Rome III Regulation Adopted by Council

As a Christmas gift for European PIL scholars, the first enhanced cooperation in the history of the EU has been achieved in the field of conflict of laws (on the origin of the initiative see our previous post here).

The Council, in its meeting of 20 December 2010, **adopted the Rome III regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation** (for previous steps of the procedure, see here and here). As of mid-2012 (18 months after its adoption, pursuant to Art. 21), the Rome III reg. will apply in the **14 Member States** which have been authorised to participate in the enhanced cooperation by Council decision no. 2010/405/EU: Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia. Further Member States which wish to participate may do so in accordance with the second or third subparagraph of Article 331(1) of the Treaty on the Functioning of the European Union.

The text of the new regulation is available in Council doc. no. 17523/10 of 17 December 2010; after the signing of the President of the Council, it will be soon published in the Official Journal. The regulation is accompanied by a Declaration of the Council regarding the insertion of a provision on *forum necessitatis* in reg. no. 2201/2003, worded as follows:

> *The Council invites the Commission to submit at its earliest convenience to the Council and to the European Parliament a proposal for the amendment of Regulation (EC) No 2201/2003 with the aim of providing a forum in those cases where the courts that have jurisdiction are all situated in Member States whose law either does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings (forum necessitatis).*

The European Parliament, merely consulted under the special legislative procedure provided by Art. 81(3) TFEU for measures concerning family law, gave its opinion on 15 December 2010 (informal contacts with the Council have ensured that the EP views were taken into account in the final text). In the

preamble of the legislative resolution, the EP called "on the Commission to submit a proposal for amendment of Regulation (EC) No 2201/2003, limited to the addition of a clause on *forum necessitatis*, as a matter of great urgency before the promised general review of that Regulation".

Many thanks to Federico Garau (Conflictus Legum blog) and to Marina Castellaneta for the tip-off.

Luxembourg Conference on Provisional Measures (updated)

The *Journal des Tribunaux Luxembourg* will hold a conference on Provisional Measures in International Private and Criminal Law before Luxembourg Courts (*Les mesures provisoires du contentieux privé et le droit pénal international devant le juge luxembourgeois*) on **February 10th**, 2011, in Luxembourg.

Programme

17h00 : Accueil des participants

17h30-17h45 : Présentation du Journal des Tribunaux – Luxembourg et introduction au colloque, Marc Thewes, rédacteur en chef et avocat à la Cour

17h45-18h00 : Les mesures provisoires dans le contentieux commercial international, Gilles Cuniberti, professeur à l'Université du Luxembourg

18h00-18h15 : Les mesures provisoires dans le cadre des demandes d'entraide internationales en matière pénale, Michel Turk, magistrat

18h15-18h30 : La communication forcée de pièces par voie de référé dans le cadre d'un contentieux international – La Document discovery à la luxembourgeoise, Marc Kleyr, président du conseil de la concurrence

18h30-18h45 : Rapport de synthèse, Thierry Hoscheit

18h45-19h00 : Question time

19h00-21h00 : Cocktail dînatoire

More details can be found here.

Third Issue of 2010's Revue Critique de Droit International Privé



The last issue of the *Revue critique de droit international privé* was just released. It contains two articles and several casenotes. The full table of content can be found here.

The first article is authored by Jürgen Basedow, who is one of the directors of the Max Planck Institute of Comparative and International Private Law in Hamburg. The article discusses nationality as a connecting factor in European Union law (*Le rattachement à la nationalité et les conflits de nationalité en droit de l'Union Européenne*). The English abstract reads:

> *The constance and variety of recourse to nationality as connecting factor in the laws of Member States as within the private international law of the European Union requires that its use be confronted with article 18 TFEU, which prohibits all discrimination by reason of nationality. In cases of double nationality, the Court of Justice has undertaken to conciliate the principle and the prohibition by setting aside more traditional approaches in favour of one based on the equality of treatment of national regulations, which implies both preference to the first in time and mutual recognition. A renewed assessment of nationality as an indicator of close connection and a reading of article 18 which restricts its content to unilateral rules conferring rights and privileges to citizens of the*

forum State leads to the formulation of a corpus of general rules of private international law.

The second article is authored by the Director of the *Revue*, Bertand Ancel (Paris II University) and its Editor in Chief Horatia Muir Watt (Sciences Po Law School). The article offers a comprehensive study of the 2009 maintenance regulation (*Aliments sans frontières. Le règlement CE n° 4/2009 du 18 décembre 2008 relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions et la coopération en matière d'obligations alimentaires*). The English abstract reads:

Beyond its commitment to ensure the effectiveness within the European Union of the Convention and Protocol signed at the Hague on 23rd November 2007, on alimentary obligations, EC Regulation n° 4/2009 lays out the defining features of the future European private international law ; it imposes new orientations on jurisdictional issues, particularly since trans-European enforcement of judgments is now freed from the constraints of specific enforcement procedures or formalities ; on issues of applicable law, il devises a method of coordination with the Hague Protocol which consists in actually borrowing its content ; in turn, this content serves as a guarantee ensuring the free movement of decisions as between Member States ; finally, by extending its personal scope and establishing a forum necessitatis, it carries its own authority beyond the borders of the internal market so as to catch litigation involving third states.

