Surrogacy Agreements Violate French Public Policy

The French Supreme Court for private and criminal matters (*Cour de cassation*) has delivered yesterday three judgments which ruled that foreign surrogacy agreements violate French public policy.

In each of the three cases, the child or children were born in a state of the United States where the practice was lawful (MN twice, CA once). In a common press release, the *Cour de cassation* explained that it was faced with two issues: 1) did the American judgments violate public policy, and 2) if so, should they be nevertheless recognised as a consequence of rights of the French couple and of the children afforded by international conventions. All three judgments gave the same reasons:

1. The foreign (ie American) birth certificate could not be mentioned in the French civil status registry.
2. The reason why was that the foundation of the birth certificate was a foreign judgment which violated French public policy.
3. Under present French law ("*en l'état du droit positif*"), surrogacy agreements violate a fundamental principle of French law.
4. The fundamental principle of French law is the principle that civil status is inalienable. Pursuant to this principle, one may not derogate to the law of parenthood by contract (see Art. 16-7 and 16-9 of the Civil Code).
5. This outcome does not violate Article 8 of the European Convention of Human Rights, as the children have a father in any case (ie the biological father), a mother under the law of the relevant US state, and may live together with the French couple in France.
6. This outcome does not violate either Article 3-1 of the New York Convention on the Rights of the Child and the best interest of the child rule (no reason given for this statement)

We had already reported on one of the three cases, where the California judgment had first been recognised by the Paris Court of appeal. The *Cour de cassation* had then allowed an appeal against this decision on a procedural point. A second Court of appeal judgment followed, which held that the American judgment

violated French public policy. This new judgment of the *Cour de cassation* dismisses an appeal against this second jugdment of another division of the Paris Court of appeal.

Needless to say, the couple (picture) is not happy about this decision. They claim that the judgment ignores the best interest of the child. They challenge the fact that the children may live in France, as, it is argued, they would not be granted French citizenship in the absence of mention in the French civil status registry. The couple has already announced that they intend to initiate proceedings before the European Court of Human Rights.

Krombach v. Bamberski: Update (updated)

The second criminal trial of Dr. Dieter Krombach began on March 29th in Paris.

Readers will recall that the first trial took place in the absence of Dr. Krombach, and then led to the famous *Krombach* decision of the European Court of Human Rights. Readers will also recall that this second trial will take place because the father of the alleged victim of Dr. Krombach, Mr. Bamberski, had Krombach kidnapped in Germany and delivered to French authorities.

Counsel for Krombach argued that the kidnapping made the procedure illegal. They also requested that the matter be referred (again) to the European Court of Justice.

These arguments were rejected by the Paris court on March 30th. The trial will go on.

Gambazzi Looses in Milan

On 24 November 2010, the Milan Court of appeal found that the English judgments delivered in 1998 and 1999 in the *Gambazzi* case were not contrary to Italian public policy and could thus be declared enforceable in Italy.

We had reported earlier on this judicial saga which has occupied the dockets of a number of higher courts of the western world in the last decade.

Most readers will remember that the Milan court had first referred the case to Luxembourg. The European Court of Justice had asked the national court to verify the following:

> *42 With regard, first, to the disclosure order, it is for the national court to examine whether, and if so to what extent, Mr Gambazzi had the opportunity to be heard as to its subject-matter and scope, before it was made. It is also for it to examine what legal remedies were available to Mr. Gambazzi, after the disclosure order was made, in order to request its amendment or revocation. In that regard, it must be established whether he had the opportunity to raise all the factual and legal issues which, in his view, could support his application and whether those issues were examined as to the merits, in full accordance with the adversarial principle, or whether on the contrary, he was able to ask only limited questions.*
>
> *43 With regard to Mr Gambazzi's failure to comply with the disclosure order, it is for the national court to ascertain whether the reasons advanced by Mr Gambazzi, in particular the fact that disclosure of the information requested would have led him to infringe the principle of protection of legal confidentiality by which he is bound as a lawyer and therefore to commit a criminal offence, could have been raised in adversarial court proceedings.*
>
> *44 Concerning, second, the making of the unless order, the national court must examine whether Mr Gambazzi could avail himself of procedural guarantees which gave him a genuine possibility of challenging the adopted measure.*

> *45 Finally, with regard to the High Court judgments in which the High Court ruled on the applicants' claims as if the defendant was in default, it is for the national court to investigate the question whether the well-foundedness of those claims was examined, at that stage or at an earlier stage, and whether Mr Gambazzi had, at that stage or at an earlier stage, the possibility of expressing his opinion on that subject and a right of appeal.*

In a ten page long judgment, the Milan Court of appeal explained why the English proceedings were not manifestly unfair to Gambazzi. The essentials of the decision are the following.

Betting on Winning on Jurisdiction

Gambazzi was able to convince Swiss courts to deny recognition to the English judgments because the documents he needed to defend himself had been retained by an English firm with which he had an argument over the fees which had been charged (Pounds 1 million).

The Milan court found that Gambazzi had admitted that he had hoped to win on jurisdiction and had therefore dedicated all its resources to the jurisdictional challenge, that he eventually lost before the House of Lords. As a consequence, he had consciously decided not to invest anymore on defending on the merits, if only because by doing so, he was taking the risk of being told that he had submitted to English jurisdiction (and so he would indeed be told by the New York Court of Appeals later at the enforcement stage). The Milan court was not ready to rule that his rights to defend himself on the merits had been violated, since this was the result, the Milan Court ruled, of an informed decision to focus on jurisdiction.

Proportionality of the Sanction

The heart of the decision of the Italian court is that the sanction suffered by Gambazzi was proportionate. The judgement repeated several time that the lesson from the ECJ judgment was that Contempt of Court was not a violation of the right to a fair trial per se, but only if disproportionate with the goals pursued by the institution, namely proper adminsitration of justice.

