Legal parentage of children born of a surrogate mother: what about the intended mother?

On October 5th, The *Cour de Cassation*, the highest court in France for private law matters, requested an advisory opinion of the ECtHR (Ass. plén. 5 octobre 2018, n°10-19053). It is the first time a Contracting State applies to the ECtHR for an advisory opinion on the basis of Protocol n° 16 which entered into force on August 1st, 2018. The request relates to the legal parentage of children born to a surrogate mother. More specifically, it concerns the intended mother's legal relationship with the child.

The *Mennesson* case is again under the spotlight, after 18 years of judicial proceedings. Previous developments will be briefly recalled, before the Advisory opinion request is summarized.

Previous developments in the *Mennesson* case:

A French couple, Mr and Mrs Mennesson, went to California to conclude a surrogacy agreement. Thanks to the surrogate mother, twins were born en 2000. They were conceived with genetic material from the intended father and eggs from a friend of the couple. The Californian Supreme Court issued a judgment referring to the couple as genetic father and legal mother of the children. Birth certificates were issued and the couple asked for their transcription into the French civil status register.

French authorities refused the transcription, arguing that it would be contrary to public policy. Surrogate motherhood, in particular, is forbidden under article 16-7 of the Civil Code. Such agreements are then considered void and resulting foreign birth certificates establishing parentage are considered contrary to public policy (Cass. Civ. 1ère, 6 avril 2011, n°10-19053).

As a last resort, The Mennesson family brought a claim before the ECtHR. They claimed that the refusal to transcribe the birth certificate violated their right to respect for private and family life. While the Court considered that the parent's

right to family life was not infringed, it ruled that the refusal to transcribe the birth certificates violated the children's right to identity and was not in their best interest. As a consequence, it ruled that the refusal to establish the legal parentage of the indented parents was a violation of the children's right to private life, particularly so if the indented father was also the biological father.

After the ECtHR ruling: the French landscape

After the ECtHR ruling, the *Cour de Cassation* softened its position. In 2015, sitting in *Assemblée plénière*, it ruled that the mere fact that a child was born of a surrogate mother did not in itself justify the refusal to transcribe the birth certificate, as long as that certificate was neither unlawful nor forged, nor did it contain facts that did not correspond to reality (Ass. plén., 3 juillet 2015, n° 14-21323 et n°15-50002).

As a consequence, the Court only accepted the transcription of foreign birth certificate when the intended father is also the biological father. When it came to the other intended parent, the *Cour de Cassation* refused the transcription. By so doing, the *Cour de Cassation* reiterates its commitment to the *Mater semper certa* principle as the sole basis of its conception of motherhood. Meanwhile, in 2017, the *Cour de Cassation* signalled that the genetic father's spouse could adopt the child if all the requirements for adoption were met and if it was in the best interest of the child (Cass. Civ. 1ère, 5 juillet, 2017, n°15-28597, n°16-16455, and n°16-16901 ; 16-50025 and the press release)

However, the Mennessons' fight was not over yet. Although according to the latest decisions, it looked like both Mr and Mrs Mennesson could finally establish their kinship with the twins, they still had to overcome procedural obstacles. As the Cour de Cassation had refused the transcription in its 2011 judgment which had become final, the parents were barred from applying for it again. As pointed out by the ECtHR in the *Foulon and Bouvet v. France* case (21/07/2016, Application n°9063/14 and 10410/14), French authorities failed to provide an avenue for the parties involved in cases adjudicated before 2014 to have them re-examined in the light of the subsequent changes in the law. Thus, France was again held to be in violation of its obligations under the Convention. (See also *Laborie v. France*, 19/01/2017, Application n°44024/13).

In 2016, the legislator adopted a new procedure to allow for the review of final

decisions in matter of personal status in cases where the ECtHR had ruled that a violation of the ECHR had occurred. The review is possible when it appears that the consequences of the violation of the Convention are serious and that the just satisfaction awarded on the basis of article 41 ECHR cannot put an end to the violation (see articles L.452-1 to L.452-6 of the *Code de l'organisation judiciaire*).

Current situation:

Taking advantage of this new procedure, the Mennesson family asked for a review of their situation. They claimed that the refusal to transcribe the birth certificates was contrary to the best interest of the children. They also argued that, as it obstructed the establishment of parentage, it amounted to a violation of article 8 ECHR. Moreover, they argued that the refusal to transcribe the birth certificates on the ground that the children were born of a surrogate mother was discriminatory and infringed article 14 ECHR.

Sitting again in *Assemblée plénière*, the *Cour de Cassation* summarized its previous case law. It concluded that while the issue of the transcription of the father biological parentage is settled, the answer is less certain regarding the intended mother. The Court wondered if its refusal to transcribe the birth certificate as far as the intended mother is concerned is consistent with the State margin of appreciation under article 8. It also wondered whether it should distinguish between cases where the child is conceived with the genetic material of the intended mother and cases where it is not. Finally, it raised the issue of whether its approach of allowing the intended mother to adopt her husband's biological child was compatible with article 8 ECHR.

After pointing out the uncertain compatibility of its reasoning with ECtHR case law, the Court chose to request an advisory opinion from the ECtHR. Protocol 16 allows Contracting States to apply to the ECtHR for its advisory opinion "on questions of principles relating to the interpretation or application of the rights and freedom defined in the Convention or the protocols thereto" (Protocol 16 art.1).

Thus, the *Cour de Cassation* asked the ECtHR the two following questions:

- By refusing to transcribe into civil status registers the birth certificate of a child born abroad from a surrogate mother inasmuch as it refers to the intended mother as the "legal mother", while the transcription has been

accepted when the intended father is the biological father of the child, does a State Party exceed its margin of appreciation under article 8 ECHR? In this respect, is it necessary to distinguish between whether or not the child is conceived with the gametes of the intended mother?

