Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 6/2015: Abstracts

The latest issue of the *"Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)"* features the following articles:

F. Garcimartin, **The situs of shares, financial instruments and claims in the Insolvency Regulation Recast: seeds of a future EU instrument on rights in rem?**
The location of intangible assets is a key issue for the application of certain Private International Law rules. At the EU level, Regulation 1346/2000 on Insolvency proceedings contains three uniform rules on location of assets, one of which deals with claims (Art. 2 (g) III 2000 EIR). The recast of this instrument (Regulation 2015/84) has extended this provision, which now includes eight different rules (Art. 2 (9) EIR Recast). The purpose of this paper is to analyze one set of these rules, specifically those laid down for intangible assets: shares and other financial instruments, claims and cash accounts. The relevance of this analysis is twofold. From a positive-law perspective, it may be useful to resolve some of the problems that the interpretation and application of Article 2 (9) EIR Recast may give rise to in practice. From a normative perspective, Article 2 (9) EIR Recast may be the seed of a future EU instrument on the law applicable to rights in rem. This provision establishes a detailed list of common rules on location of assets. Should the future instrument take as a starting point the traditional conflict of laws rule in this area, i.e. the *lex rei sitae*, this list would be the primary reference to determine the situs of most assets.

M. Lehmann, **A Gap in EU Private International Law? OGH and BGH on the Law Applicable to Liability for Asset Acquisition and Takeover of a Commercial Enterprise**
The contribution discusses a recent tendency in some Member States to avoid applying European conflict laws to certain aspects of the law of obligations. In question are national rules under which persons who take over the entire property or the commercial business of another are liable for the latter's debt. The highest courts in civil matters in Germany and Austria have decided that

these issues are not covered by the Rome Convention of 1980, and have instead submitted them to autonomous national conflict rules. An important strand of the literature wants to transfer this solution to the Rome I and II Regulations. It must be borne in mind, however, that both regulations establish a comprehensive regime for the law of obligations. They do not leave any room for national conflict rules, save for those areas that are expressly exempt from their scope of application. A solution must therefore be found within the regulations themselves. It is suggested here that the type of liability in question could be characterized as an overriding mandatory rule. Looking to the future, it would be preferable if the EU legislator introduced specific conflict rules to address this problem.

C. Kohler, **Special Rules for State-owned Companies in European Civil Procedure? (ECJ, 23.10.2014 – Case C-302/13 – flyLAL-Lithuanian Airlines AS, in liquidation, v Starptautiska lidosta Riga VAS, Air Baltic Corporation AS)**

In Case C-302/13, *flyLAL-Lithuanian Airlines*, the ECJ held that an action for damages resulting from the alleged infringement of EU competition rules by two Latvian companies, *Starptautiska Lidosta Ri-ga* and Air Baltic, was civil and commercial in nature. It was irrelevant in that respect that the in fringement was said to result from the determination by the defendant *Starptautiska Lidosta Ri-ga* of airport charges pursuant to statutory provisions of the Republic of Latvia. Equally irrelevant was the fact that the defendant companies were wholly or partly owned by that Member State. Furthermore, the ECJ specified the grounds which would bar the recognition and enforcement of a judgment ordering protective measures as being contrary to the public policy of the Member State addressed. The Court ruled that the mere invocation of serious economic consequences for state-owned companies do not constitute such grounds. The author welcomes the judgment as it clarifies that there is no special regime for state-owned companies in European civil procedure. He adds that the ECJ's opinion 2/13 on the accession of the EU to the European Convention of Human Rights, given shortly after the judgment in Case C-302/13, does, in principle, not affect the relevance of the public policy exception in Regulation Brussels I.

F. Wedemann, **The Applicability of the Brussels Ia Regulation or the European Regulation on Insolvency Proceedings in Company Law Liability Cases**

The ECJ's *G.T. GmbH* decision is important for European civil procedure law as it

has significant implications for the demarcation between the scopes of the Brussels Ia-Regulation and the European Regulation on Insolvency Proceedings in company law liability cases. The author analyses these implications. First of all, she identifies and critically discusses the general guidelines established or confirmed by the decision: (1) The fact that a liability provision allows an action to be brought even where no insolvency proceedings have been opened, does not per se preclude such an action from being characterized as falling within the scope of Art. 3 (1) European Regulation on Insolvency Proceedings. Rather, it is necessary to determine whether the provision finds its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings. (2) In cases where no insolvency proceedings have been opened, actions fall within the scope of the Brussels Ia Regulation. (3) Cases where insolvency proceedings have been opened, but the action in question is brought by someone other than the liquidator, require a differentiating treatment. (4) The defendant's domicile is irrelevant for the applicability of Art. 3 (1) European Regulation on Insolvency Proceedings. (5) The jurisdiction based on Art. 3 (1) European Regulation on Insolvency Proceedings is exclusive. Subsequently, the author focusses on German company law and its broad range of liability provisions and examines the consequences of *G.T. GmbH* for jurisdiction in proceedings based on these provisions.

F. Temming, **International jurisdiction over individual contracts of employment – How wide is the personal scope of Art. 18 et sqq. of the Brussels I Regulation?**

This case note is about the question whether or not independent sales representatives can be considered as employees for the purposes of Art. 18 et sqq. of the Brussels I Regulation (44/2001/EC). This could be the case if an individual sales representative renders his services only to one principal and does not employ personnel on his own account. The resulting economic dependence vis-à-vis his principal could call for the jurisdictional protection that is granted by Art. 18 et sqq. of the Brussels I Regulation (44/2001/EC) to individual employees. Whereas the Regional Higher Labour Court of Düsseldorf (*LAG Düsseldorf*) denied the analogous application of Art. 18 et sqq. of the Brussels I Regulation (44/2001/EC) in favour of the claimant, there is a good case that – in light of recent judgements – the Court of the European Union could consider individuals, who are economically dependant on their partner of a service contract, to fall under its flexible autonomous concept of "employee", if the degree of

subordination due to a right of direction was comparable to the one of an employee. If this case is referred to the Court of the European Union, it will have the potential of becoming a landmark case.

M. Fornasier, **The law applicable to employment contracts and the country of closest connection under Art. 8(4) Rome I**
In its *Schlecker* judgment (Case C-64/12), the European Court of Justice shed some light on the escape clause in the choice-of-law rule regarding employment contracts (Art. 8 (4) Rome I Regulation). The Court held that the employment relationship may be more closely connected with a country other than that in which the habitual workplace is located even where the employee carries out the work habitually, for a lengthy period and without interruption in the same country and where, thus, the territorial connection of the employment contract with the habitual workplace is particularly strong. The following case note analyses to what extent the ruling is reconcilable with the principle of favor laboratories and whether it is consistent with the case law of the ECJ relating to the posting of workers. Moreover, the paper examines the impact of the judgment on mechanisms of collective labor law such as collective bargaining and employee participation.

J. Schilling, **The International Private Law of Freight Forwarding Contracts**
After having taken position to charter parties in its ICF-decision already, the ECJ now comments the international private law of freight forwarding contracts. In its *Haeger & Schmidt* ruling the court clarifies that those contracts, which exclusively state an obligation to arrange for transport cannot be considered contracts of carriage in the meaning of Art. 4 para. 4 Rome Convention or Art. 5 para. 1 Rome I Regulation. However a freight forwarding contract falls within the material scope of the special rule for transport contracts, if its principal purpose is the transport as such of the goods. This can be considered, if the forwarding agent is performing the transport partially or entirely by himself, or in case of freight forwarding at a fixed price. The question of qualification will particularly be relevant in cases to which the Rome I Regulation applies, because the differences between the conflict of laws regime for general contracts and that for contracts of carriage have increased. As the uniform transport law does generally not apply to freight forwarding contracts, the recent ECJ decision on the international private law of those contracts appears even more important.

