Form over Substance

There is a short note by Wendy Hopkins and Stephen Turner (Beachcroft LLP) in the new issue of the Solicitors Journal on the recent House of Lords ruling in *Harding v Wealands* (2006) UKHL 32; (2006) 3 WLR 83 (HL) [see this post for the judgment].

The article focuses on whether the relevant provisions of the New South Wales Motor Accidents Compensation Act 1999 were procedural and should be excluded when determining the quantification of damages for personal injury.

Ref: *Solicitors Journal S.J. (2006) Vol.150 No.32 Page 1071*.

German Publication: The Consumer Contract in Private International Law and International Civil Procedure Law

A new thesis concerning consumer contracts has been published in Germany in June 2006: *Kathrin Sachse, Der Verbrauchervertrag im Internationalen Privat- und Prozessrecht.* In this thesis, structure and limits of the international consumer contract are analysed against the background of European law and comparative law. On the basis of the different approaches to define the term "consumer", a proposal for a uniform concept of "international consumer contract" is developed.

More information can be found on the publisher´s website.

German Articles on International Adoption Law

The German legal journal "Das Jugendamt" (The Youth Welfare Office) attends in its new volume 8 (2006) in particular to international adoption law. It contains articles concerning this topic as well as judicial decisions, which focus on problems concerning the recognition of foreign adoptions, such as the question whether German public policy is violated if the interests of the child have not taken into account sufficiently.

Contents (concerning international adoption law):

1. *Jörg **Reinhardt**, Die Praxis der Anerkennung ausländischer Adoptionsentscheidungen aus Sicht der Adoptionsvermittlung* (The recognition of foreign adoptions from the perspective of adoption agencies), p. 325
    - *Jörg Reinhardt* describes in this article the recognition of foreign adoptions from the point-of-view of adoption agencies.
2. *Mathias **Beyer**, Zur Frage der ordre public-Widrigkeit ausländischer Adoptionsentscheidungen wegen unzureichender Elterneignungs- und Kindeswohlprüfung* (On the violation of German public policy by foreign adoptions due to an insufficient examination of the adoptive parents´ qualifications and the child´s interests), p. 329
    - *Mathias Beyer* annotates in his article two decisions of German local courts which concerned the question whether German public policy is violated if no sufficient examination of the future adoptive parents´ suitability and the interests of the child has taken place.
3. *Wolfgang **Weitzel**, Anerkennung einer Auslandsadoption nach deutschem Recht trotz schwerwiegender Mängel der ausländischen Entscheidung?* (Recognition of a foreign adoption according to German law despite serious legal flaws of the foreign decision?), p. 333

- *Wolfgang Weitzel* discusses in his article a decision of the *Amtsgericht* (Local Court) *Hamm* (see below) which concerns the question whether a foreign adoption can be recognized in Germany even if the adoption was flawed.

4. ***KG Berlin,*** *4 April 2006 – 1 W 369/05, p. 356*

   - In this decision the court ruled that an adoption which has been carried out without taking the interests of the child into account violates German public policy and can therefore not be recognized.

5. ***LG Dresden****, 26 January 2006 – 2 T 1208/04, p. 360*

   - In this decision the court ruled that the relevant point in time for assessing whether the recognition of the foreign adoption violates German public policy is when deciding about the recognition.

6. ***AG Hamm****, 3 February 2006 – XVI 41/05, p. 361*

   - The court ruled that a foreign adoption which has been carried out without an examination of the prospecitve adoptive parents´ qualification violates German public policy.

7. ***AG Hamm****, 17 April 2006 – XVI 44/05, p. 363*

   - The court ruled that a foreign adoption can be recognized even if it is legally flawed as long as it serves the interests of the child and is consistent with the essential principles of German law.

Publication: An Economic Analysis of Private International Law

An new book edited by *Jürgen Basedow* and *Toshiyuki Kono* with the cooperation of *Giesela Rühl* is being published in August 2006: An Economic Analysis of Private International Law. The book contains eleven contributions covering

different aspects of private international law which have been discussed at a German-Japanese Conference in 2005.

More information can be found on the publisher´s website.

