Latest Issue of RabelsZ: Vol. 78 No 3 (2014)

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:

- *Klaus Bartels,* **Zum Rückgriff nach eigennütziger Zahlung auf fremde Schuld – Anleihen bei DCFR und common law für das deutsche Recht** (Recourse After Self-serving Payment on Another's Debt – German Law Borrowing From the DCFR and the Common Law) pp. 479-507(29)

Under German law, the self-serving payment on another's debt must be regarded as a performance (Leistung) of the payer to the creditor. The payment leads to a discharge of the debt (§ 267 of the German BGB). A cessio legis, being incompatible with discharge, takes effect only under the exceptions provided by law. A third party may claim reimbursement from the original debtor only under the regime of benevolent intervention in another's affairs (Geschäftsführung ohne Auftrag). But the criteria for determining the meaning of concepts such as "another's affairs" and the "intention of benefiting another" are widely challenged. And having a recourse plan in mind, also positive effects on the debtor's issues, which could support the criteria of § 683 sentence 1 BGB, are regularly missed.

The prevailing German doctrine is comfortable with the Rückgriffskondiktion (§ 812 (1) sentence 1, alternative 2 BGB), hereby enabling, subsidiarily, recourse to the benefit of the true debtor. The common law has traditionally been averse to this approach. And the Draft Common Frame of Reference avoids this condictio entirely. It is obvious that the English rules on legal compulsion (with their reservation vis-à-vis full restitution as under continental regimes) are substantially convincing. And despite its cautious approach, the Draft Common Frame of Reference offers similar solutions regarding payments of a third party, who did not consent freely (Art. VII.-2:101(1)(b) DCFR). In cases involving, for instance, an "execution interest", a corresponding interpretation is needed, perhaps even an analogous application of this rule. A

similar approach is taken by the German doctrine following § 814 alternative 1 BGB by lowering the restitution barrier for cases of pressure caused by a conflict or compulsion. The already very narrow scope of application of the German Rückgriffskondiktion is thus further and markedly circumscribed: The law of unjust enrichment recognizes gratuitous interference in another's affairs only if the intervener presents substantial reasons to let his conduct be regarded as consistent.

- *Tanja Domej*, D**ie Neufassung der EuGVVO – Quantensprünge im europäischen Zivilprozessrecht** (The Recast Brussels I Regulation – Quantum Leaps in European Civil Procedure) pp. 508-550(43)

In November and December 2012, the European Parliament and the Council adopted the recast Brussels I Regulation (Regulation 1215/2012). The main feature of the reform is the abolition of the exequatur procedure. With this step, one of the main political goals in the field of European judicial cooperation, the abolition of ,,intermediate procedures" standing in the way of cross-border enforcement of judgments, has been achieved – at the price, however, of retaining the grounds for refusal of recognition and enforcement. In other respects as well, the changes introduced by the recast Regulation are modest, compared to the Commission's original political intentions. Instead of a "great leap forward", the European legislator chose incremental change. The plans to extend the rules on jurisdiction to third-state defendants were largely abandoned. The attempt to create new rules on the interface with arbitration was also unsuccessful. The changes with regard to jurisdiction agreements and provisional measures turned out more moderate than proposed by the Commission. This article discusses the innovations introduced by the recast Regulation. It analyses the upsides and downsides of the new rules and points out lost opportunities and avenues for further reforms.

- *Claudia Mayer*, **Ordre public und Anerkennung der rechtlichen Elternschaft in internationalen Leihmutterschaftsfällen** (Ordre public and Recognition of Legal Parenthood in International Surrogacy Cases), pp. 551-591(41)

Through the use of gestational surrogacy modern artificial reproductive technology provides infertile couples with new opportunities to become parents

of children who are genetically their own. While surrogacy is lawful under certain circumstances in a limited number of countries worldwide, in others – including Germany – it is prohibited. Consequently, international surrogacy tourism to countries that allow surrogacy, such as India, the United States, or Ukraine, is booming. However, there is no legal regulation at the international level regarding this matter.

Due to the current legal situation in Germany, infertile couples face severe difficulties in view of the recognition by German courts or by public authorities of their legal parenthood of a child born abroad through surrogacy: Not only is surrogacy illegal in Germany, its prohibition is also considered as part of the German ordre public. Based on this perception, German authorities deny the recognition of existing foreign judgments conferring legal parenthood upon the intended parents, as well as the application of more liberal foreign substantive law, thus paving the way for a recourse to German law: According to the relevant German provisions, the woman who gave birth to the child – i.e. the surrogate mother – is to be considered as the legal mother, and her husband is the legal father. As a consequence, in many cases the child does not acquire German nationality by birth and is thus denied the right to a German passport and the right to enter Germany. In the worst case, the child does not acquire any nationality at all, leaving him or her stateless, which constitutes an unacceptable situation. This article shows that the German ordre publicshould not be considered as an obstacle to the procedural recognition of foreign decisions on legal parentage, nor should it hinder the application of foreign substantive law (designated by the German conflict of law rules) conferring legal parentage on the intended parents. Instead, already de lege lata the welfare of the child must be considered the primary and decisive concern in surrogacy cases. This also results from Article 8 of the European Convention on Human Rights, guaranteeing the right to respect for one's family life.

Regulation at the international level is overdue, and it is to be welcomed that international institutions have started to give attention to the matter. However, until an international consensus is reached, the national legislator should be called upon to revise the German law on descent, and to provide provisions legalizing surrogacy under certain conditions.

- *A. (Teun) Struycken V.M.*, **The Codification of Dutch Private**

International LAw- A Brief Introduction to Book 10 BW, pp. 592-614(23)

Guest Post by Professor Vivian Grosswald Curran: The French Supreme Court Reverses Itself in an Islamic Veil Case in « L'Affaire Baby Loup »

Professor Curran is a Distinguished Faculty Scholar and Professor of Law at the University of Pittsburgh School of Law. The Editors are grateful for this contribution.