J. Hoffmann, **Duties of disclosure towards contracting parties without**

knowledge of the contract language

The judgement of the German Federal Labour Court discussed in this article had to determine the legal consequences of the conclusion of a standard contract with an employee who had no knowledge of the language of the contract. Although neither the validity of the contract nor the inclusion and validity of the standard terms are in question, the information imbalance should be addressed by accepting a precontractual duty to explain the contract contents in appropriate cases. Such a duty should specifically be acknowledged if the precontractual negotiations were conducted in a different language. It can also be endorsed as a contractual obligation based on the fiduciary duty of the employer towards his employee as long as the language deficit remains.

M. Zwickel, **Prima facie evidence between lex causae and lex fori in the area of the French Road Traffic Liability Act (Loi Badinter)**

The decision of the Regional Court Saarbrücken, which had already given rise to a preliminary ruling by the ECJ regarding the "effective service of notice of proceedings on the claims representative of a foreign insurer", relates to the problem of the usability of German prima facie evidence in a case to be decided in accordance with French law. The jurisprudence of the French *Cour de cassation* does not permit any reduction in the standard of proof within the framework of road traffic liability. Adducing the prima facie evidence – contrary to French civil law – therefore potentially leads to a divergence of procedural and substantive law. The decision makes it especially clear that prima facie evidence within and outside of the scope of Art. 22 (1) Rome II-Regulation can sensibly only be treated in accordance with the *lex causae*.

M. Stürner, **Enforceability of English third party costs order**

The German *Bundesgerichtshof* (*BGH*) had to deal with an application to declare enforceable a third party costs order issued by the English High Court in the context of an insolvency proceeding. The *BGH* left open the question whether that decision falls within the scope of the Brussels I Regulation or the Insolvency Regulation as both regimes should not leave any gap between them and also provide identical grounds for refusing recognition. On that basis, the *BGH* held that the third party costs order did not violate German public policy. The author generally agrees with the decision.

H. Roth, **Actions to oppose enforcement and set-off**

Due to the close connection with the enforcement procedure, the exclusive

jurisdiction of Article 22 (5) Lugano Convention of 2007 includes actions to oppose enforcement pursuant to § 767 of the German Code of Civil Procedure (*ZPO*).
Contrary to the view of the Federal High Court of Justice (BGH), § 767 ZPO can be applied even if the court seized would not be internationally competent in case of an independent legal assertion of the counterclaim.
The court is able to assess preliminary questions, which were submitted in defense, regardless of the restrictions by the law relating to jurisdiction. This principle also applies to the set-off.

H. Odendahl, **The 1961 Hague Protection of Minors Convention – How vital is the fossil?**
The Austrian Supreme Court of Justice had to decide upon the recognition of a Turkish court decision on the custody of a child of Turkish nationality living in a foster family in Austria, which was based on Art. 4 of the 1961 Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants. Recognition was rejected for reasons of public policy (Art. 16). The following article discusses the remaining scope of this outdated convention and the impact of its application in relation to its successor, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children, as well as the 1980 Luxembourg European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children.

Coming soon: Yearbook of Private International Law Vol. XVI (2014/2015)

This year’s volume of the Yearbook of Private International Law is just about to be released. The Yearbook is edited by Professors Andrea Bonomi (Lausanne)

and Gian Paolo Romano (Geneva) and published in association with the Swiss Institute of Comparative Law. This year's edition is the first volume to be published by Otto Schmidt (Cologne), ISBN 978-3-504-08004-4. It is 588 pages strong and costs 189,00 €. For further information, please click here.

The new volume contains the following contributions:

Doctrine
Linda J. SILBERMAN
Daimler AG v. Bauman: A New Era for Judicial Jurisdiction in the United States
Rui Manuel MOURA RAMOS
The New Portuguese Arbitration Act (Law No. 63/2011 of 14 December on Voluntary Arbitration)
Francisco GARCIMARTÍN
Provisional and Protective Measures in the Brussels I Regulation Recast
Martin ILLMER
The Revised Brussels I Regulation and Arbitration – A Missed Opportunity?
Ornella FERACI
Party Autonomy and Conflict of Jurisdictions in the EU Private International Law on Family and Succession Matters
Gian Paolo ROMANO
Conflicts between Parents and between Legal Orders in Respect of Parental Responsibility

Special Jurisdiction under the Brussels I-*bis* Regulation
Thomas KADNER GRAZIANO
Jurisdiction under Article 7 no. 1 of the Recast Brussels I Regulation: Disconnecting the Procedural Place of Performance from its Counterpart in Substantive Law. An Analysis of the Case Law of the ECJ and Proposals *de lege lata* and *de lege ferenda*
Michel REYMOND
Jurisdiction under Article 7 no. 1 of the Recast Brussels I Regulation: The Case of Contracts for the Supply of Software
Jan VON HEIN
Protecting Victims of Cross-Border Torts under Article 7 No. 2 Brussels I*bis*: Towards a more Differentiated and Balanced Approach

Surrogacy across State Lines: Challenges and Responses

Regulation and its Interaction with other EU Instruments
Marjolaine ROCCATI
The Role of the National Judge in a European Judicial Area – From an Internal Market to Civil Cooperation

---

25th Meeting of the GEDIP, Luxembourg 18-20 September 2015

Last weekend the GEDIP (Group européen de droit international privé / European Group for Private International Law) met in Luxembourg. The GEDIP defines itself as "a closed forum composed of about 30 experts of the relations between private international law and European law, mainly academics from about 18 European States and also members of international organizations". Nevertheless, as the meeting was hosted by the MPI -together with the Faculty of Law of Luxembourg- I had the privilege of being invited to the deliberations.

The history and purpose of the Group are well known: founded in 1991 (which means that it has just celebrated its 25fh anniversary), the Group has since then met once a year as an academic and scientific think tank in the field of European Private International Law. During the meetings the most recent developments in the area are presented and discussed, together with proposals for improving the European PIL legal setting. Actually, while the latter activity is at the core of the GEDIP gatherings, the combination with the former results in a well-balanced program. At the same time it shows the openness and awareness of the Group to what's happening in other fora (and vice versa): the Commission -K. Vandekerckhove joined as observer and to inform on on-going activities-; the Hague Conference -represented this time by M. Pertegás, who updated us on the work of the Conference-, or the ECtHR -Prof. Kinsch summarized the most relevant decisions of the Strasbourg Court since the last GEDIP meeting.

