Surrogacy Agreements Violate French Public Policy

The French Supreme Court for private and criminal matters (*Cour de cassation*) has delivered yesterday three judgments which ruled that foreign surrogacy agreements violate French public policy.

In each of the three cases, the child or children were born in a state of the United States where the practice was lawful (MN twice, CA once). In a common press release, the *Cour de cassation* explained that it was faced with two issues: 1) did the American judgments violate public policy, and 2) if so, should they be nevertheless recognised as a consequence of rights of the French couple and of the children afforded by international conventions. All three judgments gave the same reasons:

1. The foreign (ie American) birth certificate could not be mentioned in the French civil status registry.
2. The reason why was that the foundation of the birth certificate was a foreign judgment which violated French public policy.
3. Under present French law ("*en l'état du droit positif*"), surrogacy agreements violate a fundamental principle of French law.
4. The fundamental principle of French law is the principle that civil status is inalienable. Pursuant to this principle, one may not derogate to the law of parenthood by contract (see Art. 16-7 and 16-9 of the Civil Code).
5. This outcome does not violate Article 8 of the European Convention of Human Rights, as the children have a father in any case (ie the biological father), a mother under the law of the relevant US state, and may live together with the French couple in France.
6. This outcome does not violate either Article 3-1 of the New York Convention on the Rights of the Child and the best interest of the child rule (no reason given for this statement)

We had already reported on one of the three cases, where the California judgment had first been recognised by the Paris Court of appeal. The *Cour de cassation* had then allowed an appeal against this decision on a procedural point. A second Court of appeal judgment followed, which held that the American judgment

violated French public policy. This new judgment of the *Cour de cassation* dismisses an appeal against this second jugdment of another division of the Paris Court of appeal.

Needless to say, the couple (picture) is not happy about this decision. They claim that the judgment ignores the best interest of the child. They challenge the fact that the children may live in France, as, it is argued, they would not be granted French citizenship in the absence of mention in the French civil status registry. The couple has already announced that they intend to initiate proceedings before the European Court of Human Rights.

ECJ Rules on Law Applicable to Employment Contracts

On March 15, the European Court of Justice delivered its first ruling on Article 6 of the Rome Convention in *Koelzsch v. Luxembourg* (case C-29/10).

Mr Koelzsch was a heavy goods vehicle driver domiciled in Osnabrück (Germany). He was hired by the Luxemburgish subsidiary of Gasa, a Danish company in the business of transporting flowers from Danemark to various destinations in Germany and in other European states by means of lorries stationed in Germany. Gasa did not have a seat or offices in Germany. The lorries were registered in Luxembourg and the drivers were covered by Luxembourg social security. The employment contract of Mr Koelzsch provided for the application of Luxembourg law and the jurisdiction of its courts. In March 2001, Koelzsch was elected as a representative of employees of Gasa Luxembourg. He was fired a week later.

Koelzsch sued his Luxembourgish employer first in Germany, but the German

court declined jurisdiction. He then sued in Luxembourg. Before the Luxembourg court, he argued that he was protected by mandatory rules of German labour law protecting employees' representatives. The Luxembourg courts held that, as he was not working in a single state, the mandatory rules protecting him pursuant to Article 6 (1) of the Rome Convention were those of the place where the business which had engaged him was situated, i.e. Luxembourg.

> ***Article 6 of the Rome Convention***
>
> *1. Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice.*
>
> *2. Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:*
>
> *(a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or*
>
> *(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated;*
>
> *unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.*

Unsurprisingly given the Court's case law on jurisdiction, the ECJ held that "the criterion of the country in which the employee 'habitually carries out his work', set out in Article 6(2)(a) of the Rome Convention, must be given a broad interpretation". It further ruled:

> *44. It follows from the foregoing that the criterion in Article 6(2)(a) of the Rome Convention can apply also in a situation, such as that at issue in the main proceedings, where the employee carries out his activities in more than one Contracting State, if it is possible, for the court seised, to determine the State with which the work has a significant connection.*

The Court, however, did not conclude and did not say whether Germany was the place where the work was habitually carried out. It instructed the national court to verify the following:

> *47 It follows from the foregoing that the referring court must give a broad interpretation to the connecting criterion laid down in Article 6(2)(a) of the Rome Convention in order to establish whether the appellant in the main proceedings habitually carried out his work in one of the Contracting States and, if so, to determine which one.*
>
> *48 Accordingly, in the light of the nature of work in the international transport sector, such as that at issue in the main proceedings, the referring court must, as proposed by the Advocate General in points 93 to 96 of her Opinion, take account of all the factors which characterise the activity of the employee.*
>
> *49 It must, in particular, determine in which State is situated the place from which the employee carries out his transport tasks, receives instructions concerning his tasks and organises his work, and the place where his work tools are situated. It must also determine the places where the transport is principally carried out, where the goods are unloaded and the place to which the employee returns after completion of his tasks.*

Final conclusion:

> *Article 6(2)(a) of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, must be interpreted as meaning that, in a situation in which an employee carries out his activities in more than one Contracting State, the country in which the employee habitually carries out his work in performance of the contract, within the meaning of that provision, is that in which or from which, in the light of all the factors which characterise that activity, the employee performs the greater part of his obligations towards his employer.*

Many thanks to Maja Brkan for the tip-off.

Levi on Transnational Libel

Lili Levi, who is a professor at the University of Miami Law School, has posted The Problem of Trans-national Libel on SSRN.

> *Forum shopping in trans-national libel cases – "libel tourism" – has a chilling effect on journalism, academic scholarship, and scientific criticism. The United States and Britain (the most popular venue for such cases) have recently attempted to address the issue legislatively. In 2010, the U.S. passed the SPEECH Act, which prohibits recognition and enforcement of libel judgments from jurisdictions applying law less protective than the First Amendment. On March 15, 2011, the British Ministry of Justice proposed a draft Defamation Act 2011 with provisions designed, inter alia, to discourage libel tourism. This Article questions the extent to which the SPEECH Act and the proposed Defamation Act 2011 will accomplish their stated aims. The SPEECH Act provides little protection for hard-hitting investigative and accountability journalism by professional news organizations with global assets. The proposed British bill has important substantive limits and, controversial in Britain, may well not be adopted. Even if Parliament approves it, the site of libel tourism may shift to other claimant-friendly jurisdictions. Global harmonization of libel law is neither realistically feasible nor desirable. Instead, this Article proposes a two-fold approach. On the legal front, it supports the procedural focus of Britain's proposed bill, but also calls for foreign courts to apply a governmental interest analysis to choice of law in trans-national defamation cases threatening core political speech in the United States. On the policy front, it calls for: 1) measures to improve the way in which the press does its job in order to reduce the number of trans-national libel cases; and 2) new approaches to help defend the claims when they are brought. The recommended press-improvement measures include expanded access to, and efficient use of, documents, journalistic self-criticism, and best-practices education. The defense measures explored include the development of alternative, community-based support for libel defense funds; the formation of pro bono libel review consortia; and the promotion of the availability of libel insurance by means designed to help*

insurers more accurately assess libel risk.

The paper can be freely downloaded here.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (2/2011)

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

Here is the contents:

- ***Jürgen Basedow***: "Das Staatsangehörigkeitsprinzip in der Europäischen Union" – the English abstract reads as follows:

In continental countries, citizenship has traditionally played an important role as a connecting factor in the private international law relating to personal status. The article outlines the gradual emergence of this connecting factor throughout the 150 years of rising nationalism up to World War II and explores its remaining significance in the framework of European integration, with a par- ticular view to the prohibition of discrimination on grounds of nationality under article 18 TFEU. Against the background of the historical purpose of that provi- sion, the author advocates an anti-protectionist reading of that article which does not categorically prohibit the use of citizenship as a connecting factor, but only a discrimination of foreigners on the sole ground of their foreign citizenship. This interpretation is underpinned by a detailed inquiry into the case law of the Euro- pean Court of Justice on article 18 and into the secondary law of the European Union. This approach leads to detailed conclusions with regard to the use of nationality in the areas of jurisdiction, choice of law rules and recognition.

- ***Ivo Bach**:* "Zurück in die Zukunft – die dogmatische Einordnung der Rechtsscheinvollmacht im gemeineuropäischen IPR" – the English abstract reads as follows:

Under most legal systems, a principal may be bound by a contract that his agent has concluded even if the agent lacked the actual authority to do so. As long as the principal's conduct creates the reasonable impression that he authorized his agent to conduct the transaction, the law protects the third party. Under German law, such a "reasonable impression" is presumed in particular when (a) the principal has knowledge of the agent's behavior yet does not intervene ("Duldungs- vollmacht"), or when (b) the principal could (and should) have knowledge that would allow him to intervene ("Anscheinsvollmacht").