The conclusion of the Milan court was that, although debarment from defending

was clearly severe, and unknown from Italian civil procedure, human rights are not absolute, proper administration of justice being a value which should also be considered. The issue was then whether such sanction was proportionate. The Court held that it was, for the following reasons: 1) Gambazzi had been repeatedly in default (the Court had also acknowledged, however, that Gambazzi had participated actively during the first stages of the English proceedings), 2) Gambazzi had no proper reason not to comply such as violating professional secrecy or foreign (i.e. Swiss) criminal law, and 3) Gambazzi knew about the sanction.

Many thanks to Remo Caponi for the tip-off

Book: From House of Lords to Supreme Court (including Article by Briggs)

Hart Publishing has recently published an edited collection entitled *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging*, edited by James Lee (University of Birmingham), celebrating the transition from the House of Lords to the new United Kingdom Supreme Court. The book includes an essay by Adrian Briggs, entitled 'The Development of Principle by a Final Court of Appeal in Matters of Private International (Common) Law'. Briggs analyses "what the Supreme Court might properly have contributed to the development of principle in private international law, and why it is improbable that it will get much chance to do so".

There are also essays by leading authorities on the House of Lords in its judicial capacity and by academics whose specialisms lie in particular fields of law, including tort, human rights, restitution and European law. Hon Michael Kirby contributes a chapter on appointments to final courts of appeal. Further details of the book, including a full table of contents, may be found here.

Kinsch on Choice of Law and the Prohibition of Discrimination

Patrick Kinsch, who is a visiting professor at the University of Luxembourg and the Secretary General of the European Group for Private International Law, has posted Choice of Law and the Prohibition of Discrimination under the European Convention on Human Rights on SSRN. The abstract reads:

> *This article deals with the relevance, or irrelevance, of the principle of non-discrimination to that part of private international law that deals with choice of law. Non-discrimination potentially goes to the very core of conflict of laws rules as they are traditionally conceived – that, at least, is the idea at the basis of several academic schools of thought. The empirical reality of case law (of the European Court of Human Rights, or the equally authoritative pronouncements of national courts on similar provisions in national constitutions) is to a large extent different. And it is possible to adopt a compromise solution: the general principle of equality before the law may be tolerant towards multilateral conflict rules, but the position will be different where specific rules of non-discrimination are at stake, or where the rules of private international law concerned have a substantive content.*

The paper is forthcoming in the *Nederlands Internationaal Privaatrecht*.

Latest Issue of "Praxis des

Internationalen Privat- und Verfahrensrechts" (1/2011)

Recently, the January/February issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

Here is the contents:

- ***Heinz-Peter Mansel/ Karsten Thorn/Rolf Wagner:*** "Europäisches Kollisionsrecht 2010: Verstärkte Zusammenarbeit als Motor der Vereinheitlichung?" – The English abstract reads as follows:

The article gives an overview on the developments in Brussels in the judicial cooperation in civil and commercial matters, covering a period from November 2009 until November 2010. It summarises current projects and new instruments that are currently making their way through the EU legislative process. It also refers to the laws enacted on a national level in Germany which were a consequence of the new European instruments. Furthermore, the article shows areas of law where the EU has made use of its external competence. The article discusses both important decisions and pending cases before the ECJ as well as important decisions from German courts touching the subject matter of the article. In particular, it critically analyses two decisions from the Court of Appeal of Munich and the Court of Appeal of Berlin. These two courts used the Grunkin Paul case as a starting point to develop their own kind of recognition principle based on art. 21 Treaty on the Functioning of the European Union, thereby, in the author's view, deciding legal questions that would have been better left to the ECJ to decide. In addition, the present article turns to the current projects of the Hague Conference as well.

- ***Theodor Schilling***: "Das Exequatur und die EMRK"- the English abstract reads as follows:

The article raises the question of the requirements the ECHR may pose for the enforcement of foreign judgments. It starts with discussing the human rights protection of creditor and debtor in enforcement proceedings within a single country. It goes on to consider that protection in foreign enforcement

proceedings with special emphasis on the role of the exequatur and of possible alternatives to it. The next item is the level of protection granted by human rights law in foreign enforcement proceedings, exemplified by the Stolzenberg-Gambazzi story and a judgment of the German Federal Court. Finally the discussion turns to the abolition of the exequatur by certain EU regulations. The overall result is that the demands of the ECHR concerning the protection of the debtor in foreign enforcement proceedings are not very high but that human rights law is rather accommodating to the more muscular approaches to enforcement.

- ***Matthias Lehmann/André Duczek***: "Zuständigkeit nach Art. 5 Nr. 1 lit. b EuGVVO – besondere Herausforderungen bei Dienstleistungsverträgen" – the English abstract reads as follows:

The subject of this article is the application of Article 5 (1) (b) of the Brussels I Regulation on service contracts. The authors criticise the recent ECJ judgment in Wood Floor Solutions Andreas Domberger GmbH v. Silva Trade SA, case No. C-19/09. They argue that the decision conflicts with the primary goals of the Brussels I Regulation, because (1) the competent court cannot be determined with certainty since the determination would depend on factual circumstances that may occur after the conclusion of the contract; (2) the court at the place where the main service is rendered is not necessarily close to the dispute between the parties; (3) the determination of the competent court would require a lot of futile time and effort; and (4) if no main service can be found, the service provider would be able to bring the claim at its domicile, contrary to the principle of actor sequitur forum rei. In light of these problems, the authors suggest a different approach: In their view, the court at the place of performance of the service that is the subject of litigation should have jurisdiction. Such interpretation would be in line with the goals of legal certainty and proximity and solve most of the problems that the ECJ judgment has produced. But it would create another difficulty since it allows the provider of services in multiple locations to bring its claim, e. g. for payment, virtually anywhere. This problem, the authors suggest, can be avoided through a contractual stipulation on the place of performance, which is explicitly allowed by Article 5 (1) (b) Brussels I Regulation.