France's Cour de cassation decided yesterday (June 25, 2014) in plenary session that a private day care center could terminate an employee for wearing an Islamic veil (or outward sign of another religion) where the latter contravenes company rules deemed to be reasonable and proportionate in terms of the employer's mission. The case had made its way to the Supreme Court once before, in March of 2013. At that time, the Court had held that the employee could not be terminated because the private company's prohibition against outward signs of religion infringed its workers' religious freedom. A key word here is « private.» Where the employer is public, by contrast, the principle of laïcité , or secularism in the public space, is deemed to justify the absence of manifestations of religious conviction.

Yesterday, however, the Court reversed itself, finding for Baby Loup, a rare day care center open seven days a week and around the clock, so that poorer women and especially single mothers, sometimes working night shifts, can find a place

for their young children. The Court approved the lower court's finding that the restriction on religious freedom at issue was justified inasmuch as the center was a small business whose employees come into continual contact with young children and their parents, such that the day care center has a legitimate interest in trying to make parents from all backgrounds feel welcome.

A note on French procedure may be of interest. Since the Supreme Court can only in the rarest of cases directly decide the substantive result of cases, in 2013 it had remanded to the Court of Appeals for further decision-making. In France, moreover, courts of appeal need not agree with the Supreme Court in its initial ruling, and the second appellate court rejected the high court's ruling, thus leading the plaintiff to appeal to the Supreme Court a second time, yielding yesterday's decision.

The facts of the case beyond those mentioned above add a potentially pragmatic cast to the plaintiff's quest. She had been an assistant manager of the day care center before taking three years of maternity leave, followed by another three years of parental leave. When she returned after six years, she asked her employer to release her from her contract through a rupture conventionnelle, which would have guaranteed her certain benefits. The company refused, saying she would have to resign. Instead, she returned to work wearing an Islamic veil, knowing that it violated the company's rules because she had helped draft those rules. When the company then terminated her employment for violating the prohibition, she sued.

A last legal option remaining to the plaintiff is an appeal to the European Court of Human Rights. Baby Loup, meanwhile, according to press accounts, is skirting financial failure due to the accumulated costs of its legal defense.

For those who read French, the decision is Arrêt n° 612 du 25 juin 2014 (13-28.369) – Cour de cassation – Assemblée Plénière – ECLI:FR:CCASS:2014:AP00612, and is available here.

First 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 first issue of 2014 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features three articles, one comment and two reports.

Alberto Malatesta, Professor at the University Cattaneo-LIUC in Castellanza, examines the interface between the new Brussels I Regulation and arbitration in **"Il nuovo regolamento Bruxelles I-bis e l'arbitrato: verso un ampliamento dell'*arbitration exclusion*"** (The New Brussels I-bis Regulation and Arbitration: Towards an Extension of the Arbitration Exclusion; in Italian).

> *This article covers the "arbitration exclusion" as set out in the new EU Regulation No 1215/2012 of 12 December 2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters, recasting the old "Brussels I" Regulation, No 44/2001. The new Regulation apparently retains the same solutions adopted by the latter by providing only for some clarifications in lengthy Recital No 12. However, a careful analysis shows that under the new framework the above "exclusion" is more far reaching than in the past and it impinges on some controversial and much debated issues. After reviewing the current background and the 2010 Proposal of the European Commission on this issue – rejected by the Parliament and by the Council –, this article focuses mainly on the following aspects: i) the actions or the ancillary proceedings relating to arbitration; ii) parallel proceedings before State courts and arbitration and the overcoming of the West Tankers judgment stemming from Recital No 12; iii) the circulation of the Member State courts' decisions ruling whether or not an arbitration agreement is "null and void, inoperative or incapable of being performed"; iv) the recognition and enforcement of a Member State judgment on the merits resulting from the determination that the arbitration agreement is not effective; v) the potential conflicts between State*

judgments and arbitral awards.

Pietro Franzina, Associate Professor at the University of Ferrara, addresses the issue of lis pendens involving a non-EU Member State in **"Lis Pendens Involving a Third Country under the Brussels I-bis Regulation: An Overview"** (in English).

The paper provides an account of the provisions laid down in Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I-bis) to deal with proceedings concurrently pending in a Member State and in a third country (Articles 33 and 34). It begins by discussing the reasons for addressing the issue of extra-European lis pendens and related actions within the law of the European Union. Reference is made, in this connection, to the relevance accorded to third countries' proceedings and the judgments emanating therefrom under the Brussels Convention of 1968 and Regulation (EC) No 44/2001, as evidenced inter alia by the rule providing for the non-recognition of decisions rendered in a Member State if irreconcilable with a prior decision coming from a third country but recognized in the Member State addressed. The paper goes on to analyse the operation of the newly enacted provisions on extra-European lis pendens and related actions, in particular as regards the conditions on which proceedings in a Member State may be stayed; the conditions on which a Member State court should, or could, dismiss the claim before it, once a decision on the merits has been rendered in the third country; the relationship between the rules on extra-European and intra-European lis pendens and related actions in cases where several proceedings on the same cause of actions and between the same parties, or on related actions, have been instituted in two or more Member States and in a third country.

Chiara E. Tuo, Researcher at the University of Genoa, examines the recognition of foreign adoptions in the framework of cultural diversities in **"Riconoscimento degli effetti delle adozioni straniere e rispetto delle diversità culturali"** (Recognition of the Effects of Foreign Adoptions and Respect for Cultural Diversity; in Italian).