Domestic Courts and Global Governance

Christopher Whytock (Duke University) has posted a very interesting article on SSRN, entitled Domestic Courts and Global Governance. Here's the abstract:

> *This paper proposes a concept of "transnational judicial governance" that draws attention to the important but widely neglected role of domestic courts in the governance of transnational relations, makes explicit the connections between private international law and global governance, and emphasizes the domestic legal and institutional foundations of transnational activity. Because legal scholars have done little positive theoretical or systematic empirical work on judicial decisionmaking in transnational disputes, and because international relations scholars – even those interested in global governance – generally have paid little attention to domestic courts, we have little knowledge about how domestic courts actually behave as global governors.*
>
> *This paper, and the broader project on domestic courts and global governance of which it is a part, seeks to help fill that gap. I first present the concept of transnational judicial governance, and clarify its relationship to the concepts of transgovernmental networks and the legalization of world politics. Second, taking an interdisciplinary approach, I situate the concept in relation to private international law scholarship, and international relations scholarship on global governance, international political economy, sovereignty, and the judicialization of politics. Third, I draw on the judicial decisionmaking literature to develop a positive theory of transnational judicial governance. I highlight a key dimension of variation in transnational judicial governance decisionmaking: assertion of domestic governance authority versus deference to foreign governance*

authority. Then, treating judges as boundedly rational actors, I argue that this variation can be largely explained by the heuristics used by judges to make their decisions. Fourth, I explain the overall research design for the project. I conclude by discussing the broader implications of transnational judicial governance and identifying some of the important empirical and normative questions raised by the role of domestic courts in global governance that can guide future research. Public international law scholars and international relations scholars are increasingly collaborating. This paper is the first in a series of papers aimed at bringing together private international law and international relations, two disciplines which have for the most part remained separate, but which have the potential for substantial mutual gains.

Comment: The article does not deal with private international *law* in substantive detail (i.e. it simply provides definitions of phrases such as "choice of forum", "recognition and enforcement", and so on), but that is arguably not within its scope. Regardless, it is certainly a fascinating insight into the potential connections between the conflict of laws and the political sciences.

German Court refuses Recognition of Same-Sex Marriages

(*VG Karlsruhe, judgment of 9 September 2004 – 2 K 1420/03; (2006) 3 IPRax, 284*)

The *VG Karlsruhe* (Administrative Court) decided in this judgment that a non-resident of the EU who has contracted a same-sex marriage with an EU resident is not a spouse in terms of Art.10 (1) lit. a Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. Therefore the permit of residence was not granted for the length it has been applied for. The court refers in its explanations *inter alia* to a decision of the ECJ from 2001 (joined cases C-122/99 P and C-125/99 P), where the ECJ states that the term “marriage” characterizes – according to the definitions

applying in the Member States – only a partnership of two persons of different sexes. Since then, only two Member States had changed their definition of "marriage" and included also partnerships between couples of the same sex, namely Belgium and the Netherlands (remark: after the judgment had been passed, Spain also began to allow same-sex marriages in July 2005). The court argues now that a different interpretation of the term "spouse" was only justified if there had been already a social change in the whole EU – and not only in a few Member States. According to the *VG,* same-sex marriages can only be recognized if the State of recognition treats them as equivalent to traditional marriages. Since this is not the case in Germany (as only a registered partnership is possible between partners of the same sex), a recognition was not possible.

This decision has been discussed affirmative by *Röthel* (2006) 3 *IPRax*, 250, who argues that there is no obligation of the Member States to recognize the personal status of a person which has been obtained in another Member State which can be derived from the fundamental freedoms.

Comment: Another decision of interest in this context is one from the Tribunal administratif du Grand-Duché de Luxembourg of 3 October 2005 (N° 19509). Here the court held – in contrast to the German court – that a same-sex marriage which has been concluded in Belgium between a Belgian and a Madagascarian has to be recognized in Luxembourg according to Art.8 of the European Convention on Human Rights – despite the fact that same-sex marriages are unknown to Luxembourgian law.

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25 years IPRax – Conference in Regensburg

To celebrate the 25th anniversary of the German legal journal "IPRax" (*Praxis des Internationalen Privat- und Verfahrensrechts*), a conference took place in Regensburg from 20th to 21st January 2006, where current questions of private international law and international civil procedure law were discussed.

A talk was given by *Prof. Dr. W.-H. Roth, (*Bonn*)* who addressed *inter alia* the question whether primary EU law contains conflict of law rules and whether the principle of mutual recognition can be deduced from the fundamental freedoms. Further he attended – as *Prof. Dr. D. Coester-Waltjen* did- to the question whether the principle of mutual recognition might be regarded as a corrective of private international law rules.

Prof. Dr. B. Hess (Heidelberg) attended to European civil procedure law and in particular to the methods of interpretation used by the ECJ. He stressed the significance of autonomous interpretation which can be regarded as the most important method of interpretation. While the importance of the comparative interpretation was decreasing, the relevance of a systematical – teleological interpretation was increasing. Further, he favoured a resumption of the ratification process concerning the European Constitution. He argued the entry into force of the Charter for Fundamental Rights would strengthen a constitutional interpretation.