Articles of the *Revue* can be downloaded here by subscribers.

When to Depart from Rome?

The Commission has published lists of the Conventions which Member States have notified under Art. 26(1) of the Rome I Regulation and Art. 29(1) of the Rome II Regulation.

It appears that Belgium alone among the Member States has not notified the Commission of any derogating conventions, even though it has ratified the Hague Traffic Accidents Convention and signed (but not ratified) the Hague Products Liability Convention, two instruments to which Art. 29(1) Rome II was clearly intended to apply.

The reasons for these omissions are unclear, with the deadlines for notification having long passed (28 July 2008 in the case of Rome II and 17 June 2009 in the case of Rome I). The failure to notify should not prevent Belgian Courts from applying the Hague Traffic Accidents Convention, just as it should not prevent any other Member State court from applying any convention involving a third state, to determine the law applicable to contractual or non-contractual obligations. Belgium's apparent lack of engagement with EU private international law instruments, resulting in doubt for those litigating before Belgian courts, is however unfortunate. It is unclear whether the Commission intends to take steps to address this.

New Edition of Mayer/Heuzé's Droit International Privé

The tenth edition of Pierre Mayer and Vincent Heuzé's leading treaty on French private international law was released earlier this month.

Mayer and Heuzé are both professors at Paris I (Panthéon-Sorbonne) School of Law.

More details on the book can be found here.

Commission Proposal on the Review of Brussels I

The long awaited Commission proposal (COM(2010) 748/3) on the review of Brussels I has been published today. The proposed amendments are numerous and require more detailed study, but here are some of the highlights.

1) **Abolition of the exequatur.** Following the argumentation in the Green Paper on the costs, time and trouble of obtaining a declaration of enforceability in another Member State, and the abolition of the exequatur in recent specific instruments, the Commission proposal indeed provides for the abolition of the exequatur (Art. 38). However, exceptions are made for defamation cases – also excluded from Rome II – and, most interestingly, compensatory collective redress cases – at least on a transitional basis. The 'necessary safeguards' are: 1) a review procedure at the court of origin in exceptional cases where the defendant was not properly informed, similar to the review clause in specific instruments abolishing the exequatur; 2) an extraordinary remedy at the Member State of enforcement to contest any other procedural defects which may have infringed the defendant's right to a fair trial; 3) a remedy in case the judgment is irreconcilable with another judgment which has been issued in the Member State of enforcement or – provided that certain conditions are fulfilled – in another country. The proposal also contains a series of standard forms which aim at facilitating the recognition or enforcement of the foreign judgment in the absence of the *exequatur* procedure as well as the application for a review.

2) **Extension of the Regulation to defendant's domiciled in third States.** The special grounds of jurisdiction will enable businesses and citizens to sue a non EU defendant in, amongst others, the place of contractual performance, or the place where the harmful event occurred. It further aims to ensure that the protective jurisdiction rules available for consumers, employees and insured will also apply if the defendant is domiciled outside the EU. Two additional fora are created: under certain conditions a non-EU defendant can be sued at the place where moveable assets belonging to him are located, or where no other forum is available and the dispute has a sufficient connection with the Member State concerned ("*forum necessitatis*"). Further, the proposal introduces a discretionary *lis pendens* rule for disputes on the same subject matter and between the same

parties which are pending before the courts in the EU and in a third country.

3) **Enhanced effectiveness of choice of court clauses.** Another anchor is the improvement of the effectiveness of choice of court clauses, by: a) giving priority to the chosen court to decide on its jurisdiction, regardless of whether it is first or second seised, meaning that any other court has to stay proceedings until the chosen court has established or – in case the agreement is invalid – declined jurisdiction; b) introducing a harmonised conflict of law rule on the substantive validity, referring to the law of the chosen court. As the explanatory memorandum states, both modifications reflect the solutions established in the 2005 Hague Convention on the Choice of Court Agreements, thereby facilitating a possible conclusion of this Convention by the European Union.

4) **Improvement of the interface between the regulation and arbitration.** One of the most controversial issues giving rise to heated debates is whether the arbitration exception should be maintained. Art. 1 of the proposal still contains the arbitration exclusion, but adds 'save as provided for in Articles 29, paragraph 4 and 33, paragraph 3'. The proposed Article 29 includes a specific rule on the relation between arbitration and court proceedings, which obliges a court seised of a dispute to stay proceedings if its jurisdiction is contested on the basis of an arbitration agreement and an arbitral tribunal has been seised of the case or court proceedings relating to the arbitration agreement have been commenced in the Member State of the seat of the arbitration.

5) **Provisional and protective measures.** The proposal adds several articles concerning provisional, including protective measures. It provides that the court where proceedings on the substance are pending and the court that is addressed in relation to provisional measures, should cooperate in order to ensure that all circumstances of the case are taken into account when a provisional measure is granted. Further, the proposal provides for the free circulation of those measures which have been granted by a court having jurisdiction on the substance of the case, including – subject to certain conditions – of measures which have been granted *ex parte* (!). However, contrary to the Mietz decision, the proposal provides that provisional measures ordered by a court other than the one having jurisdiction on the substance cannot at all be enforced in another Member State, in view of the wide divergence of national law on this issue and to prevent the risk of abusive forum-shopping.