This paper focuses on the protection of cultural identities (or of cultural pluralism) in the context of proceedings for the recognition of the effects of

adoptive relationships established abroad. The subject is dealt with in light of the case-law of the European Court of Human Rights (ECtHR) as it has recently developed with regard to Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which, as it is well known, enshrines the right to family life. According to the ECtHR's case-law, a violation of Art. 8 of the Convention may be ascertained when personal status legally and stably constituted abroad are denied transnational continuity. Thus, on the basis of said ECtHR jurisprudence, this paper raises some questions (and tries to provide for the related answers) with regard to the consistency therewith of the conditions that familial relationships created abroad must satisfy when their recognition is sought pursuant to the relevant provisions currently applicable within the Italian legal system.

In addition to the foregoing, the following comment is featured:

Sara Tonolo, Associate Professor at the University of Trieste, **"La trascrizione degli atti di nascita derivanti da maternità surrogata: ordine pubblico e interesse del minore"** (The Registration of Birth Certificates Resulting from Surrogacy: Public Policy and Best Interests of the Child; in Italian).

Nowadays surrogacy is a widespread practice for childless parents. Surrogacy laws vary widely from State to State. Some States require genetic parents to obtain a judicial order to have their names on the original birth certificate, without the name of the surrogate mother. Other States (e.g. Ukraine) allow putting the name of the intended parents on the birth certificate. In Italy all forms of surrogacy are forbidden, whether traditional or gestational, commercial or altruistic. Act No 40 of19 February 2004, entitled "Rules on medically-assisted reproduction", introduces a prohibition against employing gametes from donors, and specifically incriminates not only intermediary agencies and clinics practicing surrogacy, but also the intended parents and the surrogate mother. Other penal consequences are provided by the Criminal Code for the registration of a birth certificate where parents are the intended ones, as provided by the lex loci actus (Art. 567 of the Italian Criminal Code, concerning the false representation or concealment of status). In the cases decided by the Italian Criminal Courts of First Instance (Milan and Trieste), the judges excluded the criminal responsibility of the intended parents applying for the registration of foreign birth certificates which were not exactly genuine

(due to the absence of genetic ties for the intended mothers), affirming in some way that subverting the effectiveness of the Italian prohibition of surrogacy may be justified by the best interests of the child. Apart from the mentioned criminal problems, several aspects of private international law are involved in the legal reasoning of the courts in these cases: among these, probably, the one that the principle of the child's best interests should have been read not like an exception to the public policy clause but like a basic value of this clause, in light, among others, of the case law of the European Court of Human Rights.

Finally, this issue of the Rivista di diritto internazionale privato e processuale features two reports on recent German case-law on private international and procedural issues, and namely:

Georgia Koutsoukou, Research Fellow at the Max Planck Institute Luxembourg, **"Report on Recent German Case-Law Relating to Private International Law in Civil and Commercial Matters"** (in English).

Stefanie Spancken, PhD Candidate at the University of Heidelberg, **"Report on Recent German Case-Law Relating to Private International Law in Family Law Matters"** (in English).

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.

Latest Issue of RabelsZ: Vol. 78 No 2 (2014)

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:

- *Reinhard Zimmermann*, **Text and Context – Introduction to the**

Symposium on the Process of Law Making in Comparative Perspective, pp. 315-328(14)

On 29 June 2013, on the occasion of the annual meeting of the Association of Friends of the Hamburg Max Planck Institute, a symposium took place on the topic of “The Process of Law Making”. This essay is based on the lecture introducing that symposium. First, it provides an overview of the position in Germany: the procedure to be adopted, the different actors involved, and the documents produced in the various stages of law making by means of legislation. Secondly, the essay analyzes the role and influence of legal scholarship in the process of law making by means of legislation. And, thirdly, it reflects on the fact that the application of a statute normally involves two stages. A statute is a text that has been formulated at a specific time by specific persons and in response to, or in contemplation of, specific problems or challenges. It needs to be understood against that background and in that context. This implies a historical approach. Such understanding provides a reliable basis for a critical reflection of that text from today’s perspective, and in view of the challenges and problems with which the modern lawyer is faced.

- *Jörg Schmid*, **The Process of Law Making in Switzerland,** pp. 329-345(17)

This paper explores the importance of the law-making process from the Swiss perspective. After explaining the term “preparatory works” (*Gesetzesmaterialien*, “legislative materials”, i.e. materials which document the process of the formation of a new act or section) and distinguishing different types thereof, the article presents the formative players in Swiss legislation. In Switzerland, these are the Federal Council (government) and the Federal Assembly (parliament). The Federal Council submits bills to the Federal Assembly which are explained in the Federal Council’s Dispatch (*Botschaft des Bundesrates*). The Federal Assembly (with its two chambers: the National Council and the Council of States) is the formal legislative power on the federal level. The Federal Council’s drafts and explanations are debated by the Federal Assembly and are often explicitly or implicitly approved. In other cases the texts are modified and the Federal Assembly creates its own rationale. As an exception, a statutory rule does not derive from parliament, but from a majority of the

electorate and the cantons (approved popular initiative). As there are no law commissions in Switzerland, it is academic opinion and jurisprudence which indicate the need for legal reforms.The article furthermore explores the meaning of the law-making process for the interpretation and gap-filling of statutes. Firstly, the author explains how Swiss law is interpreted in general. Secondly, he examines how the Federal Supreme Court applies a purposive approach particularly when interpreting recently enacted statutory law. However, the Federal Supreme Court employs the purposive approach in a rather "result-oriented" way (called "pluralism of methods"). Thirdly, the author argues that unpublished preparatory documents (i.e. preparatory works that are not open to the public) must not be taken into account for the interpretation of the law.

