasting powers are or are not valid. A lasting power validly made in South Australia by a person habitually resident in South Australia is now valid whenever the power was made. An English Enduring Power of Attorney made by a person habitually resident in a state where such powers are not valid, may now be invalid, even if made at a time when Schedule 3 to the Act did not apply.

The difficulty that Schedule 3 extends Convention XXXV to the applicable law issues of Lasting Powers not only of adults subject to incapacity but also to all Lasting Powers, including those of persons not subject to incapacity remains. Other ratifying states will not recognise this extension of the Convention.

What is remarkable about the *Mental Capacity Act* is that it makes applicable in a domestic legal order an international treaty which is not applicable from an international perspective. Thus, in effect, the domestic law incorporates the international convention in the domestic legal order. In this case, as the UK is working on extending the application of the Convention to England and Wales, it seems close to an early entry into force.

In other instances, however, states have incorporated international conventions that they had ratified for cases beyond their scope. This was the case of Italy which decided to incorporate the Brussels Convention into Italian law to replace its common law of jurisdiction in civil and commercial matters (see art. 3 of the

1995 Italian law of international private law).

Is that acceptable for the contracting states of the relevant Convention? For the organisation which supervised the negotiation of the relevant convention such as the Hague Conference?

New Reference on Brussels II bis

Another reference for a preliminary ruling on the **Brussels II *bis* Regulation** has been referred to the ECJ, this time by the Republic of Lithuania.

The Lithuanian court (*Lietuvos Aukš?iausiasis Teismas*) has referred the following questions to the ECJ:

> *Can an interested party within the meaning of Article 21 of Council Regulation (EC) No 2201/2003 apply for non-recognition of a judicial decision if no application has been submitted for recognition of that decision?*
>
> *If the answer to Question 1 is in the affirmative: how is a national court, when examining an application for non-recognition of a decision brought by a person against whom that decision is to be enforced, to apply Article 31(1) of Regulation No 2201/2003, which states that '… Neither the person against whom enforcement is sought, nor the child shall, at this stage of the proceedings, be entitled to make any submissions on the application'?*
>
> *Is the national court which has received an application by the holder of parental responsibility for non-recognition of that part of the decision of the court of the Member State of origin requiring that that holder return to the State of origin the child staying with that holder, and in respect of which the certificate provided for in Article 42 of Regulation No 2201/2003 has been issued, required to examine that application on the basis of the provisions contained in Sections 1 and 2 of Chapter III of Regulation No 2201/2003, as provided for in Article 40(2) of that regulation?*
>
> *What meaning is to be attached to the condition laid down in Article 21(3) of*

Regulation No 2201/2003 ('Without prejudice to Section 4 of this Chapter')?

Do the adoption of a decision that the child be returned and the issue of a certificate under Article 42 of Regulation No 2201/2003 in the court of the Member State of origin, after a court of the Member State in which the child is being unlawfully kept has taken a decision that the child be returned to his or her State of origin, comply with the objectives of and procedures under Regulation No 2201/2003?

Does the prohibition in Article 24 of Regulation No 2201/2003 of review of the jurisdiction of the court of the Member State of origin mean that, if it has received an application for recognition or non-recognition of a decision of a foreign court and is unable to establish the jurisdiction of the court of the Member State of origin and unable to identify any other grounds set out in Article 23 of Regulation No 2201/2003 as a basis for non-recognition of decisions, the national court is obliged to recognise the decision of the court of the Member State of origin ordering the child's return in the case where the court of the Member State of origin failed to observe the procedures laid down in the regulation when deciding on the issue of the child's return?

The case is pending as C-195/08 (*Inga Rinau*)

(Many thanks again to Jens Karsten (Brussels) for information on this case.)

Update: it seems that *Rinau* is the first reference to the ECJ to use the "urgent preliminary reference procedure" – more information can be found on the excellent EU Law Blog (which is where we spotted it). The effect of that is that the hearing is due before the Third Chamber on 26th June 2008, *less than two months* after it was first lodged.

See for more information on the urgent preliminary reference procedure the following press release of the Commission which can be found here.

Guest Editorial: Harris on "Reflections on the Proposed EU Regulation on Succession and Wills"

The second instalment of our 2008 series of Guest Editorials is by Professor Jonathan Harris: **Reflections on the Proposed EU Regulation on Succession and Wills.**

Prof. Jonathan Harris is Professor of International Commercial Law and Deputy Head of the Law School at the University of Birmingham, UK. He also practises as a barrister at Brick Court Chambers, London. He is an editor of Dicey, Morris and Collins, *The Conflict of Laws* (14th ed 2006; First Supplement 2007) and co-editor of the *Journal of Private International Law*. He is author of *The Hague Trusts Convention* (Hart Publishing, 2002) and co-author of *International Sale of Goods in the Conflict of Laws* (OUP, 2005). He has numerous articles and book chapters in the field of private international law. He is also a contributor to Underhill and Hayton, *Law of Trusts and Trustees* (16th and 17th editions, Butterworths). Professor Harris has recently been advising the UK Ministry of Justice on the proposed EU Regulation on Wills and Succession and gave oral evidence to the House of Lords Select Committee on European Union Law in October 2007. The transcript of this evidence is available here.