There are many more interesting proposed amendments. This proposal certainly is ambitious, but also controversial on some points. Let the negotiations and the scholarly debate begin!

Hess: Remarks on Case C-491/10PPU – Andrea Aguirre Pelz

We are grateful to ***Professor Burkhard Hess*** (Heidelberg) for the following remarks on the German preliminary reference in case C- 491/10 PPU (Andrea Aguirre Pelz):

Mutual Recognition and Fundamental Rights

Case C-491/10PPU – Andrea Aguirre Pelz

An important preliminary reference has recently reached the ECJ's dockets: In the case C-491/10PPU the Higher Regional Court of Celle referred to Luxemburg the following questions:

1. Where the judgment to be enforced issued in the Member State of origin contains a serious infringement of fundamental rights, does the court of the Member State of enforcement exceptionally itself enjoy a power to examine the matter, pursuant to an interpretation of Article 42 of the Brussels II^{bis} Regulation in conformity with the Charter on Fundamental Rights?
2. Is the court of the Member State of enforcement obliged to enforce notwithstanding the fact that, according to the case-file, the certificate issued by the court of the Member State of origin under Article 42 of the Brussels II^{bis} Regulation is clearly inaccurate?

The case addresses fundamental issues of mutual recognition and of mutual trust.

As most of the readers of conflict of laws are certainly aware of, the EU-Commission is going to publish its proposals for the amendment of the Regulation Brussels I in the course of this week (on Wednesday). The enlargement of mutual recognition within the Regulation will certainly be one of the core proposals. The ECJ's decision in *Andrea Aguirre Pelz* will undoubtedly influence the discussion on the abolition of exequatur proceedings and the (general) implementation of the principle of mutual recognition under the Regulation Brussels I.

The facts and the legal issues of the case

In this case, a Spanish-German couple which had resided near Bilbao separated in 2007. Their (then) eight years old daughter stayed with the mother; both spouses applied for divorce at the Spanish court and sought the sole parental responsibility for their daughter. In May 2008, the Spanish court transferred the custody to the father and the daughter temporarily moved to the father. The mother returned to Germany. However, after a holiday visit to her mother in summer 2008, Andrea did not return to Spain. The father immediately sought her return to Spain and the 5th court for family matters in Bilbao ordered that Andrea was generally forbidden to leave Spanish soil.[1] An order for the return of Andrea of the same day was not recognized under the Hague Child Abduction Convention in Germany, after Andrea had been heard by the German family court and strongly opposed to her return.[2] In December 2009, the Spanish court gave a judgment on the merits and transferred the custody to the father. The court did not personally hear the mother and the daughter, although both had been summoned, but did not appear in the hearing.[3] However, the Spanish judge had denied the mother's request for granting safe conduct and had not accepted the proposal of her lawyer to hear Andrea by video-conference.[4] The Court of Appeal of Biskaya dismissed the mother's appeal in April 2010 which was based on the insufficient hearing of the child.

Some weeks earlier, in February 2010, the 5th family court of Bilbao had issued a certificate under Article 42 of the Regulation ordering the immediate return of Andrea to her father. According to Article 11 (8) of the Regulation Brussels IIbis, German family courts must immediately enforce the return order of the Spanish court without any recognition proceedings.[5] Nevertheless, the mother filed a new action in the (competent) German family court seeking a declaration that the Spanish decision was unenforceable in Germany, because Andrea and her mother

had not been personally heard by the Spanish judge. On appeal, the Higher Regional Court of Celle referred to the ECJ (under Article 267 TFEU) the questions whether it was obliged to enforce the Spanish decision ordering the return of the child of ten years although the child had not get a personal hearing at the court of origin and whether it was bound by a form which seemed to be filled in incorrectly.

According to the referring court, the Spanish court had not sufficiently respected the child's right to be heard – a right which shall protect her family relations and procedural situation under Articles 24 and 47 of the CFR. The necessity of hearing the child and the parent is equally expressed by Article 42 (2) of the Regulation. However, the German court asked the ECJ whether a serious violation of human rights (as guaranteed by the Charta) entails the need of reviewing a judgment of another Member State even in the context of mutual recognition. If the answer of the ECJ is positive, the abolition of exequatur and of the public policy clause (which directly refers to fundamental rights) by Article 42 of the Regulation Brussels will be modified (or even reversed). Thus, the reference of the Higher Regional Court of Celle directly questions the concept of mutual recognition and its underlying assumption that all courts of the Member States fully and equally respect the fundamental rights of the parties.

In addition, the 2nd question equally raises fundamental issues of the application of mutual trust: in practice, mutual recognition operates on the basis of forms which are filled in by the court of the Member State of origin. These forms pursue several functions:[6] firstly, they shall inform the requested court about the enforceable decision and its content. Secondly, they shall reduce the need of translating the decision. Thirdly, and most importantly, they contain factual or legal findings which shall bind the courts and judicial organs in the Member State of enforcement. However, the court of origin is not obliged to give any motivation for its findings – the forms are usually filled out by simple crossing. As a result, the requested court must simply enforce the foreign judgment – any verification does not take place.[7] However, sometimes the forms are not filled out accurately – the 2nd question asks about the binding force of a form which was apparently incorrectly established.