In Luxembourg we enjoyed as *hors d'oeuvre* a presentation by Prof. C. Kohler on the CJEU Opinion 2/13, Opinion of the Court (Full Court) of 18 December 2014, on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedom. Prof. Kohler started recalling the principle of mutual trust as backbone of the Opinion. From this he moved on to focus on the potential impact of the Opinion on PIL issues, in particular on the public policy clause in the framework of the recognition and enforcement of judgements in civil and commercial matters (here he recalled the recently published decision on C-681/13, where the Opinion is expressly quoted); and on cases of child abduction involving Member States, where the abolition of exequatur may elicit a doubt on the compliance with the ECHR obligations (see ad.ex. the ECtHR decision on the application no. 3890/11, *Povse v. Austria*). A second presentation, this time by Prof. T. Hartley, addressed the very much disputed issue of antisuit injunctions and the Brussels system in light of the Gazprom decision, case C-536/13. Prof. Hartley expressed his views on the case and explained new strategies developed under English law to protect the effects of choice of court agreements, like the one shown in *AMT Futures Limited* v. *Marzillier,* where the latter is sued for having induced the clients of the former to issue proceedings in Germany and to advance causes of action under German law, and thereby to breach the terms of the applicable exclusive jurisdiction and choice of law clauses. AMT claims damages against Marzillier for their having done so, its claim being a claim in tort for inducement of breach of contract

The heart of the meeting was the discussion on two GEDIP on-going projects: a proposal for a regulation on the law applicable to companies, and another on the jurisdiction, the applicable law, the recognition and enforcement of decisions and the cooperation in divorce matters. The first one is at its very final stage, while the second has barely started. From an outsiders point of view such a divergence is really interesting: it's like assisting to the decoration of a baked cake (companies project), or to the preparation of the pastry (divorce project). Indeed, in terms of the intensity and quality of the debate it does not make much difference: but the fine-tuning of an almost-finished legal text is an amazing *encaje de bolillos* task, a hard exercise of concentration and deploy of expertise to manage and conciliate a bunch of imperative requisites, starting with internal consistency and consistency with other existing instruments. I am not going to reproduce here the details of the argument: a *compte-rendu* will be published in the GEDIP website in due time. I'd rather limit myself to highlight how impressive

and strenuous is the work of finalizing a legal document, making sure that the policy objectives represented by one provision are not belied by another (the moment this happens the risk is high that the whole project, the underlying basics of it, is unconsciously being challenged), checking the wording to the last adverb, conjunction and preposition, deciding on what should be part of the text and what should rather be taken up in a recital, and so on. By way of example, let me mention the lively discussion on Sunday on the scope and drafting of art. 10 of the proposal on the law applicable to companies, concerning the overriding mandatory rules: I am really eager to see what the final outcome is after the heated debate on how to frame them in the context of a project where party autonomy is the overarching principle, at a time when companies are required to engage in the so-called corporate social responsibility whether they want it or not. Only this point has remained open and has been reported to the next meeting of the GEDIP next year.

I wouldn't like to end this post without referring to the commitment of the GEDIP and its members with the civil society concerns. On Saturday Prof. Van Loon presented a document drafted in light of the plight of migrants, refugees, and asylum seekers in Europe. The text, addressed to the Member States and Institutions of the EU, aims to raise awareness of the immediate needs of these groups in terms of civil status and of measures to protect the most vulnerable persons within them. Reworked to take up the comments of the members of the GEDIP, a second draft was submitted on Sunday which resumes the problematic and insists on the role of PIL instruments in that context.

All in all, this has been an invaluable experience, for which I would like to thank the GEDIP and in particular the organizers of the event here, Prof. Christian Kohler and Prof. Patrick Kinsch.

The proceedings of the working sessions and the statements of the Group will soon be posted on its Website and published in various law reviews.

Duden on Surrogate Motherhood in Private International Law and the Law of International Civil Procedure

Konrad Duden from the Max Planck Institute in Hamburg has authored a book (in German) on surrogate motherhood in private international law and the law of international civil procedure ("Leihmutterschaft im Internationalen Privat- und Verfahrensrecht. Abstammung und ordre public im Spiegel des Verfassungs-, Völker- und Europarechts"). Published by Mohr Siebeck, the book looks at filiation and public policy in the light of constitutional, international and European law. The official abstract reads as follows:

> *More and more Germans seek out foreign surrogate mothers to bear children which they will then raise as their own. But does a child legally belong to these parents once they return to Germany? Surrogate motherhood raises questions, regardless of the fact that the fundamental and human rights of the child often prescribe clear answers.*

Further information is available on the publisher's website.

RECOVERY OF MAINTENANCE IN ASIA PACIFIC AND WORLDWIDE: NATIONAL AND REGIONAL

SYSTEMS AND THE HAGUE 2007 CHILD SUPPORT CONVENTION AND PROTOCOL

The Permanent Bureau of the Hague Conference on Private International Law (HCCH), through its Asia Pacific Regional Office, will hold a global conference on the recovery of child support and family maintenance in Hong Kong from 9 to 11 November 2015.

Please Save the Date. A conference program and further details will be circulated in due course. Note that the conference will begin at approximately 1:00 pm on Monday 9 November, and finish by 1:00 pm on Wednesday 11 November 2015.

The event is jointly sponsored by the HCCH and the Department of Justice of the Hong Kong Special Administrative Region of the People's Republic of China, in collaboration with a number of other partners.

This international conference will provide an opportunity to discuss the dynamic development of family law and policy in the Asia Pacific region, and represents an excellent occasion for professionals working in this field from throughout the world to meet colleagues, make new contacts, expand networks and fill knowledge gaps. The meeting will allow for the further building of a global professional network in the child support / family maintenance field and for follow up on the 5-8 March 2013 Heidelberg Conference on the International Recovery of Maintenance in the EU and Worldwide. It will include exciting academic and hands-on workshops and lectures.

CALL FOR PROPOSALS

The conference organisers invite the submission of conference presentation proposals. Please send abstracts of 200-300 words, along with a short bio of no longer than 200 words, to Ms Alix Ng (HCCH Asia Pacific Regional Office) at before 15 June 2015. Limited funding is available for speakers requiring assistance to attend.

Legal practitioners, caseworkers, judges, enforcement officers, academics, and

others engaged in the child support / family maintenance field are invited to submit proposals. The organisers in particular invite presentation proposals on the following themes:

• Current regional and national challenges or developments in Asia Pacific in relation to the recovery of child support and family maintenance, both domestically and in the cross-border context; evolutions in national policies on child support and family maintenance, and descriptions of recent legal reform in this field (or suggestions for such reform);
• The benefits of the Hague 2007 Child Support Convention and perspectives on its adoption and implementation in the Asia Pacific region and worldwide;
• Research and statistics in relation to demographic and sociological shifts (e.g. prevalence of single parent families) and migration patterns in the Asia Pacific region and globally bearing on the national and cross-border recovery of child support and family maintenance;
• Enforcement challenges and best practices in the field of child support and family maintenance;
• Perspectives on high functioning administrative systems for the recovery of child support and family maintenance (e.g., Australia, Norway, U.S.A.) and their potential in the Asia Pacific region;
• The roles of various 'system actors' and their potential for collaboration in the field of child support and family maintenance, e.g., caseworkers, judges, enforcement officers, private practitioners, etc.;
• Lessons learned from existing systems (e.g., Canada, EU, U.S.A.) for the cross-border recovery of child support and family maintenance;
• Data protection, privacy laws and duty of information policies with respect to income and assets of debtors in particular—developing best practices in the Asia Pacific region and globally;
• The use of information technology for the effective collection of child support and family maintenance at the national and international levels;
• The Hague 2007 Protocol on the Law Applicable to Maintenance Obligations;
• Economic and human rights dimensions (e.g., child poverty, UNCRC Art. 27, etc.) and issues of access to justice with respect to the national and cross-border recovery of child support and family maintenance;
• Other topics pertinent to the recovery of child support and family maintenance in the Asia Pacific region and worldwide.

For more information, please contact Ms Alix Ng (HCCH Asia Pacific Regional Office) at an@hcch.nl.

Conference on Extraterritorial Application of EU Law 18-19 June (Vigo, Spain)

The Spanish Association of Professors of International Law and International Relations is hosting a conference on

The Extraterritorial Application of EU Law

in Vigo (Spain) the 18th and 19th of June 2015.

The conference is structured in 8 thematic panels entitled:

- EU, Values and Human Rights
- Extraterritorial Application of EU Law: Trade and Contracts
- The Fight against Corruption from an International Law Perspective
- The Extraterritorial Application of Intellectual Property Rights
- The Extraterritorial Application of Data Protection Legislation
- The Extraterritorial Application of EU Competition Law
- The Extraterritorial Application of Environmental Law
- Fishing Industries and the Changes in Maritime Areas

The entrance is free but prior registration is required by June, 17 via e-mail to: montserrat.abad@uc3m.es or laura.carballo@usc.es

Further information can be found here.