- ***Jörg Pirrung:*** "Gewöhnlicher Aufenthalt des Kindes bei internationalem Wanderleben und Voraussetzungen für die Zulässigkeit einstweiliger Maßnahmen in Sorgerechtssachen nach der EuEheVO" – the English abstract reads as follows:

Judgment and Opinion in case A give rise to the hope that the ECJ will interpret the Brussels IIa regulation 2201/2003 in a way leading to success fthe Brussels I regulation 44/2001, the former Brussels Convention of 1968. In view of the entry into force of the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children for all EU States, envisaged for 2010 (or 2011), the application of regulation 2201/2003 by courts in the EU should be open-minded. In order to avoid, as far as possible, differences in the development of the law concerning international jurisdiction and recognition of decisions in custody cases in the EU on the one hand and in the relations to the contracting states of the Hague Convention on the other hand, the courts in the EU should try to apply the regulation in conformity with the understanding of the international treaty.

- ***David-Christoph Bittmann:*** "Das Verhältnis der EuVTVO zur EuGVVO" – the English abstract reads as follows:

Today European Civil Procedure Law offers creditors several ways of executing a title in another Member State. Beside the "traditional" way of applying for a declaration of enforceability in the second state – as foreseen by Regulation (EC) 44/2001 – the creditor can make use of some modern legal instruments, which provide simplified procedures for getting a European title enforceable in all Member States. To reach this aim the European legislator especially created the European Payment Order and a Small-Claim-Procedure. Some years before, as a first step towards an original European title, the European Enforcement Order for uncontested claims was established by Regulation (EC) 805/2004. With the rising number of such parallel-regulations concerning cross-border enforcement the question of how to delineate the scope of application of these instruments appeared. A special problem discussed in German literature and jurisprudence was, if it should be possible for a creditor to apply for a declaration of enforceability in the second state according to Regulation (EC) 44/2001 although he already holds a European Enforcement Order issued by

the court of the first state. The German Federal Supreme Court (BGH) denied this possibility by stating that the creditor does not have an interest in getting a declaration of enforceability when he can reach his aim of cross-border enforcement by making use of the European Enforcement Order. This article discusses the decision of the Federal Supreme Court.

- ***Hans-Patrick Schroeder:*** "Zur Reichweite des § 110 ZPO im grenzüberschreitenden Konzernverbund" – the English abstract reads as follows:

Under the preconditions of Sec. 110 et seq. German Code of Civil Procedure (Zivilprozessordnung, "ZPO"), a respondent in a civil action may request the court to order the claimant to provide security for costs. The statutory preconditions include that the claimant must have its seat or residence outside of the EU and that the claimant does not have any real property inside the EU which could enable the respondent to enforce a claim for reimbursement of costs. Starting with two recent decisions rendered by German courts, the article explores the scope of application of Sec. 110 et seq. ZPO in the context of international groups of companies. Its first conclusion is that a German company may not be ordered to provide security for costs under any circumstances. This applies even if it is the subsidiary of a holding company outside of the EU and was created only to bring a claim instead of the holding company in order to circumvent the duty to provide security for costs. Under such circumstances, however, the assignment of the rights claimed might be void if the German company is insufficiently funded and the intent to frustrate the respondent's potential claim for reimbursement of costs is evident. Its second conclusion is that having a subsidiary within the territory of the EU does not exempt a claimant seated outside the EU from the duty to provide security for costs since the respondent cannot enforce a claim for the reimbursement of costs against the subsidiary which is not a party to the dispute. This is the main difference between a legally independent subsidiary and a branch lacking legal independence. Only in the latter case are the assets located at the branch attributable to the claimant. Consequently, they may then enable the respondent to enforce its claim for reimbursement of costs within the territory of the EU.

- ***Nadjma Yassari***: "Die islamische Brautgabe im deutschen Kollisions- und Sachrecht" – the English abstract reads as follows:

This article critically reviews a judgement of the German Federal Supreme Court on the characterisation of the Islamic dower (mahr, s. ada¯q, mehriye) in German private international law. On 9 December 2009, the German Federal Supreme Court (BGH) concluded a long-lasting dispute by deciding that the mahr was to be characterised as an effect of the marriage under Art. 14 EGBGB. The court rejected all other norms of international family law including the characterisation of the mahr under the matrimonial property regime of Art. 15 EGBGB. It mainly held that the mahr did not constitute, amend or replace a matrimonial property regime and that the unchangeable nature of the connection of the matrimonial property regime under Art. 15 EGBGB (Unwandelbarkeit) was too static to accommodate the changes in the lives of people who had immigrated to Germany, acquired German nationality and left behind any relation to the law of their former nationality. This view is contested. Rather it is argued that Art. 15 EGBGB provides for a better characterisation of the mahr. Firstly, the mahr is an important instrument of property transfer in marriage. Secondly, linking the mahr to the matrimonial property regime in terms of characterisation will ensure that both the mahr and the financial equalization of the spouses' property upon divorce are governed by the same law, thus leading to more equitable results. The judgement of the BGH will lead to an increase of cases in which the mahr will fall under German law. Unfortunately, however, the court provides only for little guidance as to the accommodation of the mahr in German national family law. It declares the agreement on the mahr to be valid, but fails to give details on its relation to the native claims awarded under German law, i.e. post-marital maintenance and the equalisation of the matrimonial accrue. Finally, one also misses conclusive hints on the formal requirement for the validity of the mahr agreement under German law.