European conflict-of-laws rules raise the question of whether the prin- cipal's liability under the agent's apparent authority should be classified as a contractual or a non-contractual obligation – i.e. whether Rome I or Rome II determines the applicable law. In light of the ECJ's criteria for dis- tinguishing contractual from non-contractual obligations, this paper concludes that both of the above-mentioned apparent authority scenarios of German law must be classified as non-contractual obligations, thus placing them within the scope of Rome II.

This result generates a difficult follow-up question: is apparent authority a case of culpa in contrahendo (Art. 12 Rome II) or should it be governed by Rome II's general rule on torts/delicts (Art. 4)? This paper tends towards an application of Art. 12 Rome II.

- ***Marianne Micha:*** **"**Der Klägergerichtsstand des Geschädigten bei versicherungsrechtlichen Direktklagen in der Revision der EuGVVO" – the English abstract reads as follows:

The Commission of the EC presented a Report together with a Green Paper on the review of Regulation 44/2001 on jurisdiction in civil and commercial matters. The present article examines the needs for review with a view to a recent decision of the ECJ (FTBO ./. Jack Odenbreit), in which it granted the person injured in a car accident a forum in the Member State of his domicile, although the accident took place in another Member State where the insured

tortfeasor was domiciled and had taken out motor liability insurance for his car. On the whole, the present legal situation is satisfying. Concerning third State situations, the injured person should be granted a forum at his domicile, if the accident took place within the EU although the insurer is not domiciled in a Member State. Choice of court agreements do not bind the injured person if they are to his detriment.

- ***Burkhard Hess****:* "Die Reform der EuGVVO und die Zukunft des Europäischen Zivilprozessrechts" – the English abstract reads as follows:

On December 14, 2010, the European Commission presented its highly anticipated proposal for the reform of the Brussels I Regulation. KOM (2010) 748 endg. vom 14.12.2010, der Text ist verfügbar unter: http://ec.europa.eu/justice/policies/civil/docs/com_2010_748_en.pdf. Im folgenden Beitrag werden die Vorschläge als EuGVVO-E bezeichnet. This proposal marks the beginning of the formal law-making process to recast the Regulation. Intense, legal and political debate concerning the function and the reform of this central legal instrument of the European Judicial Area can be expected in the next months. This debate should not be limited to the legal instrument itself, but it should address the future of European Procedural Law as a whole. In particular, procedural law academics should continue to engage actively in – and thereby influence – European judicial policy. The following contribution deals with the cornerstones of the reform proposals and contrasts them to the current stage of European Civil Procedural Law. It also contains a first evaluation of the reform proposals.

- ***Andreas Spickhoff*** on the ECJ's decision in C-278/09 (Olivier Martinez, Robert Martinez ./. MGN Ltd) as well as decisions of the German Federal Supreme Court (2.3.2010 – VI ZR 23/09); Regional Court Cologne (26.8.2009 – 28 O 478/08) and the Austrian Supreme Court (8.9.2009 – 4 Ob 138/09m) dealing with the questions of jurisdiction and applicable law with regard to the infringement of personal rights on the internet: "Persönlichkeitsverletzungen im Internet: Internationale Zuständigkeit und Kollisionsrecht"
- ***Anatol Dutta.*** "Ein besonderer Gerichtsstand für die Geschäftsführung ohne Auftrag in Europa?(Higher Regional Court Cologne – 13.5.2009 –

6 U 217/08, Regional Court Aachen, 31.10.2008 – 12 O 40/089" – the English abstract reads as follows:

Localising negotiorum gestio on the map of the law of obligations is a difficult task, especially when applying autonomous criteria such as those developed by the European Court of Justice for the terms "contract" and "tort" in Article 5 (1) and (3) of the Brussels I Regulation. In a recent decision, the Regional Court of Appeal in Cologne held that obligations flowing from negotiorum gestio are, for purposes of the European jurisdictional rules, neither contractual nor tortuous. That view appears to be sound not only in theory but also in practice (infra III.): Article 5 (1) and (3) of the Brussels I Regulation – if applied to negotiorum gestio – would not lead to the proper forum for disputes on negotiorum gestio, namely the courts at the place where the negotiorum gestio was performed (infra II). Hence, the article suggests that a new special head of jurisdiction for negotiorum gestio should be introduced (infra IV.).