The conference is organized in the framework of the *Jean Monnet Project* EU Law between Universalism and Fragmentation: Exploring the Challenge of Promoting EU Values beyond its Border

Latest Issue of RabelsZ: Vol. 79 No 2 (2015)

The latest issue of "Rabels Zeitschrift für ausländisches und internationales Privatrecht – The Rabel Journal of Comparative and International Private Law" (RabelsZ) has recently been released. It contains the following articles:

Jürgen Basedow: *Das Zeitelement in der richterlichen Rechtsfortbildung – Einleitung zum Symposium* (The Time Dimension in Judicial Law-Making – Introduction to the Symposium)

> *Wherever the law changes it must be determined which fact situations and disputes are still governed by the old law and which are covered by the new. Legislation often deals with this question in transitional provisions of a new statute which may be very detailed. Where the change in the law is due to new orientations of judicial practice, the answer must be given by the courts. National traditions and the procedural framework may have an impact on the respective answers. The overall question splits into several sub-questions: Will a court confine the effect of its new case law to future cases, excepting the pending case from its judgment? Has the new orientation of the court a retroactive effect on analogous cases? To what extent will courts explain the change in jurisprudence by reference to statutes which have been adopted but not yet taken effect? This and the following papers dealing with these questions were presented and discussed at a comparative law conference held at the Institute on 14 June 2014.*

Hannes Rösler, *Die Rechtsprechungsänderung im US-amerikanischen Privatrecht – Aufgezeigt anhand des prospective overruling* (Case Law Changes in U.S. Private Law – Prospective Overruling)

> *The article deals with the practice of prospective overruling, an innovative method of U.S. law whereby a judgment does not have retrospective effect, but – like statutory law – only applies to future events. This doctrine was declared*

constitutionally unobjectionable in the Sunburst Oil decision of the U.S. Supreme Court in 1923, which explains why state courts continued with the practice of prospective overruling. On the federal level, prospective overruling was used for the first time in the 1954 Brown v. Board of Education case ending school desegregation. The next step was the U.S. Supreme Court's test developed in Chevron Oil in 1971. According to the test, courts have to consider three factors: First, whether the decision to be applied non-retroactively establishes a genuinely new rule, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed; second, whether retrospective application would further or retard the operation of that rule; and third, whether retroactivity could produce substantially inequitable results. Many state courts still apply the Chevron Oil test regarding their own state laws. However, the U.S. Supreme Court abandoned the Chevron Oil test in Harper in 1987. The ambiguities and uncertainties that exist with prospective overruling can be explained by the not entirely clear Leitbild of the judge, who when deciding in favour of a solely future application of law acts like a legislator. The article evaluates these developments in the context of the jurisprudential views on the role of a judge in the U.S. legal system and compares them with German law.

Helge Dedek, *Rumblings from Olympus: Das Zeitelement in der (Fort-)Bildung des englischen common law*
(Rumblings from Olympus: Adjudication and Time in the English Common Law)

In this article, I endeavour to render an account of various temporal aspects of judicial decision making: the judicial anticipation of future statutory reform, the retrospective effects of judicial decisions, and the possibility of rulings that have exclusively prospective effects (so-called "prospective overruling"). All three aspects are interconnected through their respective links to the same theoretical and constitutional themes – most importantly, the problem of reconciling the function of adjudication first with the constitutional principle of parliamentary sovereignty in a common law system, and second with the theoretical explanation of the decision-making process as the creation of law within the boundaries of precedent and legal principle. Since the days of Bentham's polemics, the specifically temporal implications of these classic problems of common law theory have been discussed. However, unlike some

Continental jurisdictions, as Lord Rodger of Earlsferry pointed out, England and Wales never developed a comprehensive discourse on matters concerning the relationship between law and time; instead, temporal aspects have, in a more pointillist and haphazard fashion, been treated in the context of the various discussions surrounding the abovementioned fundamental problems. Different aspects have received different degrees of attention: whereas the anticipation of statutes through judge-made law has been discussed only rarely, a much larger number of judicial and scholarly comments exist with regard to the questions of adjudicatory retrospectivity and the possibility of prospective overruling. While traditionally the retrospective effects of judgements have been accepted and explained as being inherent in the nature of the adjudicative process, only recently, in 2005, did the House of Lords make clear that it lays claim to the constitutional power to issue non-retrospective rulings, and that neither the nature of judicial decision making nor the principle of parliamentary sovereignty would stand in the way of thus employing the technique of prospective overruling.

Felix Maultzsch, *Das Zeitelement in der richterlichen Fortbildung des deutschen Rechts* (The Time Dimension in Judicial Law-Making in Germany)

The anticipated application of legal norms which are not yet in force and the retroactive effect of changes in case law receive increasing attention in recent German legal discourse. Both phenomena pose the question of whether a solution that is considered to be normatively appropriate for the future can be applied to past facts already. This concern has to be balanced with aspects of legal certainty and the protection of legitimate expectations. Furthermore, the rule of law principle may militate against the anticipated application of legal norms and, reciprocally, in favor of a retroactive effect of changes in case law. Against this background, anticipated application and retroactive effect seem to be defensible, if the respective legal norm or the new line of case law do not, by themselves, change the pertinent normative assessment, but merely trace a factual or normative change that has already taken place in society. In addition, both the problem of anticipated application and of retroactive effect may be approached by identical doctrinal means. A so called substantive law approach (sachrechtliche Lösung) addresses the anticipated application and the protection against retroactive effect within the framework of substantive

private law. This approach accords well with the role of the judiciary in the German legal system and is therefore applied rather frequently. In contrast, the so called conflict of laws approach (intertemporalrechtliche Lösung) comprises a self-contained anticipated application of legal norms which are not yet in force or a self-contained protection against retroactive effects of changes in case law. This approach is at odds with the orthodox view of the judiciary in Germany and, therefore, is practiced only cautiously.

Notwithstanding these common principles, the current doctrine of retroactive effect of changes in case law does not seem to be fully convincing. It rests on the assumption that a retroactive effect is typically necessary because the courts do merely articulate the best picture of the law based on arguments and principles. However, private law is deployed to an increasing extent to shape society and the courts assume an active part in this transformative process. In that course, the idea of a mere improved legal judgment is threatened to become a fiction. Therefore, the German Federal Supreme Court should be more attentive to the risks that are inherent to far-reaching changes in case law. This could be achieved, primarily, by a strengthened judicial self-restraint, especially with regard to changes in case law. If this solution is discarded as unrealistic, one should, alternatively, consider a better protection against retroactive effects which could be achieved, inter alia, by the means of prospective overruling.

Susan Emmenegger, *Das Zeitelement in der richterlichen Fortbildung des schweizerischen Rechts* (The Time Dimension in Judicial Law-Making in Switzerland)

"Law must be stable and yet it cannot stand still."106 In both the common law and the civil law systems courts are faced with the challenge to reconcile the principle of legal certainty, including the reasonable reliance on the existing state of the law, and the principle of legal rightness which requires a correct application of the law in an ever changing world. This article explores two areas of judicial decision-making in which this challenge arises:
(1) The role of new statutes which have not entered into force at the time of the judicial decision, and (2) the effect of a decision to overrule a precedent on pending cases.

