Heinze on Choice of Court Agreements, Coordination of Proceedings and Provisional Measures

Christian Heinze (Max Planck Institute for Comparative and PIL) has posted *Choice of Court Agreements, Coordination of Proceedings and Provisional Measures in the Reform of the Brussels I Regulation* on SSRN. The abstract reads:

> *In December 2010, the European Commission published a Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the Brussels I Regulation. The Commission proposes significant amendments which would considerably change the structure of the Brussels Regulation. In view of these developments in an area which is central for European cooperation in civil matters and the development of European private international law in general, the following paper will give a first assessment of the Commission Proposal. It will focus on the changes proposed for choice of court agreements (II), for coordination of legal proceedings (III), and for provisional measures (IV).*

The paper is forthcoming in the *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht*.

Pilich on Recognition in Poland of

Same Sex Relationships

Mateusz Jozef Pilich (University of Warsaw) has posted a paper on the Problem of Recognition of the Same-Sex Relationships in Poland in the Light of the EU Law and the New Polish Act on Private International Law on SSRN (*Das Problem der Anerkennung von gleichgeschlechtlichen Verhältnissen in Polen im Lichte des Europarechts und des neuen polnischen IPR-Gesetzes*). The English abstract reads:

> *On February 4th, 2011 Polish Parliament (Sejm) has voted on the new Act on the Private International Law, replacing the old instrument of 1965. At the final stage of the parliamentary debate the question of the constitutionality of the new Law arose; according to some deputies, the PIL would open the "backdoor" to the acknowledgment of foreign homosexual relationships, so far legally unrecognized on the constitutional level.*
>
> *The main task of the article is to cast some light on the problem of the non-marital relationships under the EU and Polish law of conflict. The European law itself abstains from taking a clear position as to cross-border legal effects of the non-marital or quasi-marital couples. Under these circumstances, it is the law of each Member State of the UE which regulates the issue.*
>
> *It is quite obvious that Art. 18 of Polish Constitution, which states that marriage is the union between the man and the woman only, forbids at the moment any material regulation of registered partnerships or homosexual marital unions in Poland. It is, however, not an argument against the application of conflict rules to such situations with the international element. It is welcomed that the new Law does not contain a 'special clause of public policy' put forward by the group of deputies just before the final parliamentary reading. The best regulation protecting Polish legal order is a general order public clause in Art. 7 of Polish Law. Some reflections on the choice-of-law characterization are also contained in the text.*
>
> *The other problem touched is the question of the so-called "recognition" of foreign legal relationships. The sense of the notion may be twofold: either it is the concurring method in the Private International Law replacing traditional conflict rules as a whole (at least as the intra-European conflicts of laws are*

concerned), or it only supplements the latter. Polish PIL contains no rules on the recognition of any type of the foreign legal relationships and the same is true also as to the homosexual unions.

According to the author's views, due to Art. 81(3) of the Treaty on the Functioning of the European Union, the EU law does not guarantee any automatic and general recognition of foreign registered partnerships or other gay or lesbian legal unions in Poland. Nonetheless, the careful application of the public policy rule makes it possible that certain legal consequences of these relationships do appear. Any general rule forbidding the application of foreign law only because of its content would infringe the sense of justice in the individual case.

Second Issue of 2011's ERA Forum

The first issue of Volume 12 of *ERA Forum* was just released.

It contains several articles of interest for conflicts specialists.

The first is authored by Jean-Philippe Lhernould, who is a professor of law at the university of Poitiers, and discusses *New rules on conflicts: regulations 883/2004 and 987/2009*. The abstract reads:

Regulations 883/2004 and 987/2009 fixed new rules on coordination of social security systems. In particular, they rearranged rules on conflicts of law, even if the core principles (one set of legislation only to be applicable and priority of workplace legislation) remain the same. Nevertheless, there are significant changes. The rules on conflicts have been simplified and several specific rules which were included in Regulation 1408/71 have been removed. The new rules also take into account the extension of regulations to all citizens and clarify the status of non-active persons. They adapt rules on conflicts for posting and for simultaneous activities in two member states.

The second, which is freely available here, is authored by our own Xandra Kramer and discusses the implementation of the Small Claims Procedure

Regulation in Member states. The abstract reads:

> *The European Small Claims Procedure is in general an instrument welcome for the enhancement it brings about to cross-border enforcement in the European Union. However, the regulation has several flaws, relating, inter alia, to its lack of consumer friendliness, and the lack of uniform rules regarding appeal and enforcement. It is further submitted that more attention should be paid to proper implementation and interpretation in the member states in order to facilitate the uniform application and the cross-border enforcement of small claims at the European level.*

Hague Conference to Work on Surrogacy

In a press release issued last week, the Hague Conference has announced that it intends to add cross frontier surrogacy issues to it work programme.