- ***Hannes Wais:*** "Internationale Zuständigkeit bei gesellschaftsrechtlichen Ansprüchen aus Geschäftsführerhaftung gemäß § 64 Abs. 2 Satz 1 GmbHG a.F./§ 64 Satz 1 GmbHG n.F.(Higher Regional Court Düsseldorf, 18.12.2009 – I-17 U 152/08, Higher Regional Court Karlsruhe, 22.12.2009 – 13 U 102/09)" **–** the English abstract reads as follows:

Must international jurisdiction for liability claims based on § 64 GmbHG against a foreign director of a German company with restricted liability (Gesellschaft mit beschränkter Haftung) be determined according to the European Insolvency Regulation or according to the Brussels I Regulation? Furthermore, if one applies the Brussels I Regulation, has the claim to be qualified as a matter relating to a contract pursuant to Art. 5 (1), or to a tort pursuant to Art. 5 (3) Brussels I Regulation? Both the OLG Düsseldorf (Higher Regional Court) and the OLG Karlsruhe had to consider these questions in recent cases. In accordance with earlier decisions of German courts the OLG Düsseldorf regarded Art. 5 (1) Brussels I Regulation applicable.

- ***Moritz Brinkmann****:* "Die Auswirkungen der Eröffnung eines Verfahrens nach Chapter 11 U.S. Bankruptcy Code auf im Inland anhängige Prozesse(Federal Supreme Court, 13.10.2009 – X ZR 79/06)" – the English abstract reads as follows:

The article discusses the effects of the commencement of insolvency proceedings on a lawsuit pending between the debtor and another party. When the lawsuit is taking place in another jurisdiction than the insolvency proceedings, three questions have to be answered: 1.) Does the lex fori processus recognize the foreign insolvency proceedings? 2.) If yes, does the commencement of the foreign insolvency proceedings lead to a stay of the litigation? 3.) If yes, who, or rather which side has the right to resume the lawsuit? Against the backdrop of a decision by the Bundesgerichtshof dealing with the effects of a U.S.-chapter 11 filing on a lawsuit before German courts, Brinkmann shows the differences between the solutions under the European Insolvency Regulation (EC) No 1346/2000 and under § 352 German Insolvency Code (InsO) which is applicable when the insolvency proceedings are in a non-EU member state: While Art. 15 of the European Insolvency Regulation is a conflict rule under which the lex fori processus is applicable to answer questions 2.) and 3.), § 352 I 1 German Insolvency Code is a substantive rule that directly stays the domestic lawsuit. On the question, who has the right to resume the litigation, the Bundesgerichtshof applies the lex fori concursus. Brinkmann argues that this issue should be decided by the lex fori processus notwithstanding § 352 I 2 InsO.

- ***Jörg Pirrung*:** "Teilaussetzung des Verfahrens zur Vollstreckbarerklärung einer griechischen „konservativen Beschlagnahme" von Vermögen(Higher Regional Court Cologne, 15.9.2008 – 16 W 6/08) " – the English abstract reads as follows:

Where the defendant has requested a revocation of a provisional measure according to art. 697 of the Greek law on civil procedure, this is equivalent to an ordinary appeal in the sense of art. 46 of the Brussels I regulation.

- ***Marc-Philippe Weller**: "*Windscheids Anspruchsbegriff im Strudel der Insolvenzrechtsarbitrage (Higher Regional Court Celle, 7.1.2010 – 6 U 60/09)" – the English abstract reads as follows:

The doctrine of actionability of a creditor's claim can be traced back to Windscheid. From the perspective of the German lex fori the actionablity has to be qualified not as a procedural but as a substantive element of the claim. As a consequence an action has to be dismissed not as (procedurally) inadmissible

but as unfounded, when the creditor's claim is non-actionable. According to French insolvency law, the creditor's claim loses its element of actionability when an insolvency proceeding is opened. The claim even remains non-actionable when the insolvency proceeding comes to an end due to lack of assets. According to Art. 17 EuInsVO, these consequences of the French insolvency law has to be recognized in all other EU member states. The differences in the insolvency laws of the EU member states lead to arbitrary behaviour of debtors in International Insolvency Law.

