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.

Publication: The American Choice-of-law Revolution

A new book by Symeon C. Symeonides, *The American Choice-of-Law Revolution: Past, Present and Future*, is being published on August 22nd. The publisher's summary of the book is as follows:

> *This book is an updated and expanded version of the General Course delivered by the author at the Hague Academy of International Law in 2002. The book chronicles and evaluates the intellectual movement known as "the revolution" in American private international law. This movement began in the 1960s, caught fire in the '70s, spread in the '80s and declared victory in the '90s, leading to the abandonment of the centuries-old choice-of-law system, at least for torts and contracts. This book:*
> *• explores the revolution's philosophical and methodological underpinnings;*
> *• provides the most comprehensive and systematic analysis of court decisions following the revolution;*
> *• identifies the revolution's successes and failures; and*
> *• proposes ways and means (including a new breed of "smart" choice-of-law rules) to turn the revolution's victory into success.*

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

Party Autonomy in the Private International Law of Contracts

Giesela Ruehl (Max Planck Institute for Comparative and Private International Law) has posted *Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency* on SSRN. Here's the abstract:

It is commonly acknowledged that during the 20th century American and European choice-of-law theory have drifted apart: in the United States the American conflicts revolution swept the traditional vested rights theory out of the courts and the classrooms and gave way to a variety of novel approaches. In Europe, in contrast, legal systems decided to adhere to the classical concept of choice of law invented by Carl Friedrich von Savigny. However, the 20th century has not only seen transatlantic divergence. Almost unnoticed, American and European choice of law theory has developed into the same direction in one area of law: contract law. Both the Restatement (Second) of Conflict of Laws, which today is the most widely followed conflicts regime for contracts in the United States, and the EC Convention on the Law Applicable to Contractual Obligations (Rome Convention), which establishes uniform conflicts rules for virtually all of Western Europe, provide for free party choice of law.

This article looks at principle of party autonomy in Europe and the United States in more detail. It demonstrates that the trend of convergence extends beyond basic conceptual similarities and that it reaches business reality through the jurisprudence of American and European courts. However, the article does not confine the discussion of party autonomy to a comparative analysis. It also determines the underlying reasons for the convergence of American and European law by looking at the field from an economic perspective. Two basic questions are adressed: first, what is the economic rationale for granting free party choice of law? Second, can limitations of the free party choice of law such as the infringement of public policy, the evasion of mandatory law or the lack of a substantial relationship with the chosen law be justified on economic grounds? In answering these questions the article ventures the hypothesis that the trend of convergence in choice of law can be explained with the help of economic theory.

Full citation: Ruehl, Giesela, "Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency" in CONFLICT OF LAWS IN A GLOBALIZED WORLD, Eckart Gottschalk, Ralf Michaels, Giesela Rühl & Jan von Hein, eds., Cambridge University Press

Methods and Approaches in Choice of Law: An Economic Perspective

Giesela Ruehl (Max Planck Institute for Comparative and Private International Law) has posted *Methods and Approaches in Choice of Law: An Economic Perspective* on the Social Science Research Network (SSRN). The abstract reads as follows:

After years of disregard, the law and economics movement has finally taken note of the field of choice of law. However, up until today most of the contributions have focused on specific topics – such as the applicable law in contracts, torts or product liability – and skipped the underlying fundamental issues that determine the general design of choice of law rules: (1) Should courts apply foreign law at all or should they always resort to their own law? (2) Should courts create multistate substantive law specifically designed for international transactions or should they apply the law of one of the states involved? (3) Should choice of law rules resort to the unilateral method and define the reach of forum law only or should they apply the multilateral method and determine the reach of both forum and foreign law? (4) Should courts search for material justice or rather for conflicts justice? (5) Should choice of law strive for legal certainty or rather for flexibility? This article provides a comparative overview as well as an economic analysis of the answers legal scholarship has provided to these questions over time and across countries. It argues that courts should (1) be open towards application of foreign law, (2) apply the law of one of the states involved (3) determine the reach of both foreign and forum law, (4) strive for conflicts justice, and (5) apply rules instead of standards.

Full citation: Ruehl, Giesela, "Methods and Approaches in Choice of Law: An Economic Perspective" *Berkeley Journal of International Law*, Vol. 24, 2006.

Maccaba v Lichtenstein, and an article

- *Maccaba v Lictenstein* [2006] EWHC 1901 (QB)

The court held that, for there to be an arbitration agreement, there had to be an agreement evidenced in writing between the two prospective parties to the arbitration. In the instant case, no such enforceable agreement as argued for by the applicant had been proved on the evidence placed before the court.

- D. Stringer, "Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction, and the Emerging Third Way" (2006) 44 *Columbia Journal of Transnational Law* 951-999.

WPP Holdings Italy v Marco Benatti

WPP HOLDINGS ITALY SRL (2) WPP 2005 LTD (3) BERKELEY SQUARE HOLDING BV v MARCO BENATTI (2006) [2006] EWHC 1641 (Comm)

It was held that the question of whether proceedings were correctly issued for the purposes of Council Regulation 44/2001 Art.30 had to be determined by the national law in which they were instituted. There was no doubt that the proceedings had been issued correctly according to English law and consequently the English court was the court first seised of the dispute between the parties.

Source: Lawtel