- *Guillaume Meunier,* ***Les travaux préparatoires*** **from a French Perspective: Looking for the Spirit of the Law,** pp. 346-360(15)

The French Constitutional Supreme Court attributes a constitutional value to the objective of making the law more accessible and more understandable, in order to facilitate its acceptance by the country's citizens. The European Court of Human Rights has also ruled that the law must be adequately accessible and that a norm cannot be regarded as "law" unless it is formulated with sufficient precision to enable citizens to regulate their conduct.Yet, it is admitted that when the letter of the law is obscure, ambiguous, or incomplete, denying the judge the power to search for the *ratio legis* may be considered to be a denial of justice. But where can we find the *ratio legis*, if not in the *travaux préparatoires*?

The identification of a theory of *travaux préparatoires* requires, first of all, a definition of that term. This, in turn, requires an overview of the legislative process, from the informal ministerial drafting phase to the formal phase involving the debates before the two chambers of Parliament. The true spirit of the law, i.e.the will of Parliament, can only, of course, be established by documents that are accessible to the public. The principle of secrecy overshadowing parts of the legislative process presents a considerable obstacle.

The merits of interpreting a statute by reference to its *travaux préparatoires* are disputed. A comprehensive investigation into the

legislative history of a statute, including its historical context, takes more time than busy practitioners often have. None the less, the *travaux préparatoires* have established themselves as an important interpretative tool when courts have to determine the conformity of a national statute with an international Treaty, or with the Constitution.

- *Jens M. Scherpe,* **The Process of Statute Making in England and Wales,** pp. 361-382(22)

  English statutory drafting has traditionally taken the position that the words "for the avoidance of doubt" should not appear in a statutory provision, because to do so implies that without it the words might generate doubt. This article addresses how the traditional approach to statutory drafting can and should continue in England. It first describes the "technical" side of the drafting of statutes in England, by looking in particular at the role of Parliamentary Counsel, bill teams and the Law Commission. Then it examines the interpretation of statutes and especially the roles that Parliamentary debates as recorded in Hansard, explanatory notes and Law Commission papers play in this. The article concludes that while the English system of legislative drafting might have been very effective in the past, this appears not to be the case anymore. The speed with which legislation needs to be drafted and the workload of the individuals involved means that this system in its current form might not be fit for the 21st century.

- *Hans-Heinrich Vogel,* **The Process of Law Making in Scandinavia,** pp. 383-414(32)

  In all Scandinavian Countries (in Denmark with the Faroe Islands and Greenland, in Finland with the Åland Islands, in Iceland, Norway, and Sweden) legislative materials are regarded as very important documents – so important that lawyers sometimes forget that the law primarily has to be identified by means of the enacted text of the statute and not the materials. Law-making procedures are streamlined and similar in all Scandinavian countries and so are the main documents emanating from them. The series of documents usually starts with a report of a government-appointed committee, which will be circulated for comment. Report and comment will be considered by the government, and a

government bill will be drafted, which after extensive internal checks and necessary adjustments will be sent to parliament. Members of parliament may propose changes, and their motions will be considered together with the bill by one of parliament's standing committees. The committee will report on the matter to the full house and submit its recommendations for a formal vote. Then, the house will debate the report and the recommendations and will finally vote on the recommendations as such – not on any reasons for or against the legislation. Both the debate and the vote will be recorded in minutes. And finally, parliament will notify the government of its decision. The government then will publish the adopted act in the Official Gazette.Nowadays almost all key documents (committee reports, hearing results, government bills, reports of parliamentary committees, minutes of parliamentary debates, and adopted acts) are highly standardized. All are published, with only very rare exceptions. Extensive publication on internet sites of both the government and parliament is the rule in all Scandinavian countries. Through these interlinked sites all key documents are easily available and accessible for everyone. Professional legal research has traditionally been made easy by footnotes or endnotes to published documents, now elaborate linkage systems across internet sites facilitate it even more. As a consequence, legislative materials have gained enormous importance even for everyday legal work. The methodological difficulties, which their use had caused earlier and which jurisprudence traditionally had to deal with, are more or less evaporating by means of the ease of use of *travaux préparatoires* in Scandinavia today. But the advice has to be honored that the law must be identified primarily by means of the enacted text.

- *Oliver Unger,* **The Process of Law Making as a Field for Comparative Research,** pp. 415-428(14)

Whereas legal literature considering the legislative process traditionally had more regard to formal parliamentary laws, the recent past has seen the emergence of a comprehensive and more contoured conception of treatises, taking into account the diverse forms that legal provisions assume in modern times (e.g. regulations, by-laws, administrative rules). The role to be played by comparative scholarship in this inquiry is still very much in its early stages of definition. Whereas studies can be found

for most European legal systems as regards the various stages of law making and the legislative materials created in this process, comparative analyses that go beyond providing merely a descriptive overview are relatively rare. Such efforts are generally limited to isolated proposals for the reform of a given legal system, aiming at the drafting of "better" laws.Thus, the topics explored at the symposium "The Development of Legal Rules in Comparative Perspective" ("Die Entstehung von Gesetzen in rechts vergleichender Perspektive"), held on 29 June 2013 at the Max Planck Institute in Hamburg, posed distinct challenges for the comparative scholars in attendance. The present paper makes a first attempt at addressing the matter in a systematic manner and should at the same time serve to summarize the conference findings and inspire further work. The article considers six different aspects of law-making which would appear to have particular relevance within a comparative framework: the role of governmental institutions, the role of interest groups and private stakeholders, the language of the law, the relevance of legislative materials, the role of academia and the importance of comparative research.

Bamberski's Trial to Start this Week

The trial of André Bamberski will be held in Mulhouse on Thursday and Friday (French style: no need to spend several months on that).

Mr Bamberski is accused of ordering the kidnapping of Dr Dieter Krombach in Germany for delivering him to French authorities so that he could be tried, again, for the murder of Kalinka Bamberski in 1982.

