OGEL and TDM Special Issue: Focus on Renewable Energy Disputes

With renewable energy disputes seemingly everywhere these days, OGEL and TDM have published a special joint issue focusing on these disputes at the level of international, European and national law. Below is the table of contents:

Non-Pecuniary Remedies Under the Energy Charter Treaty, by A. De Luca, Università Commerciale Luigi Bocconi

Joined Cases C-204/12 to C-208/12, Essent Belgium, by H. Bjørnebye, University of Oslo, Faculty of Law

Ålands Vindkraft AB v Energimyndigheten – The Free Movement Law Perspective, by S.L. Penttinen, UEF Law School, University of Eastern Finland

Recent Renewables Litigation in the UK: Some Interesting Cases, by A. Johnston, Faculty of Law, University College (Oxford)

The Rise and Fall of the Italian Scheme of Support for Renewable Energy From Photovoltaic Plants, by Z. Brocka Balbi

The Italian Photovoltaic sector in two practical cases: how to create an unfavorable investment climate in Renewables, by S.F. Massari, Università degli Studi di Bologna

Renewable Energy and Arbitration in Brazil: Some Topics, by E. Silva da Silva, CCRD-CAM / Brazil-Canada Chamber of Commerce, and N. Sosa Rebelo, Norte Rebelo Law Firm

Renewable Energy in the EU, the Energy Charter Treaty, and Italy's Withdrawal Therefrom, by A. De Luca, Università Commerciale Luigi Bocconi

Excerpts of these articles are available here and here

New German Festschriften on

private international law

A voluminous *Festschrift* in honour of Gerhard Wegen has recently been published: Christian Cascante, Andreas Spahlinger and Stephan Wilske (eds.), Global Wisdom on Business Transactions, International Law and Dispute Resolution, Festschrift für Gerhard Wegen zum 65. Geburtstag, Munich (CH Beck) 2015; XIII, 864 pp., 199 €. Gerhard Wegen is not only one of the leading German M & A lawyers and an internationally renowned expert on commercial arbitration, but also a honorary professor of international business law at the University of Tübingen (Germany) and a co-editor of a highly successful commentary on the German Civil Code (including private international law). This *liber amicorum* contains contributions both in English and in German on topics related to international business law, private international and comparative law as well as various aspects of international dispute resolution. For conflictoflaws.net readers, contributions on *Unamar* and mandatory rules (Gunther Kühne, p. 451), international labour law (Stefan Lingemann and Eva Maria Schweitzer, p. 463), problems of characterization in international insolvency law (Andreas Spahlinger, p. 527) and marital property law in German-French relations (Gerd Weinreich, p. 557) may be of particular interest. Moreover, a large number of articles is devoted to international commercial arbitration (pp. 569 et seqq.). For the full table of contents, see here.

Another recent *Festschrift* has been published in honour of Wulf-Henning Roth, professor emeritus at the University of Bonn: Thomas Ackermann/Johannes Köndgen (eds.), Privat- und Wirtschaftsrecht in Europa, Festschrift für Wulf-Henning Roth zum 70. Geburtstag, Munich (CH Beck) 2015; XIV, 744 pp., 199 €. Although Roth is generally recognized as one of the leading German conflicts scholars of his generation, this *liber amicorum* is focused mainly on substantive private and economic law, both from a German and a European perspective. Nevertheless, readers interested in choice of law may discover some gems that deserve close attention: Wolfgang Ernst deals with English judge-made case-law as the applicable foreign law (p. 83), Johannes Fetsch analyses Article 83(4) of the EU Succession Regulation (p. 107), Peter Mankowski looks at choice-of-law agreements in consumer contracts (p. 361), Heinz-Peter Mansel publishes a pioneering study on mandatory rules in international property law (p. 375), and Oliver Remien presents a survey on the application of the law of other Member

States in the EU (p. 431). For the full table of contents, see here.

The European Private International Law of Employment (book)

"The European Private International Law of Employment" that has just been published by Cambridge University Press.