- If the answer to one of the two preceding questions is in the affirmative, does the possibility for the intended mother to adopt her husband's biological child, which constitutes a mean of establishing parentage open to her, comply with the requirements of article 8 of the Convention?

As the *Cour de Cassation* indicates on the press release accompanying the request of an advisory opinion, it seized the opportunity of initiating a judicial dialogue between national jurisdictions and the ECtHR. However, it looks more like a sign of caution on the part of the French court, in a particularly sensitive case. Depending on the answer it receives, the *Cour de Cassation* will adapt its case law.

Although Protocol n°16 does not refer to a specific deadline, the Explanatory report indicates that it would be appropriate for the ECtHR to give high priority to advisory opinion proceedings.

Thus, it looks like the Mennesson saga will be continued soon…

A New Zealand perspective on Israeli judgment against New Zealand-based activists under Israel's Anti-Boycott Law

Last year the New Zealand singer Lorde cancelled a concert in Tel Aviv following an open letter by two New Zealand-based activists urging her to take a stand on

Israel's illegal occupation of Palestine. A few weeks later, the two activists found themselves the subject of a civil claim brought in the Israeli court. The claim was brought by the Israeli law group Shurat HaDin, on behalf of three minors who had bought tickets to the concert, pursuant to Israel's so-called Anti-Boycott Law (the Law for the Prevention of Damage to the State of Israel through Boycott). The Israeli court has now released a judgment upholding the claim and ordering the activists to pay NZ$18,000 in damages (plus costs).

Readers who are interested in a New Zealand perspective on the decision may wish to visit The Conflict of Laws in New Zealand, where I offer some preliminary thoughts on the conflict of laws issues raised by the judgment. In particular, the post addresses – from a perspective of the New Zealand conflict of laws – the concern that the judgment represents some kind of jurisdictional overreach, before discussing the enforceability of the judgment in New Zealand (and elsewhere).

Reports of HCCH Experts' Groups on the Surrogacy/Parentage and the Tourism Projects available

The Permanent Bureau of the Hague Conference on Private International Law has made available two reports for the attention of its governance Council (*i.e.* the Council on General Affairs and Policy): the Report of the Experts' Group on the Parentage / Surrogacy Project and the Report of the Experts' Group on the Co-operation and Access to Justice for International Tourists.

The Group on Parentage/Surrogacy Project will need to meet one more time early next year to reach final Conclusions on future work. In particular, the Group discussed possible methods to ensure cross-border continuity of legal parentage both established by and in the absence of a judicial decision.

Importantly, "[t]he Group recalled that the absence of uniform PIL rules on legal

parentage can lead to limping parentage across borders in a number of cases and can create significant problems for children and families. The Group further recalled that uniform PIL rules can assist States in resolving these conflicts and can introduce safeguards for the prevention of fraud involving public documents, while ensuring that the diverse substantive rules on legal parentage of States are respected. Any new instrument should aim to provide predictability, certainty and continuity of legal parentage in international situations for all persons involved, taking into account their fundamental rights, the *UN Convention on the Rights of the Child* and in particular the best interests of children. The Group agreed that any international instrument would need to be developed with a view to complementing the existing Hague Family Conventions and to attracting as many States as possible."

Regarding the Group on the Tourism Project, it should be noted that it is currently exploring the need for an international instrument on the co-operation and provision of access to justice for international tourists. The Group concluded that "[t]he Experts' Group recommends to the CGAP that it mandates the Experts' Group to continue its work, with a view to assessing the need for, the nature (soft law and hard law options) and the key elements of, a possible new instrument. The composition of the Experts' Group should remain open, and, if possible, also include representatives of Stakeholders, such as the UNWTO, as well as representatives of relevant organisations and private international law experts." It was noted that the Consultant will finalise his draft (substantive) Report, which will be circulated at the end of this year.

The aide-mémoire of the Chair of the Tourism Project noted: "[i]f a new instrument were to be developed, the Experts identified a number of possible expected values such instrument might add. These included that tourists might be able to obtain appropriate information, including in a language they understand, to ascertain and understand their rights, and the potentially available options to seek redress. It might also provide co-operation mechanisms among suitable bodies that can work in a concerted manner to facilitate the resolution of complaints, with a view to guaranteeing access to justice in the broadest sense, including through alternative dispute resolution, in a non- discriminatory way. The instrument might also have a preventive effect. Finally, it might create an official record of the complaint, including for subsequent use abroad."

In March 2019, the HCCH governance Council will determine whether work on

these two subjects will go forward.

Forcing a Square Peg into a Round Hole – The Actio Pauliana and the Brussels Ia Regulation

Earlier today, the Court of Justice held that, under certain circumstances, special jurisdiction for an *actio pauliana* can be based on Art. 7(1) Brussels Ia (Case C-337/17 *Feniks*).

The *actio pauliana* is an instrument provided by the national laws of several EU member states that allows the creditor to challenge fraudulent acts by their debtor that have been committed to the creditor's detriment. The ECJ already had several opportunities to decide on the availability of individual grounds of special jurisdiction for such an action, but has reliably denied their availability. In today's decision however, the Court confirmed the availability of special jurisdiction for matters relating to contract, contrary to the proposition of AG Bobek (Opinion delivered on 21 June 2018).

Previous Decisions

Many readers of this blog will be aware of the Court of Justice's earlier decisions on the availability of special or exclusive jurisdiction for a creditor's *actio pauliana*.

In Case C-115/88 *Reichert I*, the question was referred to the Court in the context of a transfer of immovable property from Mr and Mrs Reichert to their son, which had been challenged in the French courts by their creditor, a German bank. The Court held that the *actio pauliana* did not fall under the head of exclusive jurisdiction for actions concerning *rights in rem*; accordingly, the French courts did not have jurisdiction based on what is now Art 24(1) Brussels Ia.

Still in the context of this transfer of property, the ECJ held in Case C-261/90 *Reichert II* that the heads of jurisdiction in what are now Art 7(2) (matters relating to tort, delict or quasi-delict), Art 24(5) (proceedings concerned with the enforcement of judgments) and Art 35 (provisional, including protective, measures) Brussels Ia would be equally unavailable.