The first question regards judicial rulings in cases where a new (statutory) law is in the making but has not yet been formally enacted. Should the judges take these developments into account and if so, under what conditions? The answer of the Swiss Supreme Court and the Swiss scholarly writing is that future law is to be considered in the judicial interpretation and gap-filling if the future law does not contain a fundamental change but rather stays in line with the legislative perspective of the existing law. It is also unanimously held that the principle of legality bars the courts from a direct and formal application of the future law before its formal entry into force.

There is less unanimity between the Swiss Supreme Court and the Swiss doctrine with regard to the second question, namely, the effects of an overruling of judicial precedents. When the Supreme Court overturns a precedent, it will generally apply its new reasoning to the case at hand, thus accepting the retroactive nature of its ruling. The balancing of the principle of legal certainty against the principle of legal rightness is a process which precedes the court's decision regarding the alteration of its current case law. If the principle of legal certainty is considered to be of prevailing weight, the Supreme Court will abstain from an overruling. Instead, it will announce its doubts with regard to the existing case law, thereby proceeding to a sort of informal prospective overruling. A considerable part of the Swiss scholarly writing is critical of the Supreme Court's stance. It proposes a set of intertemporal rules which turn on the reliance of the parties in the stability of the existing case law. Whenever a court reaches a "better understanding" of the law, it should proceed to an overruling. However, the retroactive effect would be mitigated if the reasonable reliance of the parties warrants protection – which is almost always true for the party in the pending case. As a result, the intertemporal rules lead to a formal prospective overruling, at least concerning the party which is taking part in the proceeding.

Both the judicial and the scholarly model require the balancing of contradictory interests, and in both cases this balancing allows the court to take the intertemporal dimension of judicial decision-making into account. Therefore, the principal challenge is not so much to determine which model should be applied, but rather to ensure that the two interests in question are balanced in an adequate manner. Having said this, one should keep in mind that – just as in the case of a judicial overruling – the model of judicial intertemporal rules

proposed by the doctrine would have to be substantially more adequate than the model favoured by the Swiss Supreme Court to address the issue of contradictory interests arising in connection with a judicial overruling.

Bertrand Fages, *Das Zeitelement in der richterlichen Fortbildung des französischen Rechts*
(The Time Dimension in Judicial Law-Making in France)

Under French law, the principle of legal certainty operates both against the anticipated application of legal norms and in favor of the retroactive effect of changes in case law. Although exceptions to these two positions are occurring more frequently, they still remain largely unpredictable.

Imen Gallala-Arndt, *Die Einwirkung der Europäischen Konvention für Menschenrechte auf das Internationale Privatrecht am Beispiel der Rezeption der Kafala in Europa – Besprechung der EGMR-Entscheidung Nr. 43631/09 vom 4.10.2012, Harroudj ./. Frankreich* (The Impact of the European Convention on Human Rights on Private International Law as Illustrated by the Reception of Kafala in Europe – Reflections on ECHR, Harroudj v. France (No. 43631/09, 4 October 2012))

On 4 October 2012, the European Court of Human Rights (ECHR) rendered a decision dealing with Kafala. This Islamic law-based institution is an undertaking of an adult person to support and educate a minor without creating a formal parent-child relationship. Since adoption, as understood in western legal systems, is prohibited in most Muslim jurisdictions, Kafala is employed as a substitute. The Court considered the French conflicts-of-law rule (Art. 370-3 para. 2 of the Civil Code) prohibiting adoption of foreign children whose national laws prohibit the institution as compatible with Article 8 of the European Convention on Human Rights.

This essay considers the decision of the Court as a positive contribution to the issue of the impact of Human Rights on private international law. After recalling briefly the general terms of the relationship between human rights and private international law, the essay examines the status of Kafala outside and inside the European context. It also deals with the reception of Kafala in France.

The Court considered that a relationship founded on the Kafala may be protected under Article 8 of the Convention if requirements of continuity and stability are met. Nevertheless it recalled that Article 8 contains no right to adoption. This position of the Court is in line with its case-law on similar issues: given relationships should be protected as part of the respect of family life. The court however did not recognize any right of the applicant to convert the relationship in question into a determined legal relationship such as a parent-child-relationship. Two arguments were decisive for the decision of the court: lack of consensus among state-parties concerning the reception or the status of Kafala and recognition of Kafala by the relevant international instruments as a suitable alternative to adoption. As far as the first point is concerned the essay contends that the Court was mistaken in its appraisal of other state-parties regulations on Kafala as only France specifically prohibits the conversion of Kafala to adoption.

La Ley-Unión Europea, April 2015

The latest issue of the Spanish issue *La Ley-Unión Europea* (April 2015), was released last week. Besides the usual sections dealing with case law and current developments within the EU you'll find therein the following contributions – in Spanish, abstract in English:

S. Sánchez Lorenzo, "El nuevo sistema de reconocimiento y ejecución de resoluciones en el Reglamento (UE) 1215/2012 («Bruselas I bis»)". **Abstract:** The Regulation (EU) 1215/2000 introduces significant modifications related to recognition and enforcement of foreign judgments in Spain. The most important ones deal with automatic recognition of enforceability, whose application often requires specific adaptations in domestic civil procedural law.

J. González Vega, "La «teoría del big bang» o la creciente distancia entre Luxemburgo y Estrasburgo. Comentarios al Dictamen 2/13, del Tribunal de Justicia, de 18 de diciembre de 2014 sobre la adhesión de la Unión Europea al Convenio Europeo de Derechos Humanos" **Abstract:** In its Opinion 2/13 the

European Union's Court of Justice has declared the draft accession agreement of the European Union to the European Convention on Human Rights contrary to the provisions of the Treaties and to Protocol no. 8 of the Treaty of Lisbon. The decision of the Court consistently puts into question the essential points of agreement: Firstly, it points out the specificity of the Union —as a distinctive subject— and it unambiguously states the need to preserve the autonomy of its law and the exclusive jurisdiction of the Court, threatened by the project. In its analysis, mainly laconic and formalistic, sometimes alarmist, it questions the very notion of external control and its jurisdictional monopoly threatened by the «emerging» preliminary ruling to the ECHR, conceived by the Protocol No. 16. Moreover, it rejects the regulation of the status of co-respondent and prior involvement procedure and questions strongly the jurisdictional immunity of CFSP acts. Furthermore, its decision, albeit expected, leaves open the question on the ways to address the negative of the Court, given the imperative proviso on the accession to the ECHR established in the art. 6.2 TEU. Also, inasmuch as it can generate conflicting dynamics with other actors involved in the process of protection of fundamental rights -not only the ECHR but apex national jurisdictions-, the Opinion could have a deep impact in European multilevel system of human rights protection.

J. García López, "La Asociación Transatlántica para el Comercio y la Inversión: VIII Ronda de negociaciones"**. Abstract:** The eighth round of negotiations on the Transatlantic Trade and Investment Partnership between the EU and the US was held in Brussels last February, concluding with advances in Regulatory Cooperation and discrepancies in Financial Services.

L.M. Jara Rolle, "Contratos tipo de servicios jurídicos concluidos por un abogado con una persona física que actúa con un propósito ajeno a su actividad professional". **Abstract**: Unfair terms in consumer contracts extend to standard form contracts for legal services, as contracts concluded by a lawyer with a natural person acting for purposes which are outside his trade, business or profession.

R. Lafuente Sánchez, "Competencia internacional y protección del inversor en acciones por responsabilidad contractual y delictual frente al banco emisor de títulos (a propósito del asunto *Kolassa*)". **Abstract:** This paper aims at analysing the scope of application of the Brussels I Regulation in private law relationships that stem from cross-border marketing of investment services in the European

Union. In the light with the recent ECJ case law, the possible attribution of international jurisdiction to the courts of the investor's domicile is examined; either under the applicable forum over consumer contracts, the forum of special jurisdiction in matters relating to a contract, or in matters relating to tort, delict or quasi-delict.