- ***Dieter Henrich*** on a decision of the Higher Regional Court Stuttgart on the voidability of marriage: "Rechtsprechungsübersicht zu OLG Stuttgart, Beschluss v. 30.8.2010 – 17 UF 195/10"
- ***Peter Mankowski***: "Zur Abgrenzung des Individual- vom Kollektivarbeitsrecht im europäischen internationalen Zivilverfahrensrecht" – the English abstract reads as follows:

Arts. 18–21 Brussels I Regulation establish a protective regime for labour suits. But this covers only individual law suits by individual employees or employers. It does not encompass actions by trade unions, employer's organisations, works councils or other institutional bodies. Yet the borderline between the two areas can be a slippery slope and can require quite some thought on which side of the line a case falls if for instance a local Works Councils sues substantially on an individual employee's behalf. Formal characterisation of the plaintiff body and concrete mode of claims pursued have to be reconciled.

- ***Oriola Uka/Michael Wietzorek***: "Anerkennung einer deutschen Ehescheidung durch das Appellationsgericht Tirana" – the English abstract reads as follows:

So far, it was disputed whether there is factual reciprocity as required by § 328 Sec. 1 Nr. 5 German Civil Procedure Code and § 109 Sec. 4 Family Procedure Law with regards to Albania, partially due to the circumstance that German literature was unaware of any decision of an Albanian court that recognised a German decision. Based on the decision of the Court of Appeals of Tirana dated 12 April 2010, which recognised a decision of the First Instance Court of Nuremberg regarding a divorce, and on the autonomous Albanian regulations regarding the recognition and enforcement of foreign court decisions, the present essay argues that German courts should assume that Albanian courts are generally willing and ready to recognise German decisions in Albania.

- ***Erik Jayme*** on the conference of the European Group for Private International Law in Copenhagen: "Tagung der Europäischen Gruppe für Internationales Privatrecht (GEDIP) in Kopenhagen"

Job offer in Brussels – lawyer

experienced in Private International Law of the Family required

ADDE (Association pour le Droit des Étrangers), is an association for permanent education which promotes the rights of foreigners through the respect of the principles of equality, non discrimination and human rights.

ADDE recruits a lawyer to support its “Point d’Appui DIP familial” under a contract of full-time job for 8 months, possibly renewable, from 1 March 2011.

Functions:

– Provide legal advice in family private international law, and keep and monitor the records;
– Write analyses and studies;
– Organize training and animations;
– Strengthen the network of legal support.

Profile:

– Master / Bachelor of Law;
– Professional experience in the field of international private law concerning the family;
– Ability to work as a team and to energize a network;
– Excellent verbal and written communication skills;
– Proficiency in computer skills;
– Knowledge of Dutch would be considered an advantage.

CV and a letter explaining motivation must be addressed to Isabelle Doyen, Association pour le droit des étrangers asbl, rue du Boulet, 22-1000 Brussels. Deadline: 1 February 2011.

Journal of Private International Law Conference 2011 (Milan) – Programme and Registration

The editors of J.Priv.Int.L are very pleased to announce that the **4th Journal of Private International Law Conference will take place in the University of Milan from Thursday 14th April 2011 at 2pm until Saturday 16th April at 5pm**. Over 50 early career papers are expected in parallel sessions on Thursday afternoon and Friday morning and 24 papers from experienced academics on Friday afternoon and Saturday.

- The fees for the conference are:

1. full price: 100 euros;
2. academics: 50 euros
3. students (undergraduate and postgraduate) and speakers: free

- The price for the dinner on Friday evening is 60 euros
- The price range for University accommodation per night is between 45-100 euros
- The price range for hotel accommodation per night is between 125-220 euros.

Accommodation has been reserved until the end of February 2011 and will be allocated on a first come first service basis. For registration to the conference and for further details, as well as to book any University accommodation, please contact Dr Giuseppe Serranò and Paola Carminati at jpil_2011@unimi.it. For any other accommodation, please directly contact the hotel at issue, quoting the participation in the *JPIL 2011 conference*.

Programme

Thursday 14 April 2011: 14.00-15.45

Group 1 – Treatment of Foreign Law, Preliminary Questions, PIL Treaties

- C. Azcárraga Monzonís, The urgent need of harmonization of the application of foreign laws by national authorities in Europe
- A. Gardella, Foreign law in member States' courts and its relationship with European Union law
- S. Gössl, The Preliminary Question in European Private International Law
- S. Grossi, An international convention on conflict of laws: the path to Utopia?
- T. Kyselovská, Bilateral (Multilateral) Treaties on Legal Aid as Sources of Law in the European Judicial Area

Group 2 – Jurisdiction in civil and commercial cases

- A. Arzandeh, Twenty five years of Spiliada
- U. Grusic, Jurisdiction in complex contracts under the Brussels I Regulation
- J. Kramberger Škerl, A. Jurisdiction over third party proceedings: articles 6/2 and 65 of the Brussels I Regulation and the countries in-between
- U. Maunsbach, New Technology, new problems and new solutions – Private International Law and the Internet Revisited

Group 3 – Family law – Adults

- J. Borg-Barthet, Family Law in Europe: Should Civil Rights be Divorced from Questions of Sovereignty?
- M. Harding, The public effect of marriage and the un-oustable jurisdiction of the English Matrimonial Courts over the financial consequences of marriage
- M. Melcher, An EU Regulation on the law applicable to registered relationships
- A. Sapota, What happened with Regulation Rome III? Seeking the way for unifying the rules on applicable law in divorce matters.
- S. Shakargy, Local Marriage in a Globalized World: Choice of Law in Marriage and Divorce

16.15-18.00

Group 4 – General PIL

- V. Macokina A new bill of Polish private international law – double edged

sword?
- C. Staath, Human Rights Protection in Private International Law: the role of access to justice
- E. Tornese, Mandatory rules within the European legal system
- T. Kozlowski, Ever Growing Borders in the Ever Closer Union of the EU

Group 5 – Choice of Law in Contract

- A. Dyson, Interpreting Article 4(3) of the Rome I Regulation: Something Old, Something Borrowed or Something New?
- M. Erkan, Examining the Overriding Mandatory Rules under the Rome I Regulation and the Turkish Private International Law Perspective
- E. Lein, The Optional Instrument for European Contract Law and the Conflict of Laws
- W. Long, Mandatory Rules in Cross-Border Contracts: Is China Looking Towards the EU?