A German court confirmed the decision of German prosecutors not to prosecute Dr Krombach in 1987. He was then sentenced in abstentia by a French court to

15 years of prison in 1995. As he could not be represented by a lawyer under the French criminal procedure of the time, he could successfully sue France before the European Court of Human Rights, and get the Court of Justice of the European Communities to agree that the civil ruling of the French criminal court should be denied recognition in Germany on that ground.

Bamberski did not give up on the idea of seeing Krombach in jail and had him eventually kidnapped in Germany in 2009, and delivered to French authorities. Germany protested, but Krombach was tried again, and sentenced, again, to 15 years.

Appeal to the French Supreme Court

Dr Krombach's last appeal to the French *Cour de cassation* was dismissed on 2 April 2014.

But, wait, how could a French court tolerate that criminals be delivered by kidnappers in the middle of the night? That´s all right, the Court ruled, as long as Krombach could get legal representation and the kidnappers were not French (special) officials. Real bad guys only please!

That was an easy one. Harder now: what about mutual trust? Answer: no mutual trust unless you are really obliged to trust the legal system of other Member states, and, well, there is such obligation only when a special provision of European law mandates so. Article 82 of the Treaty on the Functioning of the EU is not enough for this purpose.

Dr Krombach´s lawyer announced his intention to bring the matter before the Court of Justice of the European Union, because "le juge français dicte sa loi à l'Europe". But it seems he had only requested a referrence to the CJUE before the lower court, which rejected it.

And Now

Mr Bamberski´s own trial will now take place. Bamberski has already said that he has no regrets.

A movie on the life of Bamberski seems to be in the making, with Daniel Auteuil in the lead role.

UPDATE: Bamberski got a one year suspended sentence.

ELI UNIDROIT Launch Pilot Studies in Civil Procedure Project

The European Law Institute has announced that its joint project with UNIDROIT on civil procedure will move on as follows.

Background

In 2004, the ALI (American Law Institute) and UNIDROIT adopted and jointly publishedPrinciples of Transnational Civil Procedure. The aim of the work was to reduce uncertainty for parties litigating in unfamiliar surroundings and promote fairness in judicial proceedings through the development of a model universal civil procedural code. The Principles, developed from a universal perspective, were accompanied by a set of Rules of Transnational Civil Procedure, which were not formally adopted by either UNIDROIT or the ALI, but constituted the Reporters' model implementation of the Principles, providing greater detail and illustrating how they might be developed. The Rules were to be considered either for adoption or for further adaptation in various legal systems, and along with the Principles can be considered as a 'model for reform in domestic legislation'.

ELI-UNIDROIT cooperation

ELI and UNIDROIT cooperation aims at adapting the ALI-UNIDROIT Principles from a European perspective in order to develop European Rules of Civil Procedure. This work will take as its starting point the 2004 Principles and aim to develop them in the light of: i) the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union; ii) the wider acquis of binding EU law; iii) the common traditions in the European countries; iv) the Storme Commission's work; and v) other pertinent European sources.

At the first stage of the project, three working groups consisting of academics,

judges and practitioners will be established. These working groups should conduct pilot studies to test the viability of the methodological approach and overall project design, whilst the ultimate outcome remains to cover, as a minimum, the full range of issues addressed in the 2004 ALI-UNIDROIT Principles.

The pilot projects will cover the following topics:

i. Service and due notice of proceedings
ii. Provisional and protective measures
iii. Access to information and evidence

On 28 February 2014 the ELI Council appointed the following persons as co-reporters for the above mentioned topics: Neil Andrews, Gilles Cuniberti, Fernando Gascon Inchausti, Astrid Stadler and Eva Storskrubb.

Issue 2014.1 Nederlands Internationaal Privaatrecht

The first issue of 2014 of the Dutch journal on Private International Law *Nederlands Internationaal Privaatrecht* includes an analysis of the Brussels I Recast and the influence on Dutch legal practice, an article on Child abduction and the ECHR, and two case notes; one on the Impacto Azul case and one on the Povse case.

- Marek Zilinsky, 'De herschikte EEX-Verordening: een overzicht en de gevolgen voor de Nederlandse rechtspraktijk', p. 3-11. The English abstract reads:

> *From 10 January 2015 onwards the Brussels I Recast (Regulation No. 1215/2012) shall apply. Under the new regulation which replaces the Brussels I Regulation (Regulation No. 44/2001), the exequatur is abolished and some changes are also made to provisions on jurisdiction and lis pendens. This article gives an overview of the changes effected by the Brussels I Recast compared to the proposed changes in the Proposal for a new Brussels I Regulation (COM(2010) 748 final). The consequences of the new regulation for Dutch*

practice are also dealt with briefly.

- Paul Vlaardingerbroek, 'Internationale kinderontvoering en het EHRM', p. 12-19. The English abstract reads:

With the Neulinger/Shuruk decision in 2009, the European Court of Human Rights caused a great deal of misunderstanding and confusion among judges and academics, because in this case the ECHR seemed to protect the abductors of children and to allow them to benefit from their misconduct. After the Neulinger case some further ECHR decisions followed that seemed to compete with the fundamental purposes of the Hague Convention on child abduction, but in this paper I will try to show that in more recent cases the European Court has mitigated the hard consequences of the Neulinger/Shuruk decision and has given a new direction in how to proceed and decide when the two conventions seem to compete.

- Stephan Rammeloo, 'Multinationaal concern – Aansprakelijkheid van moedervennootschap voor schulden van dochtervennootschap: nationaal IPR ('*scope rule*') getoetst aan Europees recht (artikel 49 VWEU)', p. 20-26. Case notes European Court of Justice 20-06-2013, Case C-186/12 (*Impacto Azul*), The English abstract reads:

In June 2013 the CJEU delivered a preliminary ruling under Article 49 TfEU with regard to the exclusion, under national law, of an EU Member State from the joint and several liability of parent companies vis-à-vis the creditors of their subsidiaries in a crossborder context. Article 49 TfEU does not prohibit any such exclusion resulting from a self-restricting unilateral scope rule under the national Private International Law of an individual EU Member State. The interpretative ruling of the Court does not, however, affect cross-border parental liability for company group members under Private International Law having regard to contractual or non-contractual (cf. tort, insolvency) liability.