Prof. Dr. S. Leible (Bayreuth) analysed in his speech the relationship between European private international law and European civil procedure rules using the example of the proposal for Rome I and Regulation 44/01/EC with regard to cross-border consumer contracts. He concluded that Rome I will create a very welcome synchronism between jurisdiction and applicable law concerning international consumer contracts.

Prof. Dr. G. Wagner (Bonn) talked about the future Rome II Regulation and drew on the one hand a comparison between the two proposals for a Rome II Regulation (Commission´s proposal and the Parliament´s proposal) and on the other hand a comparison between these proposals and autonomous German law.

And finally *Prof. Dr. D. Coester-Waltjen (*Munich) addressed in her speech the principle of mutual recognition – in particular in the context of family law. She discussed – after giving a definition of the term "principle of mutual recognition" – especially potential problems such as the question whether only official or also private acts could be recognized. Further, she attended to the embedding of the principle of mutual recognition in international conventions and asked whether the principle of mutual recognition can be derived from European primary or secondary law. Finally she gave guidelines how arising problems could be handled and classified the principle of mutual recognition within the context of

private international law methods.

The mentioned speeches as well as short summaries of the respective discussions (in German) can be found in (2006) 4 IPRax.

Recognition of a Surname and Validity

In (C-96/04) Standesamt Stadt Niebüll, the ECJ negated jurisdiction to answer the question referred by the Amtsgericht Niebüll in its reference for a preliminary ruling under Art.234 EC.
The background of the case was the following: A child of two German nationals was born in Denmark. The child received – according to Danish law – a double-barrelled name composed of his father´s and mother´s surnames, who did not use a common married name. After moving to Germany, German registry offices refused to recognize the surname of the child as it had been determined in Denmark, since according to German private international law (Art.10 EGBGB) the name of a person is subject to the law of his/her nationality, i.e. in this case German law. According to German law it is not possible for a child to bear a double-barrelled name consisting of the two surnames of his/her parents.

The *Standesamt* (registry office) brought the matter before the *Amtsgericht* (Local Court) *Niebüll*, which decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling under Art.234 EC: "In light of the prohibition on discrimination set out in Art.12 EC and having regard to the right to the freedom of movement for every citizen of the Union laid down by Art. 18 EC, is the provision on the conflict of laws contained in Article 10 of the EGBGB valid, in so far as it provides that the right to bear a name is governed by nationality alone?" To put it in different words, the question is whether the freedom of movement (Art.18 EC) guarantees the recognition of a surname which has been determined validly in another Member State. This question has been answered affirmative by Advocate General Jacobs in his opinion, but has now –

due to the lack of jurisdiction – been left open by the ECJ.

The case has to be read in the context of Konstantinidis (ECJ, 30 March 1993, C-168/91) and Avello (ECJ, 2 October 2003, C-148/02) and concerns the – highly discussed – principle of mutual recognition and is therefore of high interest.

Web-Sites, Establishment and Private International Law

Michael Bogdan (University of Lund) has published an article on *Web-Sites, Establishment and Private International Law* in the King's College Law Journal (Hart Publishing). The abstract reads as follows:

> *An interactive website can today fulfill many of the functions of a traditional place of business with physical premises and staff, as contracts can be both entered into and performed through it. This gives rise to the question whether a website can, under certain conditions, constitute an establishment or place of business for the purposes of jurisdiction and applicable law pursuant to the EC Regulation No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters and the 1980 Rome Convention on the Law Applicable to Contractual Obligations.*

Further information is available on Hart's KCLJ website.

PIL case comments in J.I.M.L

There are several analyses and comments of recent cases, involving private international law aspects of maritime law, in the latest issue of the *Journal of*

International Maritime Law (J.I.M.L.):

- **Article 17 Brussels Convention – third party right to exclusive jurisdiction clause**
  Andromeda Marine SA v OW Bunkers & Trading A/S
  [2006] EWHC 777 (Comm)
- **World freezing order – undertaking to English court – no enforcement in foreign jurisdiction without the permission of English court – exercising the discretion – guidelines**
  Dadourian Group International Inc and Others v Simm and Others
  [2006] 3 All ER 48 English Court of Appeal
- **Brussels Convention –jurisdiction – matters relating to insurance – art 6(2) – claim by an insurer for contribution from another – French or Spanish jurisdiction**
  Groupement D'Interet Economique Reunion Europeenne v Zurich Espana Socieite Pyreneenene De Transit D'Autombiles
  Case C-77/04, European Court of Justice

More information on subscribing to the journal can be found at its website.