The Court has never explicitly excluded the availability of the ground of jurisdiction for matters relating to contract in what is now Art 7(1) Brussels Ia. In his Opinion on Case C-339/07 *Deko Marty Belgium*, AG Ruiz-Jarabo Colombo still appears to understand the decisions in *Reichert I* and *II* as leading to the conclusion that within the framework of the Brussels Ia Regulation, jurisdiction for an *actio pauliana* 'lies [only] with the courts in the defendant's State of domicile.' (ibid, [32]).

The Decision in *Feniks*

The case underlying today's decision involved two Polish companies, Feniks and Coliseum, who were in a contractual relationship relating to a development project. When Coliseum was unable to pay some of its subcontractors, Feniks had to pay them instead (pursuant to Polish law), thus becoming the creditor of Coliseum. Coliseum subsequently sold some immovable property to a Spanish company, a transaction which Feniks now challenges in the Polish courts, relying on the provisions of the Polish Civil Code that provide for the *actio pauliana*.

While the Court considered the action to be ultimately based on the contract between Feniks and Coliseum (see below), it is not immediately clear to what extent the situation differs from the one in *Reichert*. Still, it is true that the question of whether such an action could be based on the head of special jurisdiction for contract was raised in neither of the two orders for reference. AG Bobek had nonetheless offered several important arguments for why this head of jurisdiction should not be available. In particular, he had argued that there was no 'obligation freely assumed' by the defendant towards the claimant (Opinion, [68]) and the contractual relationships between the claimant and their debtor and between the debtor and the defendant were 'too tenuous and remote' or too 'detached', respectively, to be considered for the purpose of establishing jurisdiction (Opinion, [65], [67]). More fundamentally, the Advocate General considered the 'chameleon-like nature' of the *actio pauliana*, which allows a creditor to challenge a wide range of legal acts, to prevent it from falling within

the scope of any head of special jurisdiction (Opinion, [76]–[87]).

In today's decision, the Court very much rejects these arguments. After having established the applicability of the Brussels Ia Regulation – the action not falling into the scope of Regulation No 1346/2000, which would exclude them from the Brussels Ia Regulation (see Art 1(2)(b) Brussels Ia; Case C-339/07 *Deko Marty Belgium*, [19]) – the ECJ reiterates that the decisive criterion for jurisdiction to be based on Art 7(1) Brussels Ia is the existence of a legal obligation freely entered into by one person towards another on which the claimant's action is based (*Feniks*, [39]; see also Joined Cases C-359/14 and C-475/14, *ERGO Insurance*, [44]); the claimant does not necessarily have to be party to the contract, though (*Feniks*, [48]; see also Joined Cases C-274/16, C-447/16 and C-448/16 *flightright*, [61]). According to the Court,

> *[42] … both the security that Feniks has over the debtor's estate and the present action regarding the ineffectiveness of the sale concluded by the debtor with a third party* ***originate in the obligations freely consented to by Coliseum with regard to Feniks upon the conclusion of their contract relating to those construction works.*** *[own emphasis]*

In such a case, the creditor's action is based on the breach of a contractual obligation (ibid, [43]).

> *[44] It follows that the actio pauliana, once it is brought on the basis of the creditor's rights created upon the conclusion of a contract, falls within 'matters relating to a contract' … .*

Accordingly, the contract between Feniks and Coliseum being for construction works to be carried out in Poland, the Polish courts would have jurisdiction under Art 7(1)(b) Brussels Ia (ibid, [46]).

Special Jurisdiction under the Brussels Ia Regulation

One of several interesting details of today's decision is the degree to which the Court's approach to the grounds for special jurisdiction differs from the Advocate General's opinion. According to AG Bobek, the *actio pauliana* might be

> *[97] … one of the rare examples that only allows for the applicability of the*

> *general rule and an equally rare confirmation of the fact that '… there is no obvious foundation for the idea that there should always or even often be an alternative to the courts of the defendant's domicile'.*

Importantly, for AG Bobek, requiring the claimant to rely on the general ground of jurisdiction provided in Art. 4(1) Brussels Ia would not be a problem because

> *[93] … the defendant's domicile is precisely the key connecting factor for the purpose of application of Regulation No 1215/2012.*

– an argument that seems to echo the Court of Justice's considerations in Case C-256/00 *Besix*, [50]–[54].

Besides, allowing for special jurisdiction to be based on Art 7(1) Brussels Ia because the defendant must be aware of the fraudulent nature of the transaction for the action to succeed would amount to

> *[94] … effectively presuming the existence of the awareness of the fraud on the part of the transferee.*

Put differently, if the Court could justify the unavailability of special jurisdiction for matters relating to contract for claims brought by a sub-buyer against the manufacturer in Case C-26/91 *Jakob Handte* by the fact that such jurisdiction would be unforeseeable and 'therefore incompatible with the principle of legal certainty' (ibid, [19]), does the mere allegation that the buyer of a plot of land has been aware of the fraudulent character of the transaction really justify its application?

The Court of Justice seems to believe it does. Indeed, it appears to have remained rather unimpressed by the above considerations when arguing that if the claim could not be based on Art 7(1) Brussels Ia, then

> *[45] … the creditor would be forced to bring proceedings before the court of the place where the defendant is domiciled, that forum, as prescribed by [Art 4(1) Brussels Ia], possibly having no link to the place of performance of the obligations of the debtor with regard to his creditor.*

International commercial courts: should the EU be next? – EP study building competence in commercial law

By Erlis Themeli, Xandra Kramer, and *Georgia Antonopoulou, Erasmus University Rotterdam (postdoc researcher, PI, and PhD candidate ERC project Building EU Civil Justice)*

Previous posts on this blog have described the emerging international commercial and business courts in various Member States. While the primary aim is and should be improving the dispute resolution system for businesses, the establishment of these courts also points to the increase of competitive activities by certain Member States that try to attract international commercial litigation. Triggered by the need to facilitate business, prospects of financial gain, and more recently also by the supposed vacuum that Brexit will create, France, Germany, the Netherlands, and Belgium in particular have been busy establishing outlets for international commercial litigants. One of the previous posts by the present authors dedicated to these developments asked who will be next to enter the competition game started by these countries. In another post, Giesela Rühl suggested that the EU could be the next.