- Monique Hazelhorst, 'The ECtHR's decision in *Povse*: guidance for the future of the abolition of exequatur for civil judgments in the European Union', p. 27-33. Case notes European Court of Human Rights 18 June 2013, decision on admissibility, Appl. no. 3890/11 (*Povse* v. *Austria*). The abstract reads:

The European Court of Human Rights' decision on admissibility in Povse is worthy of analysis because it sheds light on the preconditions for the abolition of exequatur for judgments in civil matters within the European Union. The abolition of this control mechanism is intended to facilitate the free movement of judgments among Member States on the basis of the principle of mutual recognition. Concerns have however been expressed about the consequences this development may have for the protection of fundamental rights. The Human Rights Court's Povse decision provides welcome guidance on the limits imposed by the European Convention on Human Rights on the abolition of exequatur. This case note analyses the preconditions that may be inferred

from the decision. It concludes that the Human Rights Court's approach leaves a gap in the protection of fundamental rights which the accession of the EU to the Convention intends to fill.

Conflict of Laws in Israel and Palestinian Territories

Michael Karayanni (Hebrew University of Jerusalem) will shortly publish Conflicts in a Conflict – A Conflict of Laws Case Study on Israel and the Palestinian Territories.

> ***Conflicts in a Conflict*** *outlines and analyzes the legal doctrines instructing the Israeli courts in private and civil disputes involving the Occupied Palestinian Territories of the West Bank and the Gaza Strip, since 1967 until the present day. In doing so, author, Michael Karayanni sheds light on a whole sphere of legal designs and norms that have not received any thorough scholarly attention, as most of the writings thus far have been on issues pertaining to international law, human rights, history, and politics. For the most part, Israeli courts turned to conflict of laws, or private international law to address private disputes implicating the Palestinian Territories. After making a thorough investigation into the jurisdictional designs of the West Bank and the Gaza Strip, both before and after the Oslo Peace Accords,* ***Conflicts in a Conflict*** *comes to focus on traditional topics such as adjudicative jurisdiction, choice of law, and recognitions and enforcement of judgments. Related issues such as the foreign sovereign immunity claim of the Palestinian Authority before Israeli courts as well as the extent to which Palestinian plaintiffs were granted access to justice rights, are also outlined and analyzed.*
>
> *This book's compelling thesis is the existence of a close relationship between conflict of laws doctrines as they developed over the years and Israeli policies generally in respect of the Palestinian Territories. This study of the conflict of laws in a war setting and conflict of laws in a jurisdictionally ambiguous location, will greatly serve scholars and practitioners in similarly troubled and*

complex legal situations elsewhere.

First Issue of 2014's Journal of Private International Law

The first issue of the *Journal of Private International Law* for 2014 is out.

First Cornerstones of the EU Rules on Cross-Border Child Cases: The Jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation from C to Health Service Executive by *Anatol Dutta and Andrea Schulz*

> *Since the Brussels IIa Regulation became applicable for national courts in 2005, the Court of Justice of the European Union (CJEU) can be welcomed within the circle of the European family courts. The Court has so far dealt, in particular, with the part of Brussels IIa dedicated to child matters, in case C in 2007, in Rinau in 2008, in A and Deticek in 2009 and in Povse, Purrucker I, McB,Purrucker II, Aguirre Zarraga and Mercredi in 2010. In 2012, a judgment concerning the cross-border placement of children followed in the case of Health Service Executive (HSE). Some aspects of these decisions are reviewed in this paper but not so as to present a comprehensive analysis of the Regulation. Rather the article shall provide – as a kind of series of interconnected case notes – the interested reader with a first overview on a rather dynamic area of EU family law as reflected in the case-law of the Court.*

Reforming the European Insolvency Regulation: A Legal and Policy Perspective by G *McCormack*

> *This paper will critically evaluate the proposals for reform of the European Insolvency Regulation – regulation 1346/2000 – advanced by the European Commission. While criticised by some commentators as unsatisfactory, the Regulation – is widely understood to work in practice. The Commission proposals have been described as 'modest' and it is fair to say that they amount*

to a 'service' rather than a complete overhaul of the Regulation. The proposals will be considered under the following heads (1) General Philosophy; (2) Extension of the Regulation to cover pre-insolvency procedures; (3) Jurisdiction to open insolvency proceedings; (4) Co-ordination of main and secondary proceedings; (5) Groups of Companies; (6) Applicable law; (7) Publicity and improving the position of creditors. A final section concludes. The general message is that while there is much that is laudable in the Commission proposals, there is also much that has been missed out, particularly in the context of applicable law. The proposals reflect an approach that, in this particular area, progress is best achieved by a series of small steps rather than by a great leap forward. This is not necessarily an approach that is mirrored in other areas of European policy making.

Actio Pauliana – "*Actio Europensis*"? Some Cross-Border Insolvency Issues by *Tuula Linna*

Actio pauliana grants protection to the creditors against detrimental transactions and it is an important tool in the European insolvency system. When an actio pauliana is an ancillary action to collective insolvency proceedings it usually falls outside the scope of the Brussels I Regulation. The problem is that actio pauliana falls also outside the European Insolvency Regulation (EIR) if the insolvency proceedings to which it is related are not mentioned in Annex A of the EIR. These gaps are subjects to amendments in the Commission proposal for the EIR reform. When an actio pauliana falls within the scope of the EIR the lex concursus applies unless it is not possible to challenge the transaction according to the law which normally governs it. If this "veto" has succeeded the lex concursus is not applicable. In cross-border situations actio pauliana raises a number of complicated issues concerning jurisdiction, applicable law, recognition and enforceability.