Some preliminary observations:

Although the questions of the Higher Regional Court reflect the uncertainties surrounding the principle of mutual trust in civil matters, some of the legal findings of the referring court may be questioned:

– To start with the second question: it is not entirely clear whether the form was incorrectly filled out. According to Article 42 the child must get an opportunity to be heard (…) having regard to its age or maturity. Thus, the question is whether the summoning of Andrea to the hearing by the court of origin was sufficient to give her an opportunity to be heard. – According to the referring court Article 42 requires a factual hearing and additional efforts of the (foreign) court to organise such a hearing. Although the arguments put forward by the German Court with regard to the interpretation of the necessary hearing of the parties in the light of Articles 24 and 47 of the Charter of Fundamental Rights seem to be pertinent, there is still the question whether the Regulation requires that all procedures of the taking of evidence abroad must be exhausted if the parties do not respond to the request of the court to appear in the competent court. Accordingly, it seems to be doubtful whether the form was filled out incorrectly – at least formally, Andrea had an opportunity to get heard by the Spanish judge.

– On the other hand, the decision of the Spanish court not to grant a guarantee of safe conduct to the mother was certainly unfortunate. However, one is wondering why the Spanish and German judges did not try to communicate directly on these issues – supportive measures for the communication are available at the Central Authorities and from the liaison judges under the Hague Convention on Child Abduction. However, I have not read the decision of the Spanish court and, therefore, I do not know the motivation of the Spanish court not to give such a guarantee to the mother.[8]

– With regard to the first question, the interplay between the proceedings on the merits and those on the immediate return of the child is not entirely clear: The decision on the custody of December 19, 2009 was a decision on the merits which is recognised under Articles 21 and 23 of the Regulation. According to Article 23 b, “a judgment relating to parental responsibility shall not be recognised if it was given (…) without the child having been given an opportunity to be heard.” Thus, this Article explicitly confers to the German court the power to review the foreign judgment with regard to fundamental rights as guaranteed by Articles 24 and 47 CFR. However, the order on the return of Andrea was based on Articles 11 (8) and 42. These Articles provide for immediate relief in the specific case of the

unlawful retention of the child. However, the question arises whether the request of Spanish court under Article 42 must be qualified as a request on the enforcement of the judgment on the merits (of December 19, 2009). As this judgment conferred the parental responsibility to the father, the father was equally entitled to request the return of the child. In this respect, the (functional) application of Articles 11 and 42 of the Brussels II^{bis} Regulation for the enforcement of the decision of the merits does not seem to be fully in line with the system of the Regulation.[9]

The proceedings at the ECJ

Although the referring court requested the ordinary procedure (Article 267 TFEU) due to the importance of the referred questions, the President of the ECJ decided that the case should be dealt with in the preliminary urgent procedure. The hearing of the case took place last Monday (6 December). A judgment is expected in the course of the next months. This case will probably entail an important judgment for the future of European law of civil procedure.

The Institute for Private International and Comparative Law at Heidelberg translated the decision of the Higher Regional Court into English. Here is the translation:

Higher Regional Court Celle[a]

Case 18 UF 67/10

Order of September, 30, 2010

Relating to the return of the child: Andrea Aguirre Pelz

Born 31 January 2000.

The Court refers the following questions to the European Court of Justice:

1. Where the judgment to be enforced issued in the Member State of origin contains a serious infringement of fundamental rights, does the court of the Member State of enforcement exceptionally itself enjoy a power to examine the matter, pursuant to an interpretation of Article 42 of the Brussels II^{bis} Regulation in conformity with the Charter on Fundamental

Rights?

2. Is the court of the Member State of enforcement obliged to enforce notwithstanding the fact that, according to the case-file, the certificate issued by the court of the Member State of origin under Article 42 of the Brussels II^{bis} Regulation is clearly inaccurate?

The present lawsuit relates to the enforcement of a decision of the family court No.5 in Bilbao (Biscay, Spain) which orders the return of the child Andrea from her mother to her father.

I.

The parents married on 25 September 1998 in Erandio (Spain). The marriage produced the now 10,75-year-old daughter Andrea, who was born on 31 January 2000. The child has both the German and the Spanish nationality. The place of residence of the parents was located in Sondka (Spain). Towards the end of 2007, the parents broke up with each other. Upon the father's approval the mother firstly remained alone in the former joint home with the daughter Andrea. Yet, after a short time, considerable disputes arose between the parents. Both parents applied for a divorce in February 2008. In addition, each parent applied for the grant of the sole custody of Andrea.

By its order of 12 May 2008 the family court No.5 in Bilbao (Biscay, Spain) granted the custody of Andrea temporarily to her father. Thereupon Andrea moved in the household of her father. In June 2008, her mother moved to Germany. After Andrea's visit with her mother in the summer holidays of 2008, the mother kept Andrea with herself. Since 15 August 2008 Andrea lives in the household of her mother in Germany. On the same day, the family court No.5 in Bilbao (Biscay, Spain) issued an order which prohibited Andrea to leave Spain.

The father's application for the return of Andrea to Spain was dismissed by the order of the German Court of 1 July 2009. The dismissal was based on Article 13 para.2 Hague Child Abduction Convention. At that time, the hearing of Andrea in court revealed that Andrea strongly objected to the return which her father had applied for. She assertively refused to return to Spain. The court thereupon asked for an expert opinion, which stated that, given her age and maturity, Andrea's opinion should be taken into consideration.