A recently published study of the European Parliament's Committee on Legal Affairs (JURI Committee) on Building Competence in Commercial Law in the Member States, authored by Giesela Rühl, focuses on the setting up of commercial courts in the Member States and at the EU level with the purpose of enhancing the enforcement of commercial contracts and keeping up with the judicial competition in and outside Europe. This interesting study draws the complex environment in which cross-border commercial contracts operate in Europe. From existing surveys it is clear that the laws and the courts of England and Switzerland are selected more often than those of other (Member) States.

While the popularity of these jurisdictions is not problematic as such, there may be a mismatch between the parties' preferences and their best available option. In other words, while parties have clear ideas on what court they should choose, in reality they are not able to make this choice due to practical difficulties, including a lack of information or the costs involved. The study recommends reforming the Rome I and Rome II Regulations to improve parties' freedom to choose the applicable law. In addition, a European expedited procedure for cross-border commercial cases can be introduced, which would simplify and unify the settlement of international commercial disputes. The next step, would be to introduce specialised courts or chambers for cross-border commercial cases in each Member State. In addition to these, the study recommends the setting up of a European Commercial Court equipped with experienced judges from different Member States, offering neutrality and expertise in cross-border commercial cases.

This study takes on a difficult and complicated issue with important legal, economic, and political implications. From a pure legal perspective, expanding – the already very broad – party autonomy to choose the law and forum (*e.g.* including choosing a non-state law and the possibility to choose foreign law in purely domestic disputes) seems viable but will likely not contribute significantly to business needs. The economic and political implications are challenging, as the example of the Netherlands and Germany show. In the Netherlands, the proposal for the Netherlands Commercial Court (NCC) is still pending in the Senate, despite our optimistic expectations (see our previous post) after the adoption by the House of Representatives in March of this year. The most important issue is the relatively high court fee and the fear for a two-tiered justice system. The expected impact of Brexit and the gains this may bring for the other EU Member States should perhaps also be tempered, considering the findings in empirical research mentioned in the present study, on why the English court is often chosen. A recently published book, *Civil Justice System Competition in the EU*, authored by Erlis Themeli, concludes on the basis of a theoretical analysis and a survey conducted for that research that indeed lawyers base their choice of court not always on the quality of the court as such, but also on habits and trade usage. England's dominant position derives not so much from its presence in the EU, but from other sources.

The idea of a European Commercial Court that has been put forward in recent

years and is promoted by the present study, is interesting and could contribute to bundling expertise on commercial law and commercial dispute resolution. However, it is questionable whether there is a political interest from the Member States considering other pressing issues in the EU, the investments made by some Member States in setting up their own international commercial courts, and the interest in maintaining local expertise and keeping interesting cases within the local court system. Considering the dominance of arbitration, the existing well-functioning courts in business centres in Europe and elsewhere and the establishment of the new international commercial courts, one may also wonder whether a further multiplicity of courts and the concentration of disputes at the EU level is what businesses want.

That this topic has a lot of attention from practitioners, businesses, and academics was evident at a very well attended seminar (Rotterdam, 10 July 2018) dedicated to the emerging international commercial courts in Europe, organized by Erasmus University Rotterdam, the MPI Luxembourg, and Utrecht University. For those interested, in 2019, the papers presented at this seminar and additional selected papers will be published in an issue of the *Erasmus Law Review*, while also a book that takes a European and global approach to the emerging international business courts in being prepared (more info here). At the European Law Institute's Annual Conference (Riga, 5-7 September 2018) an interesting meeting with vivid discussions of the Special Interest Group on Dispute Resolution, led by Thomas Pfeiffer, was dedicated to this topic. An upcoming conference "Exploring Pathways to Civil Justice in Europe" (Rotterdam, 19-20 November 2018) offers yet another opportunity to discuss court specialisation and international business courts, along with other topics of dispute resolution.

Genocide by Expropriation – New Tendencies in US State Immunity

Law for Art-Related Holocaust Litigations

On 10 July 2018, the United States Court of Appeals for the District of Columbia Circuit rendered its judgment in the matter of Alan Philipps et al. v. the Federal Republic of Germany and the Stiftung Preussischer Kulturbesitz.

This case involves a claim by heirs of Holocaust victims for restitution of the „*Welfenschatz*" (Guelph Treasure), a collection of medieval relics and devotional art housed for generations in the Cathedral of *Braunschweig* (Brunswick), Germany. This treasure is now on display at the *Kunstgewerbemuseum Berlin* (Museum of Decorative Arts) which is run by the Stiftung Preussischer Kulturbesitz. The value of the treasure is estimated to amount to USD 250 million (according to the claim for damages raised in the proceedings).

The appeal judgment deals with, inter alia, the question whether there is state immunity for Germany and the Stiftung respectively. Under the US Federal Sovereign Immunities Act, foreign sovereigns and their agencies enjoy immunity from suit in US courts unless an expressly specified exception applies, 28 U.S.C. § 1604.

One particularly relevant exception in Holocaust litigations relating to works of art is the „expropriation exception", § 1605(a)(3). This exception has two requirements. Firstly, rights in property taken in violation of international law must be in issue. Secondly, there must be an adequate commercial nexus between the United States and the defendant:

> „A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States."

According to the Court's recent judgment in Holocaust litigation against Hungary

(Simon v. Republic of Hungary, 812 F.3d 127, D.C. Cir. 2016), intrastate expropriations in principle do not affect international law but are internal affairs of the acting state vis-à-vis its citizens. However, if the intrastate taking amounts to the commission of genocide, such a taking subjects a foreign sovereign and its instrumentalities to jurisdiction of US courts (Simon v Hungary, op.cit.).