> ***Cross-Frontier Surrogacy Issues Added to Hague Conference Work Programme***
>
> *On Thursday, 7 April 2011, the Hague Conference on Private International Law's Council on General Affairs and Policy invited its Permanent Bureau to intensify its work on the broad range of issues arising from international surrogacy arrangements.*
>
> *International surrogacy cases often involve problems concerning the establishment or recognition of the child's legal parentage and the legal consequences which flow from such a determination (e.g., the child's nationality, immigration status, who has parental responsibility for the child, who is under a duty to maintain the child, etc.). Problems also arise because the parties involved in such an arrangement can often be vulnerable or put themselves at risk.*

A brief Internet search on "international surrogacy" and, in today's world, one is a click away from hundreds of websites promising to solve the problems of infertility through in vitro fertilisation techniques (IVF) and surrogacy. It is now a simple fact that surrogacy is a booming, global business which has created a host of problems, particularly when surrogacy arrangements involve parties in different countries throughout the world.

The new mandate issued by the Hague Conference's Council requires the Permanent Bureau to gather information on the practical legal needs in the area, comparative developments in domestic and private international law, and the prospects of achieving consensus on a global approach to addressing international surrogacy issues.

Call for Papers for a Conference Entitled "Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration"

I am pleased to pass on the following call for papers for an excellent conference to be held October 21, 2011 at the University of Missouri School of Law. Please contact Professor Strong at the information below with any questions.

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CALL FOR PAPERS AND PROPOSALS

Gary Born will give the keynote address at a symposium entitled "Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration," to be convened at the University of Missouri School of Law on

October 21, 2011. A works-in-progress conference and a student writing competition is being organized in association with this event, and the University of Missouri School of Law is issuing a call for papers and proposals.

- Proposals for the works-in-progress conference are due by May 20, 2011, with responses anticipated in mid-June. The works-in-progress conference will be held at the University of Missouri on October 20, 2011, the day before the symposium itself.
- Papers for the student writing competition are due August 15, 2011, with the winning paper announced at the symposium. The winner will receive a $300 prize sponsored by the Chartered Institute of Arbitrators (CIArb) North American Branch and may have his or her paper published in the *Journal of Dispute Resolution* as part of the symposium edition.

The symposium brings speakers from Canada, Austria, Switzerland, the United Kingdom and the United States together to discuss complex issues relating to international dispute resolution. Submissions for the works-in-progress conference and student writing competition should therefore bear some relationship to international commercial arbitration, transnational litigation or the connection between the two.

More information about the works-in-progress conference, the student writing competition and the submission process is available at the symposium website, located at: http://www.law.missouri.edu/csdr/symposium/2011/. Submissions and questions should be directed to Professor S.I. Strong at strongsi@missouri.edu. Registration for the symposium itself will open shortly.

The University of Missouri's award-winning program in dispute resolution consistently ranks as one of the best in the nation. The University of Missouri is the only law school in the United States to have received Recognized Course Provider status from CIArb for courses offered during the regular academic year. London-based CIArb was founded in 1915 and offers training courses and competency assessment courses in international commercial arbitration all over the world.

Keynote speaker Gary Born was awarded *Global Arbitration Review*'s inaugural "Advocate of the Year" prize on 3 March 2011 at the annual *GAR* awards dinner in Seoul, Korea. Mr. Born is the author of a number of leading publications on

international arbitration and litigation, including *International Commercial Arbitration* (Kluwer 2009), *International Forum Selection and Arbitration Agreements: Drafting and Enforcing* (Kluwer 2010), *International Arbitration: Cases and Materials* (Aspen 2011), and *International Civil Litigation in US Courts* (Aspen 2007).

UK Government Opts In to the Revision of the Brussels I Regulation

The UK has written to the Hungarian Presidency and European Commission, confirming its intention to opt in to the revised Brussels I Regulation (see our focus group on the Green Paper and Report) and participate in the negotiations. The relevant Ministerial Statements were made in the Houses of Commons and Lords on 5th April 2011. You can also read the general debate that was had in the House of Commons by the European Committee. Unsurprising news, perhaps, but news all the same.

[Many thanks to Jean McMahon at the Ministry of Justice.]

Born and Jorek on Dallah

A most interesting note over at the Kluwer Arbitration Blog.

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.