M. Otero Crespo, "Las obligaciones precontractuales de información, explicación adecuada y de comprobación de solvencia en el ámbito de los contratos de préstamo al consumo. Comentario a la STJUE, Sala Cuarta, de 18 de diciembre de 2014, asunto C- 449/13, CA Consumer Finance sa v I. Bakkaus/ Sres. Bonato). **Abstract:** On 18 December 2014, the Court of Justice of the EU delivered its judgment in the case of CA Consumer Finance v I. Bakkaus and Bonato, concerning the pre- contractual obligations of credit providers. according to this decision, creditors must prove that they have fulfilled their pre-contractual obligations to provide information and explanations – so that the borrower can make an informed choice when subscribing a loan- and to check the creditworthiness of borrowers. Further, the Court highlights that the credit provider cannot shift the burden of proof to the consumer through a standard term.

Fourth Issue of 2014's Rivista di diritto internazionale privato e processuale

(I am grateful to Prof. Francesca Villata – University of Milan – for the following presentation of the latest issue of the RDIPP)

The fourth issue of 2014 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features two articles and five comments.

Francesco Salerno, Professor at the University of Ferrara, examines fundamental

rights in a private international law – and namely a public policy – perspective in "**I diritti fondamentali della persona straniera nel diritto internazionale privato: una proposta metodologica"** (Fundamental Rights of the Foreigner in Private International Law: A Methodological Proposition; in Italian).

Namely focusing on the role of public policy, this paper examines how personality rights of foreign individuals are ensured under the Italian private international law system. While personality rights are meant to reflect the identity of an individual at a universal level, private international law is aimed at ensuring the continuity of an individual's rights and status across borders. Art. 24 of the Italian Statute on Private International Law (Law No 218/1995) underlies this concern in that it provides, as regards personality rights, for the application of the law of nationality of the individual in question. However, as a result of the fact that personality rights are closely intertwined with human rights, it becomes inevitable to explore the link between the somehow neutral technique traditionally employed by conflict-of-law provisions and the fundamental values shared within the international community, in particular those values safeguarded by international obligations regarding the protection of human rights. As this paper portrays, the tension between personality rights under an individual's national law and fundamental rights is crucial to Art. 24 of the Italian Statute, as shown, in particular, by the process with which rights are characterized as falling within the scope of the provision: where a given right is perceived as fundamental by the *lex fori*, that right should enjoy protection in the forum regardless of its status according to the law of nationality of the concerned individual (proceedings on sex reassignment provide some significant examples in this respect). This approach embodies a "positive" expression of the notion of public policy: cross-border uniformity is foregone, here, as a means to ensure the primacy of the fundamental policies of the forum. However, as the paper illustrates, the role of public policy in ensuring fundamental rights goes even further: in fact, public policy may also serve as a guide whenever the need arises to adapt the applicable foreign law, should such law fail to provide solutions that are equivalent to those enshrined in the *lex fori*.

Fabrizio Vismara, Associate Professor at the University of Insubria, discusses agreements as to successions and family pacts in **"Patti successori nel regolamento (UE) n. 650/2012 e patti di famiglia: un'interferenza possibile?"** (Agreements as to Succession in Regulation (EU) No 650/2012 and

Family Pacts: A Possible Interference?; in Italian).

Law No 55 of 14 February 2006 enacted the regime on family pacts and amended Art 458 of the Italian Civil Code repealing the prohibition against agreements as to succession. This article analyzes the relationship between family agreements and agreements as to succession with reference to the regime enacted by Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. After examining the different solutions with respect to the characterization of family agreements (donation, division, contract), this article highlights how family agreements may be referred to the application of Regulation (EU) No 650/2012 as a form of waiver agreement as to succession. In this respect, family agreements may be governed by Regulation (EU) No 650/2012 and, in particular, by the rules on the determination of the applicable law provided therein.

In addition to the foregoing, the following comments are also featured:

Michele Nino, Researcher at the University of Salerno, examines State interests in labor disputes in "**State Immunity from Civil Jurisdiction in Labor Disputes: Evolution in International and National Law and Practice"** (in English).

This article examines the evolution of the international rule on State immunity from civil jurisdiction in labor disputes. After having shed light on the notion and content of the international rule at issue, this article examines the relevant international legal instruments (such as the 1972 European Convention on State Immunity and the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property), the national practice of civil law and common law States, as well as the case law of the European Court of Human Rights and of the European Court of Justice. In light of this analysis, this papers illustrates that, although an important trend aimed at promoting in labor disputes stable criteria of jurisdiction of the State of the forum (such as the nationality or the residence of the worker and the place of the execution of the employment relationship), the criterion based on the distinction between *acta jure imperii* and *acta jure gestionis* continues to be applied rather permanently in such disputes. As a result, in the conclusions, solutions are put forth so that the application of such criterion

be subject to revision, at national and international levels, and that, as a consequence, an effective protection of workers be guaranteed in labor disputes against the need to safeguard State interests.

Giulia Vallar, Fellow at the University of Milan, addresses the topic of intra-EU investment arbitration in "**L'arbitrabilità delle controversie tra un investitore di uno Stato membro ed un altro Stato membro. Alcune considerazioni a margine del caso *Eureko/Achmea v. The Slovak Republic*"** (Arbitrability of Disputes between an Investor from a Member State and another Member State. Some Remarks on *Eureko/Achmea v. The Slovak Republic*; in Italian).

The present paper deals with one of the issues that has recently been considered within the *Eureko/Achmea v. The Slovak Republic* case, namely the arbitrability of the so called intra-EU BITs disputes. In essence, it focuses on whether the investor of an EU member state can rely on the compromissory clause contained in a BIT that its country of origin had signed with another country that, in turn, at a later time, became an EU member State. To such a question arbitral tribunals have answered in the positive, while the EU in the negative, without however adopting a normative act in this sense. Throughout the paper, an analysis is conducted of those aspects of international law and of EU law that come into play in relation to the matter at hand. It is submitted that, in the absence of a definite/hard law solution, the way out should consist, for the time being, in applying soft law principles and, in particular, that of comity; nevertheless, the EUCJ and the arbitral tribunals do not appear to be very much keen to act in this sense. EU member states, on their part, are more and more frequently opting for the termination of the relevant BITs, allegedly on the basis of a law and economics analysis. This attitude, however, might produce negative effects on the economy of these states, since investors, seeking the protection of a BIT, could be encouraged to move their seats in third countries.

Giovanna Adinolfi, Associate Professor at the University of Milan, tackles the issue of financial instruments and State immunity from adjudication in **"Sovereign Wealth Funds and State Immunity: Overcoming the Contradiction"** (in English).

The increasing number of sovereign wealth funds (SWFs) and the growth in the value of their assets are among the main current trends in the global financial markets. The governments of recipient States have voiced their concerns,

contending that SWFs are financial vehicles used by States to pursue general public aims but acting like private economic agents. The question this contribution tackles is whether SWFs, as "sovereign" investment vehicles, come within the scope of international and national rules on sovereign immunity. This topic will be analyzed from three perspectives. As a starting point, the definition of "foreign State" given by immunity legal regimes will be investigated in order to define in which circumstances SWFs meet it. Next, the issue of SWSs' immunity from adjudication will be ascertained. In this regard, the main point is whether SWFs investments are to be understood as actions engaged in within the exercise of sovereign authority, or as mere commercial activities, over which immunity from judgment on the merits is removed. As it may not be excluded that courts render judgments against SWFs, the rules on immunity from pre-judgement and post-judgement measures of constraint are to be considered, so as to identify the property against which jurisdictional rulings may be enforced for the full satisfaction of the legitimate expectations of judgment creditors. The enquiry mainly focuses on the rules established under the UN and the Council of Europe conventions; the content and practice under national regimes is also considered, mainly the US Foreign Sovereign Immunities Act and the UK State Immunity Act. The main result is that there is no univocal answer to the question whether rules on sovereign immunity are helpful in overcoming the contradiction between the different but complementary public and private natures of SWFs. The form through which funds have been established and the content of the specific legal regime on the basis of which courts have to judge in their regard are the fundamental variables, and their combination in each case may lead to different results in terms of immunity from both the adjudicative process and enforcement measures.