Reflections on the Proposed EU Regulation on Succession and Wills.

In March 2005, the European Commission issued its Green Paper on Succession and Wills (COM(2005) 65 final). It is now starting work on a draft Regulation. The United Kingdom will, of course, have to decide in due course whether to participate in this venture.

Those not directly concerned with matters of succession law may be excused for taking only a passing interest in the subject. Others may be sceptical about the internal market justification for this initiative. Closer inspection, however, shows that this is a potentially extraordinarily wide ranging and ambitious initiative, which demands attention. The Regulation may, for instance: alter the procedures

adopted in Member States for the administration of estate; affect lifetime dispositions made by gift or on trust prior to the testator's death; and even require Member States to recognise property rights that are unknown in their own domestic legal systems.

The Regulation is intended to cover jurisdiction, recognition of foreign judgments and choice of law. Perhaps the most familiar issue for most people is the choice of law rule for succession to movable and immovable property. For the former, English courts have adopted the common law test of domicile at the time of death. We can confidently expect that this connecting factor will be replaced by habitual residence. If the United Kingdom participates in the Regulation, then, depending upon how the habitual residence test is defined, this might cause some significant change in respect of, for example, a person who dies whilst they are employed overseas for a number of years in State X, whilst intending to return to their state of origin, State Y, in due course.

Much more difficult, however, is the choice of law rule for immovables. It is clear that the European powers that be favour a unitarian system, applying the law of the deceased's last habitual residence to the devolution of the entire estate. Some onlookers will see this as a positive development; not least because it allows a local lawyer to provide advice as to the devolution of a client's estate across Europe, with apparent consequential improvement for the legal position of citizens. Others, however, will wonder about the desirability and feasibility of applying foreign law in relation to land located within the jurisdiction. It is true that, for Contracting States to the Hague Trusts Convention, the possibility of creating a valid trust governed by a foreign law over land located in the jurisdiction already exists. But it seems inconceivable that a court could apply a foreign governing law to, for example, the process by which a right in land is transferred on death; or to the question of whether that right should appear on the land register. Appropriate derogations to the law of the situs will need to be carved out.

A more fundamental matter, however, is the scope of the Regulation and the subject matter that it will encompass. In particular, the Regulation is likely to cover a far wider canvass than what would, in English law, be regarded as matters of succession. For instance, in English law, there is a clear delineation between succession rights and the prior process by which a deceased person's estate is administered. In England, property is first vested in an executor (if

named in the will) or an administrator (if not) appointed by the court, who will deal with outstanding liabilities before distributing the estate. English law also does not automatically recognise the status and competence of an administrator appointed overseas. It may very well be, however, that the Regulation will apply the lex successionis to the administration of estates; even if, for instance, that law vests the property directly in the beneficiaries and requires them to deal with administrative matters. This will, of course, constitute a fundamental change to national procedural processes for dealing with the estates of deceased persons.

But perhaps the most extraordinary aspect of the Regulation is that it seems distinctly possible that it will attempt to address the panoply of property rights that might be created upon death. A testator might, for instance, leave his property on testamentary trust; or subject to a usufruct or a tontine. There was a marked uncertainty in the Green Paper as to the relationship between trusts and the law of succession. The question of whether X has left his property to Y to be held on trust is a succession law issue; but the question of whether the trust itself is valid, the terms of the trust and the rights and obligations of the trustee are trusts specific issues (which, in the United Kingdom, are covered by the Hague Trusts Convention) and emphatically are not succession issues. This distinction between succession law and trusts has properly been drawn in the context of the Hague Succession Convention (Article 14) and the Hague Trusts Convention (Article 15). Indeed, the Hague Trusts Convention is applicable to the operation of the trust itself but not to the preliminary acts by which the property is vested in trustees (Article 4).

If the Regulation were to lay down choice of law rules and recognition rules which extend to all rights arising upon death, then doubtless, the United Kingdom would gain considerably if its testamentary trusts were routinely recognised across Europe. But this does not seem a terribly realistic aspiration. Most Member States of the European Union have shunned the Hague Trusts Convention, pursuant to which they would be required to recognise trusts qua trusts. It is difficult to believe that they will now relish having to recognise such trusts in their legal systems. Moreover, this would lead to the rather bizarre result that Member States would recognise testamentary trusts; but not be required to recognise inter vivos trusts. Yet once the trust is up and running, its genesis is arguably irrelevant to the legal regime that should govern it. Since the Regulation will also extend to matters of jurisdiction, the possibility exists that the courts of a

civilian Member State would be required, for example, to consider the operation of a discretionary trust contained in a will which gives the trustee the discretion to distribute the trust property amongst a group of person specified by the testator, but compels him to exercise the discretion; and to have to determine such questions as whether the trustee has exercised his discretion properly.