This leads to the question of what exactly is „genocide" in this sense. The Court in Simon adopted the definition of genocide set forth in Article II lit. c of the Convention on the Prevention of the Crime of Genocide of 9 December 1948, 78 U.N.T.S. 277, (signed by the USA on 11 December 1948, ratified on 25 November 1988), i.e. „[d]eliberately inflicting" on "a national, ethnical, racial or religious group … conditions of life calculated to bring about its physical destruction in whole or in part". Thus, the Court in Philipps, as it observed, was „asked for the first time whether seizures of art may constitute 'takings of property that are themselves genocide' ". "The answer is yes" (Philipps v. Germany, op.cit.).

The Court prepared this step in Simon v. Hungary:

> „The Holocaust proceeded in a series of steps. The Nazis achieved [the "Final Solution"] by first isolating [the Jews], then expropriating the Jews' property, then ghettoizing them, then deporting them to the camps, and finally, murdering the Jews and in many instances cremating their bodies".

Therefore, actions taken on the level of first steps towards genocide are themselves genocide if later steps result in genocide even if these first measures as such, without later steps, would not amount to genocide. To put it differently, this definition of genocide includes expropriations that later were escalated into genocide if already these expropriations were „deliberately inflicted" „to bring about … physical destruction in whole or in part" (see again Art. II lit. c Prevention of Genocide Convention).

It will be a crucial question what the measures and means of proof for such an intent should be. In this stage of the current proceedings, namely on the level of appeal against the decision of first instance not to grant immunity, the Philipps Court explained, in its very first sentence of the judgment, that the claimants' submissions of facts have to be laid down as the basis for review:

> „Because this appeal comes to us from the district court's ruling on a motion to dismiss, we must accept as true all material allegations of the complaint,

> drawing all reasonable inferences from those allegations in plaintiffs' favor."

However, the position of the US Congress on the point is clear: As the Philipps Court explains,

> "[i]n the Holocaust Expropriated Art Recovery Act (HEAR Act 2016), which extended statutes of limitation for Nazi art-looting claims, Congress 'f[ound]' that 'the Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe as part of their genocidal campaign against the Jewish people and other persecuted groups', see Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2, 130 Stat. 1524, 1524."

It will be another crucial question, what „expropriation" exactly means in the context of the Holocaust. It is common ground that the unlawful taking of property from persecuted persons not only took place by direct taking but also and structurally through all sorts of transactions under duress. However, the exact understanding of what constitutes such "forced sales" – and thereby "expropriation" – seems to differ substantially. Some argue that even a sale of art works at an auction in a safe third state after emigrating to that state constitutes a forced sale due to the causal link between persecution, emigration and sale for making money in the exile. Under Art. 3 of the US Military Law No. 59 of 10 November 1947 on the Restitution of Identifiable Property in Germany, there was a „presumption of confiscation" for all transfers of property by a person individually persecuted or by a person that belonged to class of persecuted persons such as in particular all Jews. This presumption could be rebutted by submission of evidence that the transferor received a fair purchase price and that the transferor could freely dispose of the price. It is not clear whether this standard or a comparable standard or another standard applies in the case at hand. Irrespective of this legal issue, the claimants submit on the level of facts that the purchase price was only 35% of the fair market value in 1935. This submission was made in the following context:

Three Jewish art dealers from Frankfurt am Main, ancestors to the claimants, acquired the Guelph Treasure in October 1929 from the dynasty of Brunswick-Lüneburg shortly before the economic crisis of that year. The agreed price was 7.5 million Reichsmark (the German currency of the time). The estimations of the value prior to the acquisition seem to have ranged between 6 and 42 million

Reichsmark. The sales contract was signed by the art dealers „J.S. Goldschmidt“, „I. Rosenbaum“ und „Z.M. Hackenbroch“. These dealers and others formed a “consortium“ with further dealers to be able to raise the money (the whereabouts of the contract for this consortium and thus the precise structure of this joint-venture is unknown up to now).

According to the sales contract, the buyers were obliged to resell the Treasure and share profits with the seller if these profits go beyond a certain limit. The contract expressly excluded the possibility for the buyers to keep the Treasure or parts of it. Rather, the buyers were to take „every effort” to achieve a resale.

In the following years, the consortium undertook many steps to sell the Treasure in Germany and in the USA. However, according to the German Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property (i.e. the alternative dispute resolution body established by the German government in order to implement the non-binding Washington Principles on Nazi Confiscated Art of 3 December 1998, on which 44 states, including Germany and the USA agreed), it was common ground that the economic crisis reduced means and willingness of potential buyers significantly. In 1930/1931, the dealers managed to sell 40 pieces for around 2.7 million *Reichsmark* in total. After displaying for sale in the USA, the remaining 42 items were stored in Amsterdam. In 1934, the Dresdner Bank showed interest as a buyer, acting on behalf of the State of Prussia. The bank apparently did not disclose this fact. In April of 1935, the consortium made a binding offer for 5 million Reichsmark, the bank offered 3.7 million, the parties ultimately agreed upon 4.25 million, to be paid partly in cash (3.37 million), partly by swap with other works of art to be sold abroad in order to react to foreign currency exchange restrictions. The sales contract was signed on 14 June 1935 by the dealers and the bank, acting on behalf of the State of Prussia whose Prime Minister was Hermann Göring at the time. In July 1935, (almost) the full price was paid (100.000 Reichsmark were kept as commission). The 42 objects were transferred to Berlin. The consortium seemed to have been able to freely dispose of the money that they received at that time and pay it out to the members of the consortium. Later, all but one of the dealers had to emigrate, the one remaining in Germany came to death later (apparently under dubious circumstances, as is submitted by the claimants).