- ***Bettina Heiderhoff:*** "Wann ist ein „Clean Break" unterhaltsrechtlich zu qualifizieren?(Federal Supreme Court, 12.8.2009 – XII ZB 12/05) – the English abstract reads as follows:

It seemed scandalous to some when the 12th chamber of the German Supreme Court (BGH) decided, in 2009, that an English divorce judgement was only partly enforceable. However, the BGH only held that the Brussels I Regulation was not applicable as the 2004 order of the High Court concerned matrimonial property (excluded from the scope of the regulation under Article 1 sec 2 lit a) rather than maintenance (to which the regulation is applicable). It is internationally acknowledged that maintenance may be paid in a lump sum. In order to decide whether a payment serves as maintenance or as a division of matrimonial property, one must inquire about the reasons behind the payment: i.e., where the payment serves to secure the future standard of living it functions as maintenance; however, where economic disparity sustained by one partner during the marriage is to be compensated, matrimonial property law is concerned. From an EU perspective, the main question should be whether the national courts may determine the quality of the lump sum payment or whether there should be a purely autonomous determination by the ECJ. It would certainly be frustrating if the mere use of the word "maintenance" in the national court order was held to be decisive. Objective and secure criteria for a distinction between matrimonial property and maintenance may be found, although none seem obvious at first glance. They must consider the fact that different countries have different economic realities, especially as far as housing is concerned. These questions should, however, be answered by the ECJ and the BGH should have requested a preliminary ruling.

- ***Ulrike Janzen/ Veronika Gärtner*:** "Kindschaftsrechtliche Spannungsverhältnisse im Rahmen der EuEheVO – die Entscheidung des EuGH in Sachen Deticek (ECJ, 23.12.2009 – Rs. C-403/09 PPU – Jasna Deticek ./. Maurizio Sgueglia)" – the English abstract reads as follows:

On 23 December 2009 the ECJ delivered its judgment in Re Deti?ek which has been dealt with under the urgent procedure pursuant to Art. 104b of the ECJ's Rules of Procedure. The case concerned basically the question whether courts of the Member State where the child is present, can take protective measures on the basis of Art. 20 Brussels II bis Regulation even if a court of another Member State having jurisdiction as to the substance has already taken a protective measure declared enforceable in the first Member State. The ECJ answered this question in the negative, based primarily on teleological and systematic arguments. While the authors agree with the ECJ with regard to the case in question, the approach taken by the ECJ might be challenged in several respects: First, it can be questioned whether the ECJ put too much emphasis on systematic and technical arguments such as facilitating the enforcement of decisions of another Member State as well as the deterrence from wrongful removals, while neglecting the principal aim of the Regulation's provisions on parental responsibility – safeguarding the child's best interest. In the authors' opinion, Art. 20 (1) Brussels II bis does, in principle, not allow provisional measures in situations where the court having jurisdiction as to the substance has already taken a protective measure declared enforceable in the Member State in question, which is illustrated by the rule Art. 20 (2) Brussels II bis. However, the authors argue that – taking into account the Regulation's paramount objective – there might be a need to allow provisional measures also in these cases under certain (strict) conditions – namely if the factual situation has changed significantly subsequent to this first decision and if the new circumstances lead to the assumption of an urgent case in terms of Art. 20 (1) Brussels II bis. Secondly, the authors raise the question whether the ECJ proceeded in a methodologically correct way by examining whether the requirements for provisional measures according to Art. 20 Brussels II bis – urgency, presence of the relevant person(s) in the Member State in question, provisional nature of the measure – are met in the present case, or whether this was rather for the national court to decide. Further, in this context it is submitted that – in derogation from the position adopted by the ECJ in the present decision – it is decisive for the question whether measures can be taken

under Art. 20 Brussels II bis whether the child is present in the respective Member State – and not where the parents are located.