Should the *Spiliada* Test Be Revised? by *Ardavan Arzandeh*

This article examines recent English authorities concerning the forum (non) conveniens doctrine. It seeks to demonstrate that, largely as a consequence of a disproportionately broad discretionary framework under its second limb, the doctrine's application has led to numerous problems. The article argues that, for both pragmatic and theoretical reasons, the status quo cannot be maintained. In this respect, its key contribution is to identify a doctrinal avenue

through which to limit (rather than completely discard) the court's discretion at the second stage. The article's basic thesis is that the court's discretion under the doctrine's second limb should be curtailed in line with the doctrinal framework underpinning the protection of a person's right to a fair trial under Article 6(1) of the European Convention on Human Rights (as defined in expulsion cases).

European Perspectives on International Commercial Arbitration by *Louise Hauberg Wilhelmsen*

During the revision of the Brussels I Regulation several issues pertaining to the interface between arbitration and the Regulation were discussed. Some of the issues were parallel proceedings and conflicting decisions between courts and between courts and arbitral tribunals and the lack of a uniform rule on the law applicable to the existence and validity of an arbitration agreement. This article examines these issues in order to find out whether they are only European or also inherent in the international regulation of international commercial arbitration. The article examines to which extent these issues have already been addressed in the international regulation. Moreover, the article analyses the issues from a European perspective by analysing the interface between the Brussels I Regulation and arbitration and by looking into the objectives of the EU judicial cooperation in civil matters. Finally, the article looks into what the future might hold for these two issues.

Enforcement of Foreign Judgments in Nigeria: Statutory Dualism and Disharmony of Laws by *Adewale Olawoyin*

The enforcement of a foreign judgment is the reward for often protracted and expensive transnational litigation. This post-judgment aspect of Private International Law is as important as the often-discussed pre-judgment considerations of choice of jurisdiction and choice of law. Regrettably, the position in Nigerian law on the enforcement of foreign judgments is far from coherent and certain. Indeed, it is in a lacunose and largely confused state. It is argued that a coherent and efficient legal regime for the enforcement of foreign judgments is a necessary adjunct to the heightened diverse global commercial relations of contemporary times between and amongst developing nations of Africa and between those African States and the international community at large. The extant state of affairs in Nigeria is the result of an admixture of a

historical legacy of antedated laws, inefficient law revision processes and an inherently weak law reform system. The article conducts an audit of Nigerian law (statute and case law) in this area and the central argument is that there is a pressing need for a holistic law reform starting with a paradigm shift from Private International Law orthodoxy regarding the conceptual predicate of reciprocity as the basis of the statutory regime for the enforcement of foreign judgments at common law.

Review Article: Human Rights and Private International Law: Regulating International Surrogacy by *ClaireFenton-Glynn.*

ECHR Rules on Enforcement of Judgments under Brussels I

On 25 February 2014, the European Court of Human Rights ruled in the case of *Avotinš v. Latvia* (application no. 17502/07) that the Brussels I Regulation imposes on Member States a duty to enforce judgments in civil and commercial matters, which triggers the Bosphorus presomption of compatibility of the actions of the enforcing state with the European Convention.

The judgment, which is only available in French, reveals a lack of knowledge of European private intenational law instruments by the members of the court.

The Court rules that the foundation of the Brussels I Regulation is mutual trust. That's of course correct. It then insists that under the Brussels I Regime, declarations of enforceability are granted almost automatically, after mere formal verification of documents. It thus concludes that under the Regulation, Member States are obliged to enforce foreign judgments, and should thus benefit as requested states from the Bosphorus presumption.

49. La Cour relève que, selon le préambule du Règlement de Bruxelles I, ce texte se fonde sur le principe de « confiance réciproque dans la justice » au sein de l'Union, ce qui implique que « la déclaration relative à la force exécutoire

d'une décision devrait être délivrée de manière quasi automatique, après un simple contrôle formel des documents fournis, sans qu'il soit possible pour la juridiction de soulever d'office un des motifs de non-exécution prévus par le présent règlement » (paragraphe 24 ci-dessus). À cet égard, la Cour rappelle que l'exécution par l'État de ses obligations juridiques découlant de son adhésion à l'Union européenne relève de l'intérêt général (Bosphorus Hava Yollar Turizm ve Ticaret Anonim irketi précité, §§ 150-151, et Michaud c. France, no 12323/11, § 100, CEDH 2012) ; le sénat de la Cour suprême lettonne se devait donc d'assurer la reconnaissance et l'exécution rapide et effective du jugement chypriote en Lettonie.

50. Devant les juridictions lettonnes, le requérant soutenait que la citation de comparaître devant le tribunal de district de Limassol et la demande de la société F.H.Ltd. ne lui avaient pas été correctement communiquées en temps utile, de sorte qu'il n'avait pas pu se défendre ; par conséquent, selon lui, la reconnaissance de ce jugement devait être refusée sur la base de l'article 34, point 2, du Règlement. Dans son arrêt du 31 janvier 2007, le sénat de la Cour suprême a écarté tous ses moyens – et, donc, l'application de l'article 34, point 2, du Règlement – en déclarant que, le requérant « n'ayant pas fait appel du jugement, les arguments de son avocat selon lesquels [il] ne se serait pas vu dûment notifier l'examen de l'affaire par un tribunal étranger, n'ont aucune importance ». Cela correspond en substance à l'interprétation donnée à la disposition susmentionnée par la Cour de justice des Communautés européennes dans l'arrêt Apostolides c. Orams, aux termes duquel « la reconnaissance ou l'exécution d'une décision prononcée par défaut ne peuvent pas être refusées au titre de l'article 34, point 2, du règlement no 44/2001 lorsque le défendeur a pu exercer un recours contre la décision rendue par défaut et que ce recours lui a permis de faire valoir que l'acte introductif d'instance ou l'acte équivalent ne lui avait pas été signifié ou notifié en temps utile et de telle manière qu'il puisse se défendre » (paragraphe 28 ci-dessus).