On the merits, the courts will have to take a decision on the central point of this

case whether these facts, as amended/modified in the further proceedings, amount to “expropriation” and, if so, whether this expropriation was intended to „deliberately inflict … conditions of life calculated to bring about … physical destruction in whole or in part” (see once more Article II lit. c of the Convention on the Prevention of the Crime of Genocide).

On a principal level, the Federal Republic of Germany argued that allowing this suit to go forward will “dramatically enlarge U.S. courts’ jurisdiction over foreign countries’ domestic affairs” by stripping sovereigns of their immunity for any litigation involving a “transaction from 1933–45 between” a Nazi-allied government and “an individual from a group that suffered Nazi persecution.” In addition to that, the principal line of argument would certainly apply to other cases of genocide and preparatory takings of property. The Court was not impressed:

> “Our conclusion rests not on the simple proposition that this case involves a 1935 transaction between the German government and Jewish art dealers, but instead on the heirs’ specific—and unchallenged—allegations that the Nazis took the art in this case from these Jewish collectors as part of their effort to drive [Jewish people] out of their ability to make a living.”

Even then, the enlargement of jurisdiction over foreign states by widening the exceptions to state immunity under the concept of genocide by expropriation appears to be in contrast to the recent efforts by US courts to narrow down jurisdiction in foreign-cubed human rights litigations under the ATS and in general.

However, the Federal Republic of Germany does no longer need to worry: The Court held that the second requirement of the expropriation exception is not fulfilled because the Guelph Treasure is not present in the United States in connection with a commercial activity carried on by the foreign state in the United States. In fact, it is not present in the USA at all but still in Berlin.

Yet, in respect to the Stiftung Preussischer Kulturbesitz, the suit will continue: For a state agency it seems sufficient that the property in question is owned or operated by that agency or instrumentality of the foreign state if that agency or instrumentality is engaged in a commercial activity (not necessarily in connection with the property in question) in the United States. The ratio of this rule is

difficult to understand for outsiders and appears not to be in line with the overall developments of (personal) jurisdictional law in the USA, and if at the end of the day there is a judgment against the Stiftung to return the Treasure there will of course be the issue of recognition and enforcement of that judgment in Germany – including all political implications and considerations of public policy.

The parties may want to think about arbitration at some point. That was the way out from lengthy court proceedings and delicate questions on all sorts of conflicts of laws in the famous case of Maria Altmann v. Republic of Austria that likewise turned, inter alia, on issues of state immunity for foreign states and their agencies or instrumentalities. In general, it seems that arbitration could play a larger role in art-related disputes (see e.g. the German Institution for Arbitration's Autumn Conference on 26 September 2018 in Berlin).

Asser's Enduring Vision: The HCCH Celebrates its 125th Anniversary

By the Permanent Bureau of the Hague Conference on Private International Law

On 12 September 1893, Tobias Asser, Dutch Jurist, Scholar and Statesman, realised a vision: he opened the first Session of the Hague Conference on Private International Law (HCCH). Today, exactly 125 years later, the HCCH celebrates Asser's vision and the occasion of this First Session with a solemn ceremony in the presence of his Majesty The King Willem-Alexander of the Netherlands.

Believing passionately that strong legal frameworks governing private cross-border interactions among people and businesses not only make a life across borders easier, but are also apt to promote peace and justice globally, Asser conceived the HCCH as multilateral platform for dialogue, discussion, negotiation and collaboration. Asser organised this first Session to canvass issues relating to general civil procedure and jurisdiction. More specifically, delegates, who hailed

from 13 States, dealt with subject matters comprising marriage, the form of documents, inheritance/wills/gifts and civil procedure. The First Session was a great success producing the Hague Convention on Civil Procedure. This instrument was adopted during the Second Session in 1894 and signed on 14 November 1896. Its entry into force on 23 May 1899 coincided with the first Hague Peace Conference – another of Asser's great visions. The global community honoured the enormous value of Asser's vision in 1911, bestowing upon him the Nobel Peace Prize for instigating the First Session of the Hague Conference on Private International Law to "prepare the ground for conventions which would establish uniformity in international private law and thus lead to greater public security and justice in international relations." (J G Løvland, Chairman of the Nobel Committee, Presentation Speech, Oslo, 10 December 1911).

Since this First Session, the HCCH has gone forth to develop an array of private international law instruments in the areas of international child protection and family law, international civil procedure and legal cooperation as well as international commercial and finance law. It is the pre-eminent international organisation for the development of innovative, global solutions in private international law. The HCCH remains steeped in Asser's vision. It continues to connect, protect, and cooperate. Since 1893.

The race is on: German reference to the CJEU on the interpretation of Art. 14 Rome I Regulation with regard to third-party effects of assignments

By Prof. Dr. Peter Mankowski, University of Hamburg

Sometimes the unexpected simply happens. Rome I aficionados will remember

that the entire Rome I project was on the brink of failure since Member States could not agree on the only seemingly technical and arcane issue of the law applicable to the third-party effects of assignments of claims. An agreement to disagree saved the project in the last minute, back then. Of course, this did not make the issue vanish – and this issues concerns billion euro-markets in the financial industry. In the spring of this year the Commission finally ventured to table a Proposal COM (2018) 96 final for a separate Regulation. This was the result of extensive preparation – and does yet deviate in important respects from the majority results reached in a very prominently staffed expert commission. The Commission proposes a compromise and combined model. Regardless of the degree to which one agrees or disagrees with this proposal (for discussion see *Peter Mankowski,* Recht der Internationalen Wirtschaft [RIW] 2018, 488; *Andrew Dickinson,* IPRax 2018, 337; *Michael F. Müller,* Zeitschrift für Europäisches Wirtschaftsrecht [EuZW] 2018, 522; *Leplat,* Petites Affiches n° 155, 3 août 2018, 3), one thing should be clear: The proposed model does definitely not form part of the still *lex lata*.