This decision was transmitted by the German Federal Office of Justice[b] on 8 July

2009 under reference to Article 11 para.6 and 7 of the Regulation Brussels II^{bis} to the central authority of Spain, with the request for transmission to the competent Spanish court. In the same month the custody proceedings before the family court No.5 in Bilbao (Biscay, Spain) were continued. The court considered it bidden to ask for another expert opinion as well as a personal hearing of Andrea and scheduled a hearing in Bilbao. At the hearing, neither Andrea nor the mother appeared. Prior to this, the court had refused the mother's application for the grant of safe conduct to her and Andrea during the assessment by an expert and for the time of the hearing in court. It also did not hear Andrea via video conference as explicitly suggested by the mother.

By its judgment of 16 December 2009 the family court No.5 in Bilbao (Biscay, Spain) transferred the sole custody of Andrea to her father. The mother appealed to this decision and argued in particular with the necessity of a hearing of Andrea. The regional court of Biscay which was competent for the appeal explicitly refused the need of a hearing of Andrea personally by a decision of 21 April 2010.

Based on its decision on the custody of 16 December 2009, the family court No.5 in Bilbao (Biscay, Spain) issued a certificate on 5 February 2010 under Article 42 of the Regulation Brussels II. By letter of 26 March 2010 the German Federal Office of Justice transmitted to the district court –family court- of Celle the judgment of the family court No.5 in Bilbao (Biscay, Spain) of 16 December 2009 as well as the certificate under Article 42 of the Regulation Brussels II of 5 February 2010. The central authority pointed out to the family court of Celle, that the order to surrender the child under Section 44 para.2 IntFamRVG (IFLPA)[c] must be enforced ex officio.

The mother for her part filed an application for a declaration that the enforcement order could not be executed and the disallowance of the order to surrender the child of the family court No.5 in Bilbao (Biscay, Spain).

By decision of 28 April 2010 the family court of Celle held that the corresponding judgment of the family court No.5 in Bilbao (Biscay, Spain) is not be recognized and thus not to be enforced, because the family court No.5 in Bilbao (Biscay, Spain) had not heard Andrea prior to its decision.

The father of Andrea, who is (only) at second instance represented by the German Federal Office of Justice, opposes to this decision through an appeal of 18 June

2010. By way of his objection of 18 June 2010 he requests the removal of the decision of the family court of Celle of 28 April 2010 and the dismissal of the applications of the mother, as well as the enforcement of the decision to surrender Andrea of the family court No.5 in Bilbao (Biscay) ex officio.

II.

The appeal of the father is admissible… On the matter itself the court comes to the provisional conclusion that the appeal is not well-founded, because Andrea has not been duly heard by the Spanish judge. With regard to the case-law of the European Court of Justice referred to by the appellant, two questions arise on the interpretation of the Regulation Brussels II[bis]. These questions are essential for the decision of the case and the Court refers them to the ECJ for the following reasons:

a) The judgment of the family court No.5 in Bilbao (Biscay, Spain) of 16 December 2009 is a judgment requiring the return of the child under Article 11 para.8 Regulation Brussels II[bis]. It is a judgment of the Member State of origin subsequent to an order refusing the return of the child of the enforcing Member State based on Article 13 Hague Child Abduction Convention. For such judgments exists the simplified enforceability from chapter III paragraph 4, therefore under Articles 40 et seq.of the Regulation Brussels II[bis].

Therefore the appeal is to be granted insofar as the court of the enforcing Member State generally does not have an own review power under Article 21 Regulation Brussels II[bis] in cases of return under Article11 para 8 of the Regulation Brussels II[bis] (ECJ 7/11/2008 case C-195/08 PPU *Inga Rinau*; ECJ, 7/1/2010 case C-211/10 PPU *Povse*). In fact, such judgments requiring return are generally enforceable without any declaration of enforceability or possibility of opposing its recognition (Article 42 para.1 of the Regulation Brussels II[bis]). If this principle applies without exceptions, the judgment of the family court of Celle is to be set aside and the enforcement of the judgment requiring the return of the child under Article 42 of the Regulation Brussels II[bis] of 5 February 2010 is to be executed ex officio (Section 44 FamFG[d]) pursuant to the appeal.

The situation would be different if the court of the enforcing Member State had

an own power of review in cases of severe violations of fundamental rights. The Senate supports this assumption for the following reasons. Article 24 para.1 of the Charter of Fundamental Rights of the European Union provides that the "views of the child shall be taken into consideration on matters which concern them in accordance with their age and maturity". The family court No.5 in Bilbao (Biscay, Spain) did not detect the current view of Andrea and could therefore not take it into consideration in its custody decision of 16 December 2009.

At the same time the Senate does not misconceive that the family court No.5 in Bilbao (Biscay, Spain) initially tried to obtain the view of Andrea in summer 2009. Yet the efforts in this regard did not suffice in view of the importance of the consideration of the child's view which is especially protected by Article 24 para.1 of the Charter of Fundamental Rights of the European Union. Furthermore, the Senate does not address the issue of whether the mother could be summoned at all to send Andrea to Spain given the criminal proceedings against her and accordingly the travel ban from Spain on Andrea. Any possible default or misconduct of the mother in this matter cannot be imputed to the affected child.