Laura Carpaneto, Researcher at the University of Genoa, examines the interface of the Brussels II-*bis* Regulation and the European Convention of Human Rights in **"In-Depth Consideration of Family Life v. Immediate Return of the Child in Abduction Proceedings within the EU"** (in English).

The paper focuses on the EU regime on child abduction provided by Regulation No 2201/2003 and, in particular, on its Art. 11(8) expressly providing for the replacement of a Hague non return order by a subsequent judgment (the so called "trumping order") imposing the return of the child made by the courts of the State where the child was habitually resident prior to the wrongful removal or

retention. Starting from the analysis of some recent decisions of the European Court of Human Rights, stating that some return orders held by domestic courts in applying the 1980 Hague Convention (*Neulinger and Shuruk v. Switzerland and X v. Latvia*) as well as the Brussels II-*bis* Regulation (*Sneersone and Kampanella v. Italy*) were not in compliance with Art. 8 of ECHR, the paper is aimed at demonstrating the that a too strict "Art. 8 ECHR's test" is capable of undermining the functioning of the Brussels II-*bis* trumping order and that a specific human rights' test for intra-EU child abduction should be carried out. In this light, the paper firstly highlights the added value of the Brussels II-*bis* regime on child abduction compared to the 1980 Hague Convention; it goes on to critically analyze the recent decisions of the European Court of Human Rights on the return orders in child abduction cases, and it finally proposes a possible human rights test capable of protecting the "effet utile" of the EU regime on child abduction.

Matteo Gargantini, Senior Research Fellow at the Max Planck Institute Luxembourg, examines and shares some considerations on the AG's Opinion in *Kolassa* in "**Jurisdictional Issues in the Circulation and Holding of (Intermediated) Securities: The Advocate General's Opinion in *Kolassa v. Barclays*"** (in English).

This article addresses the Advocate General's Opinion in *Kolassa v. Barclays* (released on September 3, 2014, in the case C-375/13) from the perspective of financial markets law. The case raises some issues on the establishment of jurisdiction in disputes concerning securities offerings. The article suggests that a restrictive interpretation should be given of the Opinion (as well as of the CJEU decision on the case, which substantially follows the Opinion). On the one hand, the interpretation affirmed by the Advocate general may in fact, if read extensively, rule out the possibility that investors enjoy the protective regime of Brussels I Regulation *vis-à-vis* the issuer if they purchase securities on the secondary market, as it denies the possibility of establishing jurisdiction on the basis of Articles 15 and 16 of the Brussels I Regulation where a consumer has purchased a security not from the issuer but from a third party that has in turn obtained it from the issuer. On the other hand, the Opinion may expose offering companies to the risk of being sued by professional investors in multiple jurisdictions on the basis of tortious liability, even in cases where a prospectus was not published and, therefore, such companies did not intend to conduct any

activity in other countries, on the basis that no contractual relationship can be identified in *Kolassa* between the issuer of the certificate and the final investor. Tortious liability, which is admitted by the Opinion, may therefore sometimes be an imperfect substitute for contractual liability. Hence, the article proposes that the Advocate General's (and the CJEU's) reasoning should be narrowly interpreted so as to confine its purview to the issues raised by the holding of certificates through trusts and other similar devices. On the contrary, further reflections are needed before a conclusive position is taken on the effects of circulation of securities under the Brussels I Regulation.

Indexes and archives of RDIPP since its establishment (1965) are available on the website of the Rivista di diritto internazionale privato e processuale. This issue is available for download on the publisher's website.

German Federal Court of Justice on Surrogacy and German Public Policy

By Dina Reis, Albert-Ludwigs-University Freiburg (Germany)

In its ruling of 10 December 2014 (Case XII ZB 463/13), the German Federal Court of Justice (Bundesgerichtshof – BGH) had to decide whether, despite the domestic prohibition of surrogacy, a foreign judgment granting legal parenthood to the intended parents of a child born as a result of a surrogacy arrangement should be recognized.

The appellants, a same-sex couple habitually resident in Berlin, are German citizens and live in a registered partnership. In August 2010, they concluded a surrogacy contract with a woman in California. The surrogate mother, a citizen of the United States, is habitually resident in California and was not married during the surrogacy process. In accordance with the contract, the child was conceived by way of assisted reproduction technology using appellant no. 1's sperm and an

anonymously donated egg. Prior to the child's birth, appellant no. 1 acknowledged paternity at the German Consulate General in San Francisco with the surrogate mother's consent, and by judgment of the Superior Court of the State of California, County of Placer, legal parenthood was assigned exclusively to the appellants. In May 2011, the surrogate mother gave birth in California; thereafter, the appellants travelled with the child to Berlin where they have been living since. After the civil registry office had refused to record the appellants as the joint legal parents of their child, they brought proceedings for an order requiring the civil registry office to do so, which was denied by the lower courts.

The BGH held that recognition of the Californian judgment could not be refused on the grounds of violation of public policy and ordered the civil registry office to register the child's birth and state the appellants as the joint legal parents. The Court found that German public policy was not violated by the mere fact that legal parenthood in a case of surrogacy treatment was assigned to the intended parents, if one intended parent was also the child's biological father while the surrogate mother had no genetic relation to the child.

Public policy exception within the scope of 'procedural' recognition

First, the Court outlined that, contrary to a mere registration or certification, the Californian judgment could be subject to a 'procedural' recognition laid down in §§ 108,109 of the German Act on the Procedure in Family Matters and Matters of Non-contentious Jurisdiction (FamFG), which enumerate limited grounds for denying recognition. The Court noted that the Californian decision was based on a substantive examination of the validity of the surrogacy agreement and the resulting status issues, which was not to be reviewed (prohibiton of '*révision au fond*'). According to § 109(1) No. 4 FamFG, recognition of a judgment will be refused where it leads to a result which is manifestly incompatible with essential principles of German law, notably fundamental rights (public policy exception). The Court stated that, in order to achieve an international harmony of decisions and to avoid limping status relationships, the public policy exception was to be interpreted restrictively. For this reason, a mere difference of legislation did not imply a violation of domestic public policy; the contradiction between the fundamental values of domestic law and the result of the application of foreign law in the case at hand had to be intolerable.

Paternity of one intended parent

With regard to the legal parenthood status of appellant no. 1, the Court pointed out that no violation of public policy could be found because the application of German law would produce the same result as the decision of the Superior Court of the State of California: Due to the fact that the surrogate mother was not married at the time of the child's birth and appellant no. 1 had acknowledged paternity with her prior consent, German substantial law (§§ 1592 No. 2, 1594(2) German Civil Code) would also regard appellant no. 1 as the legal father of the child.

Assigning legal parenthood to the registered partner of the biological father not contrary to public policy

With regard to the legal parenthood status of appellant no. 2, the Court argued that the outcome of the Californian judgment in fact deviated from the domestic determination of parenthood. However, this divergence would not violate public policy if one of the intended parents, unlike the surrogate mother, was genetically related to the child.