And now enter the surprise guest. Astonishingly, for ten years after the implementation of Rome I not a single reference to the CJEU had been made on the relevance which Art. 14 Rome I might have in the said regard. But once the Proposal is out, the Oberlandesgericht Saarbrücken (decision of 8 August 2018, case 4 U 109/17) simply did it. The decision is excellently structured and well researched. The questions submitted to the CJEU are pin-point accurate. They follow a strict line. In the author's translation they read:

1. Is Art. 14 Rome I Regulation applicable to the third-party effects of multiple assignments of the same claim by the same assignor?
2. If the first question is to be answered in the affirmative: Which law is applicable to such third-party effects?
3. If the first question is to be answered in the negative: Is Art. 14 Rome I Regulation to be applied *per analogiam*?
4. If the third question is to be answered in the affirmative: Which law is applicable to such third-party effects?

Multiple assignments of the same claim by the same assignor are particularly a field where applying the law of the assignor's habitual residence scores and applying the *lex causae* of the claim assigned fares not too badly whereas applying the law governing the relation between assignor and assignee fails.

But the more interesting question of course is whether the recent reference will interfere with the progress which the Commission Proposal might make. Will Council and Parliament wait for the CJEU to point into any direction for the *lex lata*? And if the CJEU will utter an opinion as to substance, which influence will it exert on the substance of a possible *lex ferenda*?

If one dares to employ the crystal maze and to conduct some Kirchberg astrology the most likely outcome of the reference procedure might be that the CJEU will answer the first and third questions submitted in the negative thus rendering any answer to the second and fourth questions obsolete. In the light of the drafting history how Art. 14 Rome I Regulation was rescued in the last minute (see the dramatic account by the Dutch delegate, *Pauline van der Grinten,* in: *Westrik/van der Weide* (eds.), Party Autonomy in International Property Law [2011] p. 145, 154-161) this would be a sound way out for the CJEU leaving all liberty and leeway possible for Commission, Council and Parliament.

German Supreme Court refuses to enforce Polish judgment for violation of the German ordre public

It doesn’t happen too often that a Member State refuses enforcement of a judgment rendered in another Member State for violation of the ordre public. But in a decision published yesterday exactly this happened: The German Supreme Court (Bundesgerichtshof – BGH) refused to recognize and enforce a Polish judgment under the Brussels I Regulation (before the recast) arguing that enforcement would violate the German public policy, notable freedom of speech and freedom of the press as embodied in the German Constitution. With this decision, the highest German court adds to the already difficult debate about atrocities committed by Germans in Poland during WW II.

The facts of the case were as follows:

In 2013, the ZDF (Zweites Deutsches Fernsehen), one of Germany's main public-service television broadcaster, announced the broadcasting of a documentary about the liberation of the concentration camps Ohrdruf, Buchenwald and Dachau. In the announcement, the camps Majdanek and Auschwitz were described as "Polish extermination camps". Following a complaint by the Embassy of the Republic of Poland in Berlin, the ZDF changed the text of the announcement to "German extermination camps on Polish territory". At the same time, the applicant, a Polish citizen and former prisoner of the Auschwitz-Birkenau and Flossenbürg concentration camps, complained to the ZDF claiming that his personal rights had been violated and demanded, among other things, the publication of an apology.

In 2013, the ZDF apologized to the applicant in two letters and expressed its regret. In spring 2016 it also published a correction message expressing its regret for the "careless, false and erroneous wording" and apologising to all people whose feelings had been hurt as a result. At the end of 2016, on the basis of an action he had brought in Poland in 2014, the applicant obtained a second instance judgment of the Cracow Court of Appeal requiring the ZDF to publish an apology on the home page of its website (not just anywhere on the website) for a period of one month expressing its regrets that the announcement from 2013 contained "incorrect wording distorting the history of the Polish people". The ZDF published the text of the judgment on its home page from December 2016 to January 2017, however, only via a link. The applicant considered this publication to be inadequate and, therefore, sought to have the Polish judgment enforced in Germany.

The Regional Court Mainz as well as the Court of Appeal Koblenz declared the judgment enforceable under the Brussels I Regulation (Reg. 44/2001). The German Federal Supreme Court, however, disagreed. Referring to Article 45 Brussels I Regulation, the Court held that enforcement of the judgment would result in a violation of the German ordre public because the exercise of state power to publish the text of the judgment prepared by the Cracow Court of Appeal would clearly violate the defendant's right to freedom of speech and freedom of press as embodied in Article 5(1) of the German Constitution (Grundgesetz – GG) as well as the constitutional principle of proportionality.

The Court clarified that the dispute at hand did not concern the defendant's original announcement – which was incorrect and, therefore, did not enjoy the protection of Article 5(1) GG – but only the requested publication of pre-formulated text. This text – which the ZDF, according to the Cracow court, had to make as its own statement – represented an expression of opinion. It required the ZDF to regret the use of "incorrect wording distorting the history of the Polish people" and to apologize to the applicant for the violation of his personal rights, in particular his national identity (sense of belonging to the Polish people) and his national dignity. To require the ZDF to published a text drafted by someone else as its own opinion would, therefore, violate the ZDF's fundamental rights under Article 5(1) GG. In addition, it would violate the constitutional principle of proportionality. The defendant had corrected the disputed wording "Polish concentration camps", which had been available for four days, on the day of the objection by the Embassy of the Republic of Poland. Even before the decision of the Court of Appeal, the ZDF had personally asked the applicant for an apology in two letters and also published an explanatory correction message with a request for apology addressed to all those concerned.

The official press release is available here. The full German decision can be downloaded here.