Group 6 – Recognition and enforcement of judgments

- P. Mariani, The free movement of judgements in the European Union and the CMR
- C. Nagy, Recognition and enforcement of US judgments involving punitive damages in Europe
- W. Zhang, A Comparative Research on the Exequatur Procedure within the EU and China
- G.B. Özçelik, Application of the Brussels I Regulation and property disputes in Cyprus: reflections on the Orams case

Friday 15 April 2011: 09.00-10.30

Group 7 – Choice of Law in Tort/Delict

- J. Papettas, Rome II, Intra-Community Cross Border Traffic Accidents and the Motor Insurance Directives
- D. Krivokapic, Potential impact on the US Speech Act: Influence of the Speech Act on Ongoing PIL Debate within EU and Third Countries
- J.J. Kuipers, Towards a European approach in cross-border infringement of personality rights
- T. Thiede, The protection of personality rights against supra-national

invasions by mass-media

Group 8 – Family Law – children

- P. Jimenez Blanco, The Charter of fundamental rights of the European Union and international child abduction
- I. Kucina, K. Trimmings, P. Beaumont, Loopholes in the Brussels IIbis Child Abduction Regime
- A. Muñoz Fernández, Recognition of guardianships that were established abroad and preventive powers of attorney granted abroad
- F. S. ?ahin, S. Ünver, Affiliation in surrogate motherhood in private international law perspective
  M. Wells-Greco, Cross-border surrogacy and nationality: achieving full parent status

Group 9 – Competition Law and Intellectual Property

- M. Danov, Cross-border EU competition law actions: should private international law be relied upon by the EU legislator in the European context?
- P. Dolniak, The rule in Article 6 of the Rome II Regulation as a „clarification" of general rule specified in Article 4
- S. Neumann, The infringement of intellectual property rights in European private international law – meeting the requirements of territoriality and private international law
- B. Ubertazzi, Intellectual Property Rights, Exclusive (Subject-Matter) Jurisdiction and Public International Law
- N. Zhao, China's Choice-of-law Rules in International Copyright and Related Right Disputes

11.00 – 12.30

Group 10 – Trusts and insolvency

- N. Zitkevits, Recognition of trusts in the European Union countries
- R. Yatsunami, The Choice of Law Rules on Trust in Japan
- Z. Crespi Reghizzi, Jurisdiction, recognition of judgments and law applicable to reservation of title in insolvency proceedings
  A. Leandro, EU cross-border insolvency: a free zone for the anti suit

injunctions?

Group 11 – Choice of Court and Arbitration

- V. Salveta, The Enforceability of Exclusive Choice-of-Court Agreements
- L. Manigrassi, Arbitration Exception and Brussels I -Time for Change? An appraisal in light of the review of the Brussels I Regulation
- N. Zambrana Tévar, A new approach to applicable law in investment arbitration
  B. Yüksel, The relevance of the Rome I regulation to international commercial arbitration in the European Union

Group 12 – Class actions, Property and Succession

- V. Ruiz Abou-Nigm, Maritime Liens in the Conflict of Laws Revisited
- M. Casado, The investigation of the debtor´s assets abroad
- K. Svobodova, Relation Between Succession Law Determined under the EU Draft Regulation on Succession and the Lex Rei Sitae
- B. Glaspell, Global Class Actions Prosecuted in Canadian Courts

12.30 – 14.00 Lunch break

14.00-15.45

PLENARY SESSION

Theory of PIL and party autonomy

- R. Michaels, What Private International Law Is About
- T. Kono, P. Jur?ys, Institutional Perspective to Private International Law
- M. Keyes, Party autonomy in private international law beyond international contracts
- A. Mills, Party Autonomy in Non-Contractual Private International Law Disputes

15.45-16.15 Coffee break

16.15 -18.00

Connecting Factors, Law Reform and Model Laws

- E. Schoeman, The connecting factor in private international law: neglected in theory, yet key to just solutions
- I. Canor, Reform of Choice-of-Laws in Torts in the Israeli Legal System – A Normative Perception and a Comparative Perspective
- D. E. Childress III, Courts and the conflict of norms in private international law
- J.A. Moreno Rodríguez, M.M. Albornoz, The Contribution of the Mexico City Convention to the Reflection on a New Soft Law Instrument on Choice of Law in International Contracts

20.00 Conference Dinner – After Dinner Speaker is Hans Van Loon, Secretary General of the Hague Conference on Private International Law

Saturday 16 April 2011: 09.00-10.45

Characterisation, external relations in PIL, declining jurisdiction and choice of law in contract

- G. Maher, B. Rodger, The respective roles for the lex fori, the applicable law and autonomous/harmonised concepts in international private law, with particular focus on key aspects of the law of obligations
- P. Mostowik, M. Niedzwiedz, Five Years after ECJ "Lugano II Opinion" – Its Current Developments and Further Consequences
- S. Pitel, The Canadian Codification of Forum Non Conveniens
- G. Tu, Contractual Choice of Law in the People's Republic of China: the Past, the Present and the Future