Abstract:

The European Private International Law of Employment provides a descriptive and normative account of the European rules of jurisdiction and choice of law which frame international employment litigation in the courts of EU Member States. The author outlines the relevant rules of the Brussels I Regulation Recast, the Rome Regulations, the Posted Workers Directive and the draft of the Posting of Workers Enforcement Directive, and assesses those rules in light of the objective of protection of employees. By using the UK as a case study, he highlights the impact of the 'Europeanisation' of private international law on traditional perceptions and rules in this field of law in individual Member States. The author shows how the goals and policies of the European Union, in particular the protection of employees, are fundamentally reshaping the regulation of transnational private relations. The book also provides for a separate examination of the choice-of-law treatment of claims based on breach of employment contract, statute and in tort, thus offering an accessible explanation of choice-of-law issues arising in connection with the three main types of employment claim. Finally, it presents new insights about the influence of EU private international law on the Member States' domestic private international law regimes, and offers recommendations for improving the existing rules of jurisdiction and choice of law.

About the author:

Uglješa Gruši is an assistant professor at the School of Law of the University of Nottingham, where he teaches commercial conflict of laws, arbitration and the law of torts.

Research Handbook on EU Private International Law

A new Research Handbook on EU Private International Law, within the Edward Elgar Research Handbooks in European Law series has just been published. It is edited by *Peter Stone*, Professor and *Youseph Farah*, Lecturer, School of Law, University of Essex, UK.

It contains the following contributions:

1. Internet Transactions and Activities
Peter Stone
2. A Step in the Right Direction! Critical Assessment of Forum Selection Agreements under the Revised Brussels I: A Comparative Analysis with US Law
Y*ouseph Farah and Anil Yilmaz-Vastardis*
3. Fairy is Back – Have you got your Wand Ready?
Hong-Lin Yu

4. Frustrated of the Interface between Court Litigation and Arbitration? Don't Blame it on Brussels I! Finding Reason in the Decision of West Tankers, and the Recast Brussels I
Youseph Farah and Sara Hourani

5. Does Size Matter? A Comparative Study of Jurisdictional Rules Applicable to Domestic and Community Intellectual Property Rights
Edouard Treppoz

6. Article 4 of the Rome I Regulation on the Applicable Law in the Absence of Choice – Methodological Analysis, Considerations
Gülin Güneysu-Güngör

7. International Sales of Goods and Rome I Regulation”
Indira Carr

8. The Rome I Regulation and the Relevance of Non-State Law”
Olugbenga Bamodu

9. The Interaction between Rome I and Mandatory EU Private Rules – EPIL and EPL: Communicating Vessels?
Xandra E. Kramer

10. Choice of Law for Tort Claims”
Peter Stone

11. Defamation and Privacy and the Rome II Regulation
David Kenny and Liz Heffernan

12. Corporate Domicile and Residence
Marios Koutsias

More information is available on the publisher’s website.

Upcoming international conference at the Academy of

European Law: “How to handle international commercial cases – Hands-on experience and current trends”

The Academy of European Law (ERA) will host an international conference on recent experience and current trends in international commercial litigation, with a special focus on European private international law. The event will take place in Trier (Germany), on 8-9 October 2015. This conference will bring together top experts in international commercial litigation who will report on their experiences in this field including litigation strategy and tactics.

Key topics will be:

- Recent case law in the area of European civil procedure, private and business law, including Alternative Dispute Resolution (ADR) and arbitration,
- Best practice in applying commercial litigation and conflict of laws rules,
- Forthcoming changes after the entry into force of the new Hague Choice of Court Convention in June 2015, the recast of the Insolvency Regulation in summer 2015, the revision of the Small Claims Procedure 2015, and the Regulation establishing a European Account Preservation Order,
- A round table discussion about “Coherence, consolidation and codification: the road ahead for European private international law”.