This is the part of the reasoning of the court which is plainly wrong. It fails to discuss the relevance of the public policy exception and the margin of appreciation that it offers to requested states to verify whether the state of origin respected fundamental rights.

PRESS RELEASE

The case concerned the enforcement in Latvia of a judgment delivered in Cyprus concerning the repayment of a debt. The applicant, an investment consultant who had borrowed money from a Cypriot company, complained that the Cypriot court had ordered him to repay his debt under a contract without summoning him properly and without guaranteeing his defence rights.

Like the Senate of the Latvian Supreme Court, the Court noted that the applicant should have appealed against the Cypriot court's judgment. It took the view that the Latvian authorities, which had correctly fulfilled the legal obligations arising from Latvia's status as a member State of the European Union, had sufficiently taken account of Mr Avotinš'

PRINCIPAL FACTS

The applicant, Peteris Avotinš, is a Latvian national who was born in 1954 and lives in the district of Riga (Latvia).

On 4 May 1999 Mr Avotinš and F.H.Ltd., a commercial company registered in Cyprus, signed before a notary a formal acknowledgement of his obligation to repay a debt. Mr Avotinš declared that he had borrowed 100,000 United States dollars from F.H.Ltd. and undertook to repay that amount with interest before 30 June 1999. The document stated that it would be governed "in all respects" by the laws of Cyprus and that Cypriot courts would have jurisdiction to hear all disputes arising from it.

In 2003 F.H.Ltd. sued Mr Avotinš in the court of Limassol (Cyprus), declaring that he had not repaid his debt and seeking an order against him. On 24 May 2004, ruling in his absence, the Cypriot courts ordered Mr Avotinš to repay his debt together with interest and costs and expenses. According to the judgment, the applicant had been duly informed of the date of the hearing but had not appeared.

On 22 February 2005 F.H.Ltd applied to the court for the district of Latgale (Riga) seeking the recognition and enforcement of the Cypriot judgment of 24 May 2004. The company also called for an interim measure of protection.

On 27 February 2006 the Latvian court ordered the recognition and enforcement of the Cypriot judgment of 24 May 2004 and the registration of a charge against Mr Avotinš' property in the land register.

Mr Avotinš claimed that he had became aware, by chance, on 16 June 2006, of the existence of both the Cypriot judgment and the Latvian court's enforcement order. He did not attempt to challenge the Cypriot judgment before the Cypriot courts but appealed in the Regional Court of Riga against the Latvian enforcement order.

In a final judgment of 31 January 2007 the Senate of the Latvian Supreme Court upheld F.H. Ltd.'s claim, ordering the recognition and enforcement of the Cypriot judgment together with the registration of a charge against the applicant's property in the land register. On the basis of that judgment, the court of Latgale delivered a writ of execution and Mr Avotinš complied by repaying his debt. The registered charge on his property was lifted shortly afterwards.

The applicant complained that by enforcing the judgment of the Cypriot court, which in his view was clearly unlawful as it disregarded his defence rights, the Latvian courts had failed to comply with Article 6 § 1 (right to a fair hearing within a reasonable time).

The application was lodged with the European Court of Human Rights on 20 February 2007.

JUDGMENT

Article 6 § 1

The Court noted that the judgment on the merits had been delivered on 24 May 2004 by the Cypriot court and the Latvian courts had ordered its enforcement in Latvia. Having, by a partial decision on 30 March 2010, declared inadmissible the complaint against Cyprus as being out of time, the Court did not have jurisdiction to decide whether or not the court of Limassol (Cyprus) complied with the requirements of Article 6 § 1. It was nevertheless for the Court to decide whether, in ordering the enforcement of the Cypriot judgment, the Latvian judges complied with the provisions of Article 6 § 1 of the Convention.

The Court observed that the fulfilment by the State of the legal obligations arising from its membership in the European Union was a matter of general interest. The Senate of the Latvian Supreme Court had a duty to ensure the recognition and the rapid and effective enforcement of the Cypriot judgment in Latvia.

Mr Avotinš had argued before the Latvian courts that the summons to appear before the court of Limassol and the statement of claim by the company F.H.Ltd. had not been properly served on him in a timely manner, with the result that he had not been able to defend himself. Consequently, the Latvian courts should have refused the enforcement of the Cypriot judgment.

The Court observed that, in its final judgment of 31 January 2007, the Senate of the Latvian Supreme Court had declared that Mr Avotinš had not appealed against the Cypriot judgment. Mr Avotinš had indeed not sought to lodge any appeal against the Cypriot court's judgment of 24 May 2004. Mr Avotinš, an investment consultant who had borrowed money from a Cypriot company and had signed a recognition of debt governed by Cypriot law with a clause conferring jurisdiction on the Cypriot courts, had accepted his contractual liability of his own free will: he could have been expected to find out the legal consequences of any non-payment of his debt and the manner in which proceedings would be conducted before the Cypriot courts.

The Court took the view that Mr Avotinš had, as a result of his own actions, forfeited the possibility of pleading ignorance of Cypriot law. It was for him to produce evidence of the inexistence or ineffectiveness of a remedy before the Cypriot courts, but he had not done so either before the Senate of the Latvian Supreme Court or before the European Court of Human Rights.

Having regard to the interest of the Latvian courts in ensuring the fulfilment of the legal obligations arising from Latvia's status as a member State of the European Union, the Court found that the Senate of the Latvian Supreme Court had sufficiently taken account of Mr Avotinš' rights.

There had been no violation of Article 6 § 1 in the present case.