Conversely, English courts might be asked to recognise foreign property rights unknown in its legal system such as, for example, a usufruct or a tontine, that might arise according to the lex successionis. Yet it is difficult to see how a Regulation on succession law can seek to regulate all the property rights that exist in the Member States (and, if the Regulation has universal scope, all the property rights that exist in non-Member States as well), or require overseas courts to assert jurisdiction in proceedings relating to such rights. Still less can those States automatically recognise such foreign interests, register them and give effective to them within the context of their own legal systems. Such a Regulation would, in reality, not be a pure succession law Regulation at all; and its potential impact would be enormous.

An equally difficult problem in formulating a suitable Regulation is the issue of clawback. Many legal systems have wide ranging rules on the inclusion in the deceased's estate of assets which he disposed of prior to his death. English law has only a very circumscribed right for relatives of the deceased to make an application to the court for a discretionary award under the Inheritance (Provision for Family and Dependants) Act 1975 where the deceased died domiciled in England and Wales. Otherwise, it places great weight on the sanctity and validity of inter vivos dispositions. Other Member States prefer more extensive protection against testators dissipating assets to prevent their nearest and dearest from getting at them; and in some cases, will include dispositions made many years prior to death. From an English perspective, this has the potential to undermine trusts that were validly created by their governing law, or at least threatens that these assets will be taken into account in assessing a person's entitlement under the will. This, in turn, might also drive investors to offshore trusts jurisdictions, which have legislation that can offer much greater protection against the application of foreign rules of clawback. It remains to be seen if an exclusion from the along the lines of Article 1(2)(d) of the Hague Succession Convention might be feasible. This excludes "Property rights, interests or assets created or transferred otherwise than by succession, such as in joint ownership with right of survival,

pension plans insurance contracts or other arrangements of a similar nature". Article 7(2)(c) muddies the waters somewhat, however, in stating that the lex successionis applies to " any obligation to restore or account for gifts, advancements or legacies when determining the shares of heirs, devisees or legatees". In any event, it is likely that many Member States will wish the question of clawback, and of what assets are included in the deceased's estate, simply to be left to the lex successionis.

The question of testator freedom to choose the governing law will also be an important issue. The ability to choose, for instance, the law of one's habitual residence at the time of making a will would increase the testator's confidence as to the devolution of his estate. For cross-border workers, there may also be benefit in allowing a choice between connecting factors, so as to allow e.g. a person domiciled in England but currently resident in France whilst working there for a fixed term of five years to choose the law of his domicile rather than that of his habitual residence. But too wide a choice might simply allow a testator to evade the policies and protection of his "home" law, as where he chooses English law so as to avoid rules of compulsory heirship of another legal system which require him to leave a fixed percentage of his estate to his family members.

The Regulation will also need to formulate suitable rules of jurisdiction. Given the very wide range of issues that could arise under the Regulation, this will be no easy matter. It is likely, however, that the default rule will be to confer jurisdiction on the courts of the deceased's habitual residence at death. Equally difficult will be rules on the mutual recognition of foreign judgments. A Regulation of wide scope, which includes within its ambit judgments on the administration of the estate, the validity of property rights unknown in the state where recognition is sought, or provides for clawback of assets disposed of by inter vivos trust, may create acute issues of public policy for the state which is asked to recognise the judgment. There is also the question of how the United Kingdom would accommodate the acts of notaries, since it does not have a notarial tradition.

The Green Paper also reveals plans for a standard European Certificate of Inheritance, which would be issued by courts in Member States and contain a statement as to the assets of the estate and the entitlement of beneficiaries. But even if the courts of every Member State were willing and able to adapt their domestic procedures so as to issue such a document, difficulties would remain. In

view of the problems considered above in deciding what assets should be included in the testator's estate, it may be difficult for a court to accept a conclusive statement from another Member State's courts as to the assets of the estate. It remains to be seen whether a less ambitious approach, which recognises the certificate as having only evidential value, might be acceptable.

Finally, the Green Paper makes reference to a system of registration of wills. Such a development may be desirable, at least on an optional basis. It would, however, cause certain problems if an obligation to register a will were imposed. It is not clear how that system would be policed, or what would happen to a will that had not been registered. Nor is it clear what the register would contain, who could access it and when. Some testators may not wish the existence of their will to be disclosed prior to death.

The proposed Regulation is, in summary, a very complex initiative, not least because of the considerable disparity in the ways in which the domestic legal systems of Member States deal with the devolution of a person's estate upon death. Moreover, the true scope and potential effects of the Regulation are extremely significant. It remains to be seen whether that ambition will be realised; and whether, in attempting to achieve so much, the European institutions will be able to produce a Regulation that meets with general approval and which enables the United Kingdom, in particular, to participate in the initiative.

The March Guest Editorial will be by Professor Paul Beaumont; details to follow).