11.15-13.00

Lex mercatoria, arbitration and consumer protection

- C. Gimenez Corte, Lex mercatoria, independent guarantees and non-state enforcement

L. Radicati di Brozolo, Conflicts between arbitration and courts in the EU: free for all, harmonization or home country control?
- S.I. Strong, Resolving mass legal disputes in the international sphere: are class arbitrations an option? lessons from the United States and Canada
  G. Rühl, Consumer Protection in Private International Law

Lunch break 13.00-14.00

14.00-15.30

Torts and Intellectual Property

- I. Kunda, Overriding mandatory rules in intellectual property contracts
- M. Lehmann, Where Do Pecuniary Damages Occur?
- C. O. García-Castrillón Private international law issues of non-contractual liability with special reference to environmental law claims
- E. Rodriguez Pineau, The law applicable to intra-family torts

Coffee break 15.30-15.45

15.45-17.00

Family law, succession, nationality and Europeanisation of PIL

- K. Trimmings, P. Beaumont, International Surrogacy Arrangements – An Urgent Need for a Legal Regulation at the International Level
- T. Kruger, J. Verhellen, Dual nationality = double trouble?
- J Fitchen, The Cross-Border Recognition and Enforcement of Authentic Instruments in the proposed European Succession Regulation
- L. Gillies, The Europeanisation of the Conflict of Laws and Third States: Scottish Perspectives

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

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

Mutual Recognition and Fundamental Rights

Case C-491/10PPU – Andrea Aguirre Pelz

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

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

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

The facts and the legal issues of the case

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

Some weeks earlier, in February 2010, the 5th family court of Bilbao had issued a certificate under Article 42 of the Regulation ordering the immediate return of Andrea to her father. According to Article 11 (8) of the Regulation Brussels IIbis, German family courts must immediately enforce the return order of the Spanish court without any recognition proceedings.[5] Nevertheless, the mother filed a new action in the (competent) German family court seeking a declaration that the Spanish decision was unenforceable in Germany, because Andrea and her mother had not been personally heard by the Spanish judge. On appeal, the Higher Regional Court of Celle referred to the ECJ (under Article 267 TFEU) the questions whether it was obliged to enforce the Spanish decision ordering the return of the child of ten years although the child had not get a personal hearing at the court of origin and whether it was bound by a form which seemed to be filled in incorrectly.

According to the referring court, the Spanish court had not sufficiently respected

the child's right to be heard – a right which shall protect her family relations and procedural situation under Articles 24 and 47 of the CFR. The necessity of hearing the child and the parent is equally expressed by Article 42 (2) of the Regulation. However, the German court asked the ECJ whether a serious violation of human rights (as guaranteed by the Charta) entails the need of reviewing a judgment of another Member State even in the context of mutual recognition. If the answer of the ECJ is positive, the abolition of exequatur and of the public policy clause (which directly refers to fundamental rights) by Article 42 of the Regulation Brussels will be modified (or even reversed). Thus, the reference of the Higher Regional Court of Celle directly questions the concept of mutual recognition and its underlying assumption that all courts of the Member States fully and equally respect the fundamental rights of the parties.

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

Some preliminary observations:

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

– To start with the second question: it is not entirely clear whether the form was incorrectly filled out. According to Article 42 the child must get an opportunity to be heard (…) having regard to its age or maturity. Thus, the question is whether the summoning of Andrea to the hearing by the court of origin was sufficient to

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

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

– With regard to the first question, the interplay between the proceedings on the merits and those on the immediate return of the child is not entirely clear: The decision on the custody of December 19, 2009 was a decision on the merits which is recognised under Articles 21 and 23 of the Regulation. According to Article 23 b, "a judgment relating to parental responsibility shall not be recognised if it was given (…) without the child having been given an opportunity to be heard." Thus, this Article explicitly confers to the German court the power to review the foreign judgment with regard to fundamental rights as guaranteed by Articles 24 and 47 CFR. However, the order on the return of Andrea was based on Articles 11 (8) and 42. These Articles provide for immediate relief in the specific case of the unlawful retention of the child. However, the question arises whether the request of Spanish court under Article 42 must be qualified as a request on the enforcement of the judgment on the merits (of December 19, 2009). As this judgment conferred the parental responsibility to the father, the father was equally entitled to request the return of the child. In this respect, the (functional) application of Articles 11 and 42 of the Brussels II^{bis} Regulation for the enforcement of the decision of the merits does not seem to be fully in line with the

system of the Regulation.[9]

The proceedings at the ECJ

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

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

Higher Regional Court Celle[a]

Case 18 UF 67/10

Order of September, 30, 2010

Relating to the return of the child: Andrea Aguirre Pelz

Born 31 January 2000.

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

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

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

her mother to her father.

I.

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

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

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

This decision was transmitted by the German Federal Office of Justice[b] on 8 July 2009 under reference to Article 11 para.6 and 7 of the Regulation Brussels II^{bis} to the central authority of Spain, with the request for transmission to the competent Spanish court. In the same month the custody proceedings before the family court No.5 in Bilbao (Biscay, Spain) were continued. The court considered it bidden to ask for another expert opinion as well as a personal hearing of Andrea and scheduled a hearing in Bilbao. At the hearing, neither Andrea nor the mother appeared. Prior to this, the court had refused the mother's application for the grant of safe conduct to her and Andrea during the assessment by an expert and

for the time of the hearing in court. It also did not hear Andrea via video conference as explicitly suggested by the mother.

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

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

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

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

The father of Andrea, who is (only) at second instance represented by the German Federal Office of Justice, opposes to this decision through an appeal of 18 June 2010. By way of his objection of 18 June 2010 he requests the removal of the decision of the family court of Celle of 28 April 2010 and the dismissal of the applications of the mother, as well as the enforcement of the decision to surrender Andrea of the family court No.5 in Bilbao (Biscay) ex officio.