The misconduct of a parent does not release the court from its obligation to take the child's view into consideration pursuant to Article 24 Charter of Fundamental Rights of the European Union. The situation would only be different if the conduct of the parent rendered the detection of the view of the child impossible. However this constellation is not at hand. In fact, the detection of the view of Andrea would have been possible, for example in the course of a video conference which was explicitly offered by the mother. In addition there would have been other possibilities, such as: the conduct of a hearing of the child in the way of mutual legal assistance or a journey of the competent judge to Germany in order to hear Andrea personally. Furthermore it would have been possible to detect the view of the child through the appointment of a temporary representative for the purpose of the proceedings under the terms of Section 158 FamFG. The temporary representative has to discover the interests of the child and to assert them during the proceedings (Section 168 para.4 FamFG). All relief of this kind remained undone and has not been addressed in the judgment. Therefore the personal views of Andrea could not have been taken into consideration in the judgment.

In the opinion of the Senate this violation is insomuch severe that it must entail a review power of the enforcing Member State by way of exception and in order to

interpret Article 42 para.1 of the Regulation Brussels II^{bis} in conformity to the Charter of Fundamental Rights of the European Union.

The omitted hearing is problematic especially in cases of Article11 para.8 Regulation Brussels II^{bis} where the return of the child is rejected under Article13 para.22 HCAC because of unwillingness of the child. The preferential treatment in the enforcement of judgments under Article11 para.8 can only be justified in cases pursuant to Article13 para.2 Hague Child Abduction Convention, when the child has been heard before the decision is given. Only in this constellation the court of the Member State of origin does have the possibility to deal with the unwillingness of the child and its reasons. After all, these reasons were considered of such importance by the court of the enforcing Member State that it refused the return of the child despite the fact that its removal or retention was unlawful. If the court of the Member State of origin wants to deviate from this and wants to miss out the resistance of the child which has been substantial in the Hague Child Abduction Convention-proceedings in the course of the custody decision which it is competent for, it has to hear the current view of the child in advance. The content of the certificate which is issued in context of the simplified enforcement under Article42 para.2 Regulation Brussels II^{bis} also indicates the great significance of the hearing of the child. Within the certificate, the hearing of the child must be duly certified.

Thus, the privileged enforcement without recognition by a court of the enforcing Member State as intended by Article11 para.8 combined with Article 42 Regulation Brussels II^{bis} mandatory requires that the child had the possibility to get heard. In the present case, Andrea did not get this possibility. Accordingly, the senate assumes a violation of Article24 Charter of Fundamental Rights of the European Union as well as a violation of the fundamental principle of the right to be heard.[e]

The Senate agrees with the assertion put forward by the appellant that grounds for non-enforcement which impede the enforcement as such must generally be asserted in the court of the Member State of origin which ordered the enforcement – in the present case in Spain. However, this principle cannot be applied when the enforceable decision itself – as has been argued above – violates fundamental rights. The applicability of the Regulation Brussels II^{bis} cannot result

in an obligation of the court of the enforcing Member State to execute judgments of the Member State of origin that are in breach of fundamental rights.

b) If the courts in the Member State of enforcement do not dispose of such a power of review despite a severe violation of fundamental rights, the question remains whether the enforcing Member State can be bound to a clearly incorrect certificate under Article 42 Regulation Brussels II^{bis}. The certificate at hand of 5 February 2010 which is to be enforced clearly contains incorrect information.

Persuant to Article 42 para.2a Regulation Brussels II^{bis} the certificate may only be issued if "the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity". Although Andrea was not heard by the family court No.5 in Bilbao (Biscay, Spain) the respective question is affirmed within the certificate (No.11).

The argument of the father (…) that Andrea has had the opportunity to be heard in summer 2009 in consequence of the evidence warrant of the family court No.5 in Bilbao (Biscay, Spain) is not persuasive. Even if one agrees with the statement within the appeal of the father that the mother illegitimately impeded the hearing which was considered necessary and therefore ordered by the family court No.5 in Bilbao (Biscay, Spain), this conduct cannot be attributed to the child. The protective function of Article 24 para.1 of the Charter of Fundamental Rights of the European Union cannot be conditioned on the correct conduct of a parent. This especially applies as it would indeed have been possible -as demonstrated above- that the family court No.5 in Bilbao (Biscay, Spain) detected the current will and view of Andrea despite the possibly illegitimate refusal of her mother to travel to Spain.

III.

Accordingly, the Senate refers to the ECJ the following questions (….see supra at I).

IV.

The senate explicitly does not request the application of the urgent preliminary ruling procedure in the present case. The senate considers both questions on the consultation requirement of the child- especially regarding comparable cases of

return rejections under Article13 para. 2 Hague Child Abduction Convention – as fundamental. The examination of such basic issues should be carried out in the context of a request for a preliminary ruling, at length, and not in an accelerated procedure.

Additional note of the editors:

The file number at the ECJ is C-491/10PPU – the President of the ECJ ordered that the case should be decided in the accelerated procedure. The hearing took place on December 6, 2010. A judgment of the ECJ is expected for January or February 2011.

[a] Translated and adapted for the publication by Katharina Mandery and by Burkhard Hess, all rights reserved.