The conference language will be English. The event is organized by Dr Angelika Fuchs, ERA, in cooperation with Professor Jan von Hein, University of Freiburg (Germany). The confirmed speakers are

- **Professor Camelia Toader**, Judge at the European Court of Justice of the EU (CJEU), Luxembourg
- **Professor Gilles Cuniberti**, University of Luxembourg
- **Raquel Ferreira Correia**, Counsellor, Lisbon

- **Sarah Garvey**, Counsel and Head of KnowHow in the Litigation Department, Allen & Overy LLP, London
- **Jens Haubold**, Partner, Thümmel, Schütze & Partner, Stuttgart
- **Professor Jan von Hein**, Director of the Institute for Foreign and International Private Law, Dept. III, University of Freiburg
- **Brian Hutchinson**, Arbitrator, Mediator, Barrister, GBH Dispute Resolution Consultancy; Senior Lecturer, University College Dublin
- **Marie Louise Kinsler**, Barrister, 2 Temple Gardens, London
- **Professor Xandra Kramer**, Erasmus University Rotterdam; Deputy Judge of the District Court of Rotterdam
- **Alexander Layton QC**, Barrister, Arbitrator, 20 Essex Street, London.

The full conference programme is available here. For further information and registration (including early bird rebates), please click here.

The new European Insolvency Regulation

Antonio Leandro, the author of this post, teaches International Law at the University of Bari.

On 20 May 2015 the European Parliament approved the new European Insolvency Regulation (EIR) in the text adopted by the Council at first reading on 12 March (publication on the Official Journal is expected to follow soon). This marks the end of a revision process which started with the Commission proposal of 12 December 2012 (COM/2012/744 final).

The primary aim of the revision was to improve the operation of the EIR with a view to ensuring a smooth functioning of the internal market and its resilience in economic crises, having regard to national insolvency laws and to the case law of the ECJ on the "old" Insolvency Regulation, *i.e.* Regulation No 1346/2000 (the relevant ECJ judgments include: *Susanne Staubitz-Schreiber* [2006]; *Eurofood IFSC* [2006]; *Deko Marty Belgium* [2009]; *SCT Industri* [2009]; *German Graphics*

[2009]; *MG Probud* [2010]; *Interedil* [2011]; *Zaza Retail* [2011]; *Rastelli Davide* [2011]; *F-Tex SIA* [2012]; *ERSTE Bank Hungary* [2012]; *Ulf Kazimierz Radziejewski* [2012]; *Bank Handlowy* [2012]; *Grontimmo* [2013]; *Meliha Veli Mustafa* [2013]; *Ralph Schmid* [2014]; *Burgo Group* [2014]; *Nickel & Goeldner Spedition* [2014]; *H* [2014]).

In short, the revised text: (*a*) extends the EIR's scope to proceedings aimed at giving the debtor a "second chance"; (*b*) strengthens the current jurisdictional framework in terms of certainty and clarity; (*c*) improves the coordination among insolvency proceedings opened in respect of the same debtor and strikes a better balance between efficient insolvency administration and protection of local creditors; (*d*) reinforces the publicity of the proceedings by compelling Member States to provide for insolvency registers and by providing for the interconnection of national registers; (*e*) deals with the management of multiple insolvency proceedings relating to groups of companies.

The new EIR will enter into force following its publication in the Official Journal, but the bulk of its provisions will only apply in 2017.

A broader scope

Opening the EIR to collective rescue and restructuring proceedings, to proceedings which leave the debtor fully or partially in control of its assets and affairs and to proceedings providing for a debt discharge or a debt adjustment in relation to consumers and self-employed persons as well as to interim proceedings, means that the appointment of a "liquidator" and the debtor's divestment are no more grounds of the EIR's applicability.

The difference between "all-creditors-including" and "not-all-creditors-including" proceedings has been implicitly upheld. However, Recital 14 clarifies that proceedings not including all the creditors should be proceedings aimed at rescuing the debtor, while those leading to a definitive cessation of the debtor's activities or to the liquidation of the debtor's assets should include all the creditors.

Annex A lists the proceedings at stake: national insolvency procedures not listed fall out of the scope of the Regulation. In doing so, Annex A provides – as the ECJ held in *Ulf Kazimierz Radziejewski* (§§ 23-24) and *Meliha Veli Mustafa* (§ 36) – a

clear-cut confine of the EIR's scope.

Moreover, the extension to proceedings whose purpose is not liquidation has led to replacing the term "liquidator" with "insolvency practitioner", so as to include a broader range of tasks in connection with the administration of the debtor's affairs. Annex B lists the