II.

The appeal of the father is admissible… On the matter itself the court comes to the provisional conclusion that the appeal is not well-founded, because Andrea

has not been duly heard by the Spanish judge. With regard to the case-law of the European Court of Justice referred to by the appellant, two questions arise on the interpretation of the Regulation Brussels II[bis]. These questions are essential for the decision of the case and the Court refers them to the ECJ for the following reasons:

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

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

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

At the same time the Senate does not misconceive that the family court No.5 in

Bilbao (Biscay, Spain) initially tried to obtain the view of Andrea in summer 2009. Yet the efforts in this regard did not suffice in view of the importance of the consideration of the child's view which is especially protected by Article 24 para.1 of the Charter of Fundamental Rights of the European Union. Furthermore, the Senate does not address the issue of whether the mother could be summoned at all to send Andrea to Spain given the criminal proceedings against her and accordingly the travel ban from Spain on Andrea. Any possible default or misconduct of the mother in this matter cannot be imputed to the affected child.

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

In the opinion of the Senate this violation is insomuch severe that it must entail a review power of the enforcing Member State by way of exception and in order to interpret Article 42 para.1 of the Regulation Brussels II^{bis} in conformity to the Charter of Fundamental Rights of the European Union.

The omitted hearing is problematic especially in cases of Article11 para.8 Regulation Brussels II^{bis} where the return of the child is rejected under Article13 para.22 HCAC because of unwillingness of the child. The preferential treatment in the enforcement of judgments under Article11 para.8 can only be justified in cases pursuant to Article13 para.2 Hague Child Abduction Convention, when the child has been heard before the decision is given. Only in this constellation the

court of the Member State of origin does have the possibility to deal with the unwillingness of the child and its reasons. After all, these reasons were considered of such importance by the court of the enforcing Member State that it refused the return of the child despite the fact that its removal or retention was unlawful. If the court of the Member State of origin wants to deviate from this and wants to miss out the resistance of the child which has been substantial in the Hague Child Abduction Convention-proceedings in the course of the custody decision which it is competent for, it has to hear the current view of the child in advance. The content of the certificate which is issued in context of the simplified enforcement under Article42 para.2 Regulation Brussels II^{bis} also indicates the great significance of the hearing of the child. Within the certificate, the hearing of the child must be duly certified.

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

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

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

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

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

III.

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

IV.

The senate explicitly does not request the application of the urgent preliminary ruling procedure in the present case. The senate considers both questions on the consultation requirement of the child- especially regarding comparable cases of return rejections under Article13 para. 2 Hague Child Abduction Convention – as fundamental. The examination of such basic issues should be carried out in the context of a request for a preliminary ruling, at length, and not in an accelerated procedure.

Additional note of the editors:

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

2011.

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

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

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

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

[e] Article 47 Charter of Fundamental Rights.

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

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

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

[4] It should be noted that Article 11 (4) of Regulation Brussels IIbis explicitly provides for "adequate arrangements to secure the protection of the child after his or her return." These measures include the protection of a parent who accompanies the child, *Hess*, Europäisches Zivilprozessrecht (2010), § 7, para 93.

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

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

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

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

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

Issue 2010/3 Nederlands Internationaal Privaatrecht

The third issue of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* is dedicated to the proposal for a new Dutch Act on Private International Law that will be incorporated in Book 10 of the Dutch Civil Code. It includes a critical general review, and contributions on private international law rules on marriages and the consequences for public policy and human rights; the regulation of overriding mandatory rules; the regulation of *fait accompli*; methods of interpretation in the light of Europeanization and internationalization; and party autonomy and the law of names.

- A.P.M.J. Vonken, Boek 10 BW: meer – incomplete – consolidatie dan codificatie van het Nederlandse internationaal privaatrecht. Een bekommernisvolle bespiegeling over een legislatieve IPR-surplace, p. 399-409. The English abstract reads:

In recent decades European private international law (PIL) has undoubtedly made progress. This is largely due to the fact that a number of legislators have either codified part or all of their national PIL rules or adopted treaties and regulations drawn up by, e.g., the Hague Conference on Private International Law and the European Union. Recently, the Dutch legislator has also introduced a codification or, more precisely, a 'consolidation' covering an incomplete set of topics on the field of choice of law. I will argue that this Dutch project should be amended and supplemented to include the areas of international civil procedure (e.g., jurisdiction and the recognition and enforcement of foreign judgments) and to

cover a more complete ruling of all kinds of choice of law issues for the sake of legal practice. Finally, I will propose some amendments and refinements to specific rules contained in this consolidation project.

- Susan Rutten, Aanpassing van het huwelijksrecht; gevolgen voor de openbare orde en mensenrechten in het IPR, p. 410-420. The English abstract reads:

The Dutch government is considering to take on problems of integration caused by the immigration of spouses through amending the rules governing marriage. The objective is to prevent immigrants living in the Netherlands from marrying abroad merely for the purpose of enabling their new spouse to acquire legal residence in the Netherlands. With this in mind, the government intends to raise the minimum age for marrying; to prohibit the conclusion of marriages between cousins; and to tighten the rules governing the recognition of foreign polygamous marriages. The plans will also affect rules of private international marital law, as well as the use of the public policy exception. In this article, the author examines whether the government's tentative proposals respect human rights, in particular the right to marry. Furthermore, she questions whether the public-policy exception is a suitable technique for warding off undesirable foreign marriages. The introduction and codification in the Dutch Civil Code of a new book on private international law provide an opportunity for the legislator to legally define the concept of public policy. An express reference could be made to the effect that human rights are part of our public policy, since human rights, because of their nature, are in any case seen as fundamental principles. The above proposals by the government also prompt us to be aware of the risk of public policy being used or abused for interests other than those for which the exception was intended, where it is invoked to safeguard rules of which it is less evident that they may be seen as fundamental.