[b] The Federal Office of Justice is the German Central Authority (Article 53 of Regulation Brussels II^{bis}). It provides for a helpful web site (in English) at: http://www.bundesjustizamt.de/nn_1704226/EN/Topics/Zivilrecht/HKUE/HKUEInhalte/Rechtsvorschriften_20und_20Erl_C3_A4uternde_20Berichte.html.

[c] An English translation is available at: Act to Implement Certain Legal Instruments in the Field of International Family Law, (International Family Law Procedure Act – IFLPA).

[d] Act on Proceedings in Non-Contentious and Familiy Matters of Sep. 1, 2009.

[e] Article 47 Charter of Fundamental Rights.

[1] Any infringement of this order entailed criminal sanctions against the mother.

[2] The German court relied on Article 13 of the Hague Child Abduction Convention. According to this provision, a non-return may be ordered in the best interest of the child.

[3] The Spanish court had ordered the personal appearances of both, mother and the child.

[4] It should be noted that Article 11 (4) of Regulation Brussels IIbis explicitly provides for “adequate arrangements to secure the protection of the child after

his or her return." These measures include the protection of a parent who accompanies the child, *Hess*, Europäisches Zivilprozessrecht (2010), § 7, para 93.

[5] ECJ, 7/11/2008, case C-195/08 PPU, *Inga Rinau*, ECR 2008 I- paras 59 et seq.; EuGH 7/1/2010, case C-211/10 PPU *Povse*, ECR 2010 I- nyp.

[6] *Hess*, Europäisches Zivilprozessrecht, § 3, paras 55 et seq.

[7] As a result, mutual trust operates like a kind of „blind trust", because the requested court has normally no possibility to verify whether the information contained in the form is appropriate.

[8] See *Hess*, Europäisches Zivilprozessrecht (2010), § 7, paras 80 – 82.

[9] It seems that the relationship between Articles 23 b) and Articles 11 (8), 42 of the Regulation is not entirely clear – the Court should take up this case for further clarifications.

ECJ on Pammer and Hotel Alpenhof

On 7 December the ECJ has delivered its judgement in cases C-585/08 and C-144/09 (AG's Opinion was presented on 18 May 2010).

The references for a preliminary ruling concern the interpretation of Article 15(1)(c) and (3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The references have been made (i) in proceedings between Mr Pammer and Reederei Karl Schlüter GmbH & Co KG (Case C-585/08) and (ii) in proceedings between Hotel Alpenhof GesmbH and Mr Heller (Case C-144/09). The cases were joined for the purposes of the judgment pursuant to Article 43 of the Rules of Procedure of the Court, given the similarity between the second question in Case C-585/08 and the only question in Case C-144/09.

The dispute in case C-585/08 involved Mr Pammer, who resides in Austria, and Reederei Karl Schlüter, a company established in Germany. It concerns a voyage by freighter from Trieste (Italy) to the Far East organised by that company, which gave rise to a contract between it and Mr Pammer ('the voyage contract'). Mr Pammer booked the voyage through company whose seat is in Germany, which operates in particular via the internet. The voyage booked by Mr Pammer was descried on the website of the company.

The day of departure Mr Pammer refused to embark on the ground that the abovementioned description did not, in his view, correspond to the conditions on the vessel; he also sought reimbursement of the sum which he had paid for the voyage. Since Reederei Karl Schlüter reimbursed only a part of that sum Mr Pammer claimed payment of the balance, together with interest, before an Austrian court of first instance, the Bezirksgericht (District Court) Krems an der Donau.The plea was dismissed at first instance, though the court held that it had jurisdiction on the ground that the voyage contract was a consumer contract. The appellate court declared that the Austrian courts lacked jurisdiction, denying the characterisation of the voyage contract as consumer contract. The Oberster Gerichtshof (Supreme Court) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does a "voyage by freighter" constitute package travel for the purposes of Article 15(3) of [Regulation No 44/2001]?

2. If the answer to Question 1 is in the affirmative: is the fact that an intermediary's website can be consulted on the internet sufficient to justify a finding that activities are being "directed" [to the Member State of the consumer's domicile] within the meaning of Article 15(1)(c) of Regulation No 44/2001?'

The dispute in case C-144/09 involved Hotel Alpenhof, a company which operates a hotel with the same name located in Austria, and Mr Heller, who resides in Germany. Mr Heller reserved a number of rooms for a period of a week in January 2008 through the website of the hotel. His reservation and the confirmation thereof were effected by email. Mr Heller is stated to have found fault with the hotel's services and to have left without paying his bill. Hotel Alpenhof brought an action before an Austrian court.Mr Heller raised the plea that the court before which the action had been brought lacked jurisdiction. He submittd that, as a

consumer, he could be sued only in the courts of the Member State of his domicile (German courts), pursuant to Article 15(1)(c) of Regulation No 44/2001.Both the the Bezirksgericht Sankt Johann im Pongau and (on appeal) the Landesgericht Salzburg dismissed the action before them, holding that the Austrian courts lacked jurisdiction to hear it. Hotel Alpenhof appealed to the Oberster Gerichtshof.Since the Oberster Gerichtshof was not sure that the Court would answer its second question in Case C?585/08 (his own answer being dependent upon the answer given by the ECJ), it considered it necessary to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is the fact that a website of the party with whom a consumer has concluded a contract can be consulted on the internet sufficient to justify a finding that an activity is being "directed" within the meaning of Article 15(1)(c) of [Regulation No 44/2001]?'