- ***Sergej Kopylov**:* "Zur Verbürgung der Gegenseitigkeit zwischen der Russischen Föderation und Deutschland (Oberstes Wirtschaftsgericht der Russischen Föderation, 7.12.2009 – VAS 13688/09)" – the English abstract reads as follows:

In German-Russian legal relations, there is a considerable need for certainty relating to the enforcement (exequatur) of Russian decisions in Germany and vice versa. On this issue, the supreme Russian commercial court (arbitration court) adopted a position in a ruling dated 07/12/2009 and declared a Dutch judgement enforceable. The decision is a further step towards establishing a practice of recognition and enforcement of European decisions in Russia and thus towards guaranteeing reciprocity also with Germany. In the commercial courts' now also recognising British and Dutch court rulings – in addition to the already existing treaties under international law concluded with numerous EU Member States on the recognition and enforcement of court decision – they have created a mutual legal platform, also facilitating "in the triangle" recognition. In the interim, the French courts have issued exequatur for Russian decisions in civil matters.

- ***Erik Jayme*** on the conference of the German-Lusitanian Lawyers' Association in Osnabrück: "Internationales Erbrecht und lusophone Rechte"

Vacant Professorship in Business Law at ESCP Europe Business

School

The ESCP Europe Business School is seeking to recruit an assistant/associate professor in business law. The successful candidate would be asked to teach courses in International/Comparative Business Law, and to conduct research with an international dimension.

> ***ESCP Europe Paris Campus recruits an Assistant / Associate Professor in Business Law***
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> ***Assistant/Associate Professor position in Business Law, to begin September 2011 in Paris, France.***
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> *With a PhD in Law (or equivalent), the successful candidate will have demonstrated an exceptional ability in research and teaching in the area of Business Law. The new professor will be expected to teach undergraduate and graduate level courses in French and in English. It will contribute to the teaching of law to ESCP Europe students, in collaboration with the existing law professorships. The successful applicant will develop research proposals and carry out research projects. He/She will fulfill administrative duties.*
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addressed by mail to Carole MATHIEU cmathieu@escpeurope.eu

Deadline for application : April 18, 2011.

2011 Summer Seminar in Urbino

The Faculty of Law of the University of Urbino will host this summer its 53rd Seminar of European Law.

Many of the courses taught over the two weeks of the seminar (22 August-3 September) will deal with conflict issues. Although courses can be taught in English, this is a franco-italian seminar where courses are typically taught in French or Italian, with a translation in the other language.

Speakers include leading academics, practitioners and judges.

The full program can be found here.

A New Assignment for the Rome I Regulation

When the Rome I Regulation was finalised in 2008, certain questions concerning the effect of assignments upon third parties (e.g. judgment creditors, security holders, prior assignees of the same right) were left open. In this connection, the Commission undertook to prepare and submit a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties, and the priority of the assigned or subrogated claim over a right of another person (Art 27(2)).

The British Institute of International and Comparative Law (BIICL) has been "Commissioned" to undertake a study upon which this report will, in part, be based. For the purposes of this study, BIICL has prepared a questionnaire concerning the role of assignments and the surrounding legal environment in transactions with a cross-border element. Answers to this questionnaire (involving requests for information about the nature and value of transactions undertaken, practical examples of the impact of legal regulation and views on policy options for a possible new EU conflicts rule in this area) will be used by BIICL in preparing its study report and submitted to the Commission as part of its impact assessment for any future proposal. Accordingly, the process is intended to enable EU businesses and members of the legal profession to make their views known at the outset of the review process.

As a member of the BIICL team, I would encourage all of you to take part in the study by (1) downloading and completing any parts of the questionnaire which apply to you (download here) and returning the form to Dr Eva Lein at the Institute (see contact details in the questionnaire), and/or (2) by forwarding this post to any business contact whom you think may have an interest in the subject matter of the study. Please also contact Dr Lein if you have any questions concerning the project or the questionnaire.

Krombach v. Bamberski: Update (updated)

The second criminal trial of Dr. Dieter Krombach began on March 29th in Paris.

Readers will recall that the first trial took place in the absence of Dr. Krombach, and then led to the famous *Krombach* decision of the European Court of Human Rights. Readers will also recall that this second trial will take place because the father of the alleged victim of Dr. Krombach, Mr. Bamberski, had Krombach kidnapped in Germany and delivered to French authorities.

Counsel for Krombach argued that the kidnapping made the procedure illegal. They also requested that the matter be referred (again) to the European Court of Justice.

These arguments were rejected by the Paris court on March 30th. The trial will go on.