Deviation from German substantive law

Commercial as well as altruistic surrogacy are prohibited under § 1(1) No. 7 German Embryo Protection Act and § 14b Adoption Placement Act, which penalize the undertaking of surrogacy and commercial activities promoting surrogacy such as placement of surrogate mothers. However, the surrogate mother and the intended parents are not punished. The scope of the provisions is limited to acts committed within German territory (§ 7 German Criminal Code).

In addition to the penal aspects, § 1591 German Civil Code defines the woman who gives birth as the mother of a child and excludes the motherhood of another woman even if the latter is the child's genetic mother. The provision respects the social and biological bond between child and birth mother and aims at avoiding 'split' motherhood resulting from surrogacy treatment, including cases where the latter is performed abroad. The BGH outlined that German law provided neither for joint legal parenthood of two men acknowledging paternity nor for assigning legal parenthood to the registered partner of a parent by operation of law; same-sex partners could establish joint legal parenthood solely by means of adoption.

Then the Court held, first, that assigning joint legal parenthood to same-sex partners did, in itself, not violate public policy because, according to the ruling of

the German Federal Constitutional Court on so-called 'successive adoption' – a practice granting a person the right to adopt a child already adopted by their registered partner -, married couples and couples living in a registered partnership were considered as equally suited to provide conditions beneficial to the child's upbringing [German Federal Constitutional Court 19.02.2013, Case 1 BvL 1/11 and 1 BvR 3247/09, para 80 with further references = FamRZ 2013, 521, 527].

Secondly, the Court pointed out that the general preventive aims underlying the provisions mentioned above needed to be distinguished from the situation where surrogacy had been nevertheless – lawfully – carried out abroad, because now the welfare of the child as a legal subject with independent rights had to be taken into account. A child, however, could not be held responsible for the circumstances of his or her conception. And while on the one hand a violation of the fundamental rights of the surrogate mother or the child could imply a public policy infringement, the Court stressed that, on the other hand, fundamental rights could also argue for a recognition of the foreign judgment.

Birth mother's human dignity not *per se* violated by surrogacy: drawing a parallel to adoption

With regard to the surrogate mother, the Court argued that the mere fact that surrogacy had been undertaken was, in itself, not sufficient to ascertain an infringement of human dignity. That applied, *a fortiori*, in respect of the child who owed his or her existence to the surrogacy process. The Court emphasized that the surrogate mother's human dignity could be violated if it was subject to doubt whether her decision to carry the child and hand it over to the intended parents after birth had been made on a voluntary basis. However, the Court found that if the law applied by the foreign court imposed requirements to ensure a voluntary participation of the surrogate mother and the surrogacy agreement as well as the circumstances under which the surrogacy treatment was performed had been examined in proceedings that complied with the standards of the rule of law, then, in the absence of any contrary indications, the foreign judgment provided reasonable assurance of the surrogate mother's voluntary participation. According to the surrogate mother's declaration before the Superior Court of the State of California, she was not willing to assume parental responsibilities for the child. The Court held that in this case, the surrogate mother's situation after childbirth was comparable to that of a mother giving her child up for adoption.

Focus on the best interests of the child

Given those findings, the Court concluded that the decision whether to grant recognition to the foreign judgment should be guided primarily by the best interests of the child. For this purpose, the Court referred to the guarantee of parental care laid down in Art. 2(1) in conjunction with Art. 6(2) first sentence of the German Constitution, which grants the child a right to be assigned two legal parents [cf. German Federal Constitutional Court 19.02.2013, Case 1 BvL 1/11 and 1 BvR 3247/09, paras 44, 73 = FamRZ 2013, 521, 523, 526], and the case-law of the European Court of Human Rights on Art. 8(1) ECHR concerning the child's right to respect for his or her private life: The European Court of Human Rights had ruled that the latter encompassed the right of the child to establish a legal parent-child-relationship which was regarded as part of the child's identity within domestic society [ECtHR of 26.06.2014, No. 65192/11 – Mennesson v. France, para 96].

Here, the Court stressed that not only was the surrogate mother not willing to assume parental responsibilities, but she was, in fact, also not available as a parent on a legal basis: An assignment of legal motherhood to the surrogate mother, which could only be established under German law, would have no effect in the surrogate mother's home state because of the opposing foreign judgment.

Under those circumstances, the Court found that depriving the child of a legal parent-child-relationship with the second intended parent who – unlike the surrogate mother – was willing to assume parental responsibilies for the child, violated the child's right laid down in Art. 8(1) ECHR. According to the Court's view, the limping status relationship between the surrogate mother and the child failed to fulfill the requirements laid down in Art. 2(1) in conjunction with Art. 6(2) of the German Constitution and Art. 8(1) ECHR.

The Court agreed with the opinion of the previous instance that adoption would be an appropriate instrument in the case at hand because, unlike a judgment based on the foreign legislature's general assessment of surrogacy cases, the adoption procedure included an individual examination of the child's best interests. However, the Court pointed out that in cases of stepchild adoption, the outcome of this individual evaluation would usually be favourable and thus coincide with the Californian decision, leading to legal parenthood of the biological parent's registered partner. The consistent results clearly argued

against a violation of public policy. Moreover, the Court observed that adoption would not only encounter practical difficulties in the child's country of birth, where the appellants were already considered the legal parents, it would also pose additional risks for the child: It would be left to the discretion of the intended parents whether they assumed parental responsibilities for the child or changed their minds and refrained from adoption; for example, if the child was born with a disability.

Conclusion

The Court's decision has been received with approval within German academia and legal practice [see the notes by *Helms*, FamRZ 2015, 245; *Heiderhoff* NJW 2015, 485; *Mayer*, StAZ 2015, 33; *Schwonberg*, FamRB 2/2015, 55; *Zwißler*, NZFam 2015, 118]. Before this judgment, lower courts had shown a tendency to regard public policy as violated by the mere fact that surrogacy had been performed [cf. Higher Regional Court Berlin 01.08.2013, Case 1 W 413/12, paras 26 *et seqq.* = IPRax 2014, 72, 74 *et seq.*; Administrative Court of Berlin 05.09.2012, Case 23 L 283.12, paras 10 *et seq.* = IPRax 2014, 80 *et seq.*]. In recent years, however, some scholars had advocated a more cautious and methodical handling of the public policy exception [see especially *Heiderhoff*, NJW 2014, 2673, 2674 and *Dethloff*, JZ 2014, 922, 926 *et seq.* with further references]. Instead of resorting to a diffuse disapproval of surrogacy as a whole, the ruling of the BGH is essentially based on an accurate analysis of the concrete alternatives at hand and a critical evaluation of the possible outcomes in the present case.

However, it has rightly been pointed out that, within the complex field of surrogacy, the situation in the case at hand was fairly straightforward: The surrogate mother was not married so that the biological father could acknowledge paternity without complications, there was no conflict between the intended parents and the surrogate mother because the latter did not want to keep the child, and the legal parenthood of the intended parents had been established in a judicial procedure where the rights of the child and the surrogate mother, especially her voluntary participation, had been subject to review [cf. *Heiderhoff*, NJW 2015, 485].

The BGH expressly left open whether a different finding would have been appropriate if neither of the intended parents had been the child's biological

parent or if the surrogate mother had been also the genetic mother [para 53]. Neither did the court discuss the issue of ‘recognition’ of civil status situations and documents. Furthermore, surrogacy arrangements that are undertaken in countries with poor human rights standards and a lower degree of trust in the administration of justice may not fulfill the requirements for a recognition established by the BGH. Insofar, the judgment could have a deterrent effect as regards seeking surrogacy treatment in countries that do not meet the required standards [*Heiderhoff*, NJW 2015, 485].