The ECJ has answered as follows:

1- A contract concerning a voyage by freighter, such as that at issue in the main proceedings in Case C-585/08, is a contract of transport which, for an inclusive price, provides for a combination of travel and accommodation within the meaning of Article 15(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

2. In order to determine whether a trader whose activity is presented on its website or on that of an intermediary can be considered to be 'directing' its activity to the Member State of the consumer's domicile, within the meaning of Article 15(1)(c) of Regulation No 44/2001, it should be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader's overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with them.

The following matters, the list of which is not exhaustive, are capable of constituting evidence from which it may be concluded that the trader's activity is directed to the Member State of the consumer's domicile, namely the international nature of the activity, mention of itineraries from other Member

States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States. It is for the national courts to ascertain whether such evidence exists.

On the other hand, the mere accessibility of the trader's or the intermediary's website in the Member State in which the consumer is domiciled is insufficient. The same is true of mention of an email address and of other contact details, or of use of a language or a currency which are the language and/or currency generally used in the Member State in which the trader is established

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Fourth Issue of 2010's Journal du Droit International

The fourth issue of French *Journal du droit international* (*Clunet*) for 2010 was just released.

It includes four articles and several casenotes.

The only article dealing with a conflict issue is authored by Gerald Goldstein, who is a professor of law at the University de Montreal, and Horatia Muir Watt, who is a professor of law at Sciences Po Law School. It discusses the application of the new method of recognition in the context of the 2007 Munich Convention on the recognition of civil partnerships (*La méthode de la reconnaissance à la lueur de la Convention de Munich du 5 septembre 2007 sur la reconnaissance des partenariats enregistrés*) The English abstract reads:

The new "method of recognition" displaces the frontiers between choice of law and recognition of foreign judgments. It entails giving effect to situations created abroad within the sway of another legal system, without prior verification of compliance with the forum conflicts rule. Without excluding all control of the quality of the link between the situation and the forum, the new method is more concerned with the effectiveness of an existing situation than its conformity with a preconceived parameter of validity laid down by the law of the forum. For some, these characteristics predisposes the new method to govern civil partnerships, since the novelty and diversity of these institutions makes it difficult to formulate an appropriate choice of law rule.

An analysis of the 2007 Munich Convention on the recognition of civil partnerships favorises a study of the advantages such a method has over the traditional choice of law process and suggests a certain number of more general methodological reflexions on its characteristics, objectives and foundations.

Articles of the *JDI* are available online for subscribers of Juris Classeur Lexis Nexis.

Report on Dutch Collective Settlements Act

The Dutch Collective Settlements Act in the International Arena

At the request of the Research and Documentation Centre of the Dutch Ministry of Justice, researchers at Erasmus School of Law (Erasmus University Rotterdam) have carried out exhaustive research on the private international law aspects of the Dutch Collective Settlements Act. The research was conducted and the Final Report was written by Hélène van Lith, supervised by Filip De Ly and Xandra Kramer, and assisted by Steven Stuij.

The Dutch Collective Settlements Act entered into force on 27 July 2005 to provide for collective redress in mass damage cases. In essence, the Act provides for collective redress on the basis of a settlement agreement concluded between one or more foundations representing a group of affected persons to whom damage was allegedly caused and one or more allegedly liable parties.

The Report analyses aspects of private international law when a collective settlement is concluded for the benefit of foreign interested parties under the Dutch Collective Settlements Act. The principal object of the Research was to assess the suitability of existing private international law instruments at the national, European and international levels for the application of the Dutch Collective Settlements Act in transnational mass damage cases.

The internationally famous *Shell Settlement* and more recently the *Converium Settlement* are examples of the important role The Netherlands could play in the collective redress of mass claims and makes the Dutch Collective Settlement Act an attractive alternative to American and Canadian class actions and class settlements. The Dutch Act received a lot of attention because, like the American and Canadian systems, but unlike most other European collective redress systems, the Act works on an 'opt out' basis. If the Court declares the collective settlement binding, it binds all persons covered by its terms, except for those who have indicated that they do not wish to be bound by the agreement.

The research was conducted by analyzing literature and through a series of interviews with professionals directly involved with the WCAM collective settlements. It also includes several comparative observations in relation to jurisdictions such as the U.S. and Canada that are familiar with collective actions with opt-out mechanisms.

The Report concludes that, especially with respect to international jurisdiction and cross border recognition, there is a 'mismatch' between the European rules (Brussels I Regulation) and the Dutch Collective Settlements Act. Further clarifications of the European rules are needed and new legislation at the European level specifically dealing with collective redress may be advisable. Recommendations are also made with respect to the worldwide notification of unknown interested foreign parties, as well as the representation of foreign interested parties and issues of applicable law.

The Report is available on the website of the Research and Documentation Centre of the Dutch Ministry of Justice and can be downloaded here (see “Bijlagen”).

A commercial edition will appear with Maklu Publishers and will be updated with the latest ruling of the Amsterdam Court of 12 November 2010 concerning the *Converium Settlement.*

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