- Cathalijne van der Plas, Het leerstuk van de voorrangsregels gecodificeerd in boek 10: werking(ssfeer), p. 421-429. The English abstract reads:

Draft book 10 of the Dutch Civil Code contains a general conflict of laws provision in Article 10:7 on super mandatory rules (lois de police). Many international

instruments, in particular several Hague Conventions and the Rome I and II Regulations, provide for the application of such special rules of a mandatory nature in addition to, or in derogation from, applicable private law. It nevertheless makes sense for the Dutch legislature also to provide for a domestic conflict of laws rule on the application of super mandatory rules, because not all areas of private law have been covered (as yet) by international instruments: notably parts of family law and the law of succession, the law of property, and of corporations. Some aspects of the application of super mandatory rules which remain uncertain in connection with the Rome I and II Regulations have been made explicit by the legislature, in particular the principle that the application of a law pursuant to rules of PIL includes super mandatory rules of that lex causae. Article 10:7 also allows for the application of super mandatory rules of third countries, which goes beyond the room for the application of such rules under Article 9 of the Rome I Regulation. It is submitted that the test which a court must apply when deciding whether the application of foreign public or administrative rules of law is justified and bears a resemblance to the tests under EU case law for determining whether some national rule infringes the free circulation of assets, capital and persons. EU case law provides examples of compelling public interests which could justify the application of a super mandatory rule in a specific situation. However, the Dutch courts will have the freedom to decide on the tests to be applied, and it remains to be seen how the new Article 10:7 will work out in specific cases.

- M.H. ten Wolde, De mysteries van het *fait accompli* en Boek 10 BW, p. 430-436. The English abstract reads:

Article 9 of draft Book 10 of the Civil Code introduces a new fait accompli (an accomplished fact) exception to be used in every area of conflict of laws: 'In the Netherlands, the same legal consequences may be attached to a fact to which legal consequences are attributed under the law which is applicable under the private international law of a foreign state, also when this contravenes the law which is applicable according to Dutch private international law, in as far as not attaching those consequences would constitute an unacceptable violation of the legitimate expectations of the parties or of legal certainty.' This provision aims to adjust the result of applying a Dutch conflict of law rule in the event that such a result is unacceptable since the parties involved assumed that a foreign conflict

rule that referred the case to a different law was in fact applicable. The question arises whether the consequences attributed to a fact or act according to a foreign conflict of law rule may be accepted, even if those consequences do not arise under the law which is applicable according to Dutch conflict of law rules. In such a case Dutch conflict rules should yield in favour of the foreign conflict rule, but subject to the condition that the parties rightfully believed that their legal position was determined by the closely connected foreign conflict rules in question. Moreover, not granting such effects has to constitute an unacceptable violation of the legitimate expectations of the parties or of legal certainty It is remarkable that the fait accompli exception is codified as an universal exception to all conflict rules since it has never been regarded as such in the case law or literature. Among scholars it is mainly seen as a concept that helps to discover the applicable law. The legislator bases the exception of Article 9 on the principle of legitimate expectations as expressed in the Sabah case decided by the Supreme Court and on legal certainty. However, in the Sabah case the court dealt with a completely different problem, namely that of Dutch conflict rules succeeding each other in time. The author argues that the mentioned principle cannot, without any good reason, be extended to the question of the conflict between Dutch conflict rules and foreign conflict rules. Besides this, there is no valid reason to protect parties who deliberately cross the border to a foreign country against their unfamiliarity with the law (including confict of law) of that country. The reality of international legal practice is that a legal position as a consequence of differing conflict rules may have a different content in one country than in another. Parties should be aware of this fact. International legal practice does not need a fait accompli exception. It is advisable to delete Article 9 from Book 10 Civil Code.

- A.E. Oderkerk, Een lappendeken van interpretatiemethoden in de context van het Ontwerp Boek 10 BW – De invloed van Europeanisering en internationalisering van het IPR, p. 437-446. The English abstract reads:

In the Dutch Proposal on Private International Law (Book 10 of the Dutch Civil Code), a 'General Part' containing provisions on topics like public policy, internationally mandatory provisions, party autonomy, capacity et cetera has been included. However, unlike in some foreign private international law Acts, general provisions on interpretation and/or characterisation have been deliberately omitted. In this article it is argued that it would have been useful and possible to

introduce such provisions. Useful because different methods (of a general, European or international background) of interpretation and characterisation have to be applied to different (groups of) provisions of this Book and it will not be obvious to practitioners which method will have to be applied when and how. Possible since – as will be shown – guidelines on which methods of interpretation and characterisation are to be applied and in which context can be laid down.

- Emilie C. Maclaine Pont, Partijautonomie in het 'nieuwe' internationale namenrecht, p. 447-455. The English abstract reads:

Recently, a bill has been prepared by the Dutch legislature in order to consolidate the rules of Dutch private international law. This 'Book 10 of the Dutch Civil Code' includes personal status issues. More specifically, this article focuses on surnames. In two judgments – Garcia Avello *and* Grunkin-Paul – *the Court of Justice of the EU provided incentives for the Member States to reconsider their rules regarding surnames concerning conflict of law rules and the recognition of surnames. The question is whether the Dutch regulations as laid down in the new 'Book 10 of the Dutch Civil Code' are in conformity with these decisions. This article reaches the conclusion that this question must be answered in the negative and recommends some adjustments to the current bill with the introduction of a choice of law clause.*