New Spanish Law

Spanish *Ley 4/2011, de 24 de marzo, de modificación de la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil, para facilitar la aplicación en España de los procesos europeos monitorio y de escasa cuantía*, was published yesterday in our *Boletín Oficial del Estado*. The aim of the law is to facilitate the implementation in Spain of two European Regulations: Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, and Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure. To do so, the law modifies certain provisions of the Civil

Procedure Act (2000), and adds new provisions to the "Disposiciones finales" (Final provisions). The purpose of these rules is to fix some precepts of the European Union Regulations: issues concerning jurisdiction, resolutions to be adopted by the judge or the judicial clerk and their relationship with the form set out in EU regulations, possibilities of appeal, and some extra procedural rules. These changes are needed in order to allow full implementation of the EU Regulations by the Spanish courts, and to clarify these new judicial procedures characterized by the use of Forms and reserved for cross-border disputes.

See the text of the law here.

Commission's Proposals On Matrimonial Property Regimes and Property Consequences of Registered Partnerships

As announced in the past months, **on 16 March 2011 the Commission presented the proposals for two regulations on property rights of "international" married couples and registered partnerships**:

- Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011) 126 of 16 March 2011;
- Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM(2011) 127 of 16 March 2011.

The proposals are accompanied by a Communication from the Commission "Bringing legal clarity to property rights for international couples" – COM(2011) 125 of 16 March 2011 – which describes the difficulties faced by international

couples in the current framework of EU legislation and national rules of the 27 Member States (see also the figures presented in the press release and the related FAQs).

The origin of the initiative dates back to the early days of the "communitarisation" of the conflict of laws. According to the Explanatory Memorandum to doc. COM(2011) 126:

> *The adoption of European legislation on matrimonial property regimes was among the priorities identified in the 1998 Vienna Action Plan. The programme on mutual recognition of decisions in civil and commercial matters adopted by the Council on 30 November 2001 provided for the drafting of an instrument on jurisdiction and the recognition and enforcement of decisions as regards 'rights in property arising out of a matrimonial relationship and the property consequences of the separation of an unmarried couple'. The Hague programme, which was adopted by the European Council on 4 and 5 November 2004, set the implementation of the mutual recognition programme as a top priority and called on the Commission to submit a Green Paper on 'the conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition', and stressed the need to adopt legislation by 2011.*

A thorough research on the matter was previously carried in 2003 at an academic level, on behalf of the Commission, by the TMC Asser Instituut and the *Département de droit international* of the Catholic University of Leuven (UCL) (the whole study – Final Report in French and Country Reports on the legislation of Member States – can be downloaded from the Documentation Centre of the DG Justice, Freedom and Security). The Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition, was published on 17 July 2006, and received nearly forty replies in the public consultation launched by the Commission.

The 2009 Stockholm Programme came back to the need of European legislation in the field, stating that mutual recognition should be extended to matrimonial property regimes and the property consequences of the separation of unmarried couples. The need was further stressed in the 'EU Citizenship Report 2010: Dismantling the obstacles to EU citizens' rights' (p. 5 ff.), adopted on 27 October

2010, where the Commission announced for 2011 an official legislative initiative. The drafting of the proposals is summarised as follows in the Explanatory memorandum:

> *A group of experts, PRM/III, was set up by the Commission to draw up the proposal. The group was made up of experts representing the range of professions concerned and the different European legal traditions; it met five times between 2008 and 2010. The Commission also held a public hearing on 28 September 2009 involving some hundred participants; the debates confirmed the need for an EU instrument for matrimonial property regimes that covered in particular applicable law, jurisdiction and the recognition and enforcement of decisions. A meeting with national experts was held on 23 March 2010 to discuss the thrust of the proposal being drafted.*
> *Finally, the Commission conducted a joint impact study on the proposals for Regulations on matrimonial property regimes and the property consequences of registered partnerships. [see doc. n.* SEC(2011) 327 fin. *and* SEC(2011)328 fin. *of 16 March 2011]*

Pursuant to Art. 81(3) TFEU the proposed regulations, as "measures concerning family law with cross-border implications", are subject to a special legislative procedure: the Council shall act unanimously, after consulting the European Parliament. The second subparagraph of Art. 81(3), however, provides a "passerelle-clause", under which "the Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure". The third subparagraph of the provision grants to national Parliaments of the Member States a veto power, to be exercised within six months of the notification of the Commission's proposal to enact the "passerelle".