IM Skaugen SE v MAN Diesel & Turbo SE [2018] SGHC 123

In *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123, the Singapore High Court had the occasion to discuss and resolve various meaty private international law issues. The facts concerned the alleged negligent or fraudulent misrepresentation by the defendants on the fuel consumption of a specific model of engine that was sold and installed into ships owned by the plaintiffs. The issue before the court was whether the Singapore courts had jurisdiction over the misrepresentation claim. The defendants were German and Norwegian incorporated companies so the plaintiffs applied for leave to serve the writ out of

Singapore. This entailed fulfilling a 3 stage process, following English common law rules: (1) a good arguable case that the case falls within one of the heads set out in the Rules of Court, Order 11, (2) a serious issue to be tried on the merits, and (3) Singapore is *forum conveniens* on applying the test set out in *The Spiliada* [1987] AC 460. Stages (1) and (3) were at issue in the case.

The judgment, by Coomaraswamy J, merits close reading. The main private international law issues can be summarised as follows:

(a) Choice of law is relevant when assessing the heads of Order 11 of the Rules of Court.

The plaintiffs had relied on Order 11 rule 1(f) and rule 1(p). Rule 1(f) deals with tortious claims and the court proceeded by ascertaining where the tort was committed. According to the court, this question was to be answered by the *lex fori*. If the tort was committed abroad, the court held that choice of law for tort then came into play: the court must then determine if the tort satisfied Singapore's tort choice of law rule, ie the double actionability rule. It should be noted that the Court of Appeal in *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 had held that the double actionability rule will apply even in relation to local torts (as the flexible exception may displace Singapore law to point to the law of a third jurisdiction). The double actionability rule thus remains relevant when assessing Order rule 1(f) whether the tort is committed abroad or in Singapore.

(b) 'damage' for the purposes of Order 11 rule 1(f)(*ii*) is not limited to direct damage.

Order 11 rule 1(f)(*ii*) is in these terms: 'the claim is wholly or partly founded on, or is for the recovery of damages in respect of, damage suffered in Singapore caused by a tortious act or omission wherever occurring.' The court held that 'damage' for the purposes of rule 1(f)(*ii*) included the increased fuel expenditure and reduction in capital value of the ships due to the fuel inefficient engines suffered not just by the original owners of the ships at the time of the misrepresentation, but also the subsequent purchasers of the ships. On the facts, the court held that the damage suffered by the subsequent purchasers arose directly from the misrepresentation as the misrepresentation was also intended to be relied upon by them. Further, the court held that, even if that had not been the

case, direct damage is not required under rule 1(f)(*ii*). The difference in wording between Order 11 rule 1(f) and the UK CPR equivalent (CPR PD6B para 3.1(9)) makes the decision on this point less controversial than the reasoning in *Four Seasons v Brownlie* [2017] UKSC 80, [2018] 1 WLR 192.

(c) The test used to ascertain whether 'the claim is founded on a cause of action arising in Singapore' for the purposes of Order 11 rule 1(p) differs from the substance test which applies to determine the *loci delicti* in a multi-jurisdictional tort situation for the purposes of the double actionability rule.

The former test derives from *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458. The court observed that the *Distiller's* test is more plaintiff-centric compared to the substance test used for the purposes of the double actionability rule because Order 11 rule 1(p) 'requires the court to view the facts of the case through the cause of action which the plaintiff has sought to invoke.' Whereas, the latter test is 'the more general and more factual question "where in substance did *the tort take place*."' (para [166], emphasis in original). This point will likely be revisited by the Court of Appeal, not least because it had, as the court itself acknowledged, cited the *Distillers* test as authority for the substance test in *JIO Minerals FZC v Mineral Enterprises* [2011] 1 SLR 391.

(d) Whether Singapore is *forum conveniens* for the purposes of a setting aside application and whether Singapore is *forum non conveniens* for the purposes of a stay application should be assessed with reference to current facts.

Norway and Germany were potential alternative fora for the action. After leave had been given to serve out of jurisdiction in the *ex parte* hearing, the plaintiffs commenced proceedings in Norway as a protective measure. No proceedings were commenced in Germany. This meant that, under the Lugano Convention, the Norwegian courts had priority over the German courts. The court treated this as indicating that the courts of Germany ceased to be an available forum to the parties. This was significant, given that the court had earlier held that the *loci delicti* was Germany. The defendants argued that the commencement of Norwegian proceedings was to be ignored and the application to set aside service out of jurisdiction was to be assessed solely with reference to the facts which existed at the time when leave to serve out of jurisdiction was granted. The effect of the defendants' argument would be that the setting aside application would be determined on the basis that Germany was an available forum, while their

alternative prayer for a stay would be determined on the basis that Germany was an unavailable forum. The potential for wastage in time and costs is clear on this argument and the court rightly took a common sense and practical approach on this issue.

(e) The possibility of a transfer of the case from the Singapore High Court (excluding the SICC) to the Singapore International Commercial Court (SICC) is a relevant factor in the *Spiliada* analysis.

This had previously been confirmed by the Court of Appeal in *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265. The SICC is a division of the Singapore High Court which specialises in international commercial litigation. Its rules allow for a question of foreign law to be determined on the basis of submissions instead of proof. Further, the bench includes International Judges from not only common law but also civil law jurisdictions. The court held that the specific features of the SICC and the possibility of the transfer of the case to the SICC weighed in favour of Singapore being *forum conveniens* compared to Norway and Germany.

(f) In a setting-aside application, where the plaintiffs have succeeded in showing that Singapore is the *prima facie* natural forum in the first stage of the *Spiliada* test, the burden of proof shifts to the defendants to show why they would suffer substantial injustice if the action were to proceed in Singapore.

In an Order 11 case, the second stage of the *Spiliada* test usually operates to give the plaintiffs a second bite of the cherry should they fail to establish Singapore is the natural forum under the first stage of the test. The plaintiffs are allowed to put forward reasons why they would suffer substantial injustice if trial takes place in the natural forum abroad. Very interestingly, the court held that where, as on the facts of the case, the plaintiff had already satisfied the burden of showing that Singapore is the natural forum under the first stage of the *Spiliada* test, the burden then shifts to the defendants to show why they would suffer substantial injustice if trial took place in Singapore.

The case is on appeal to the Court of Appeal. Its judgment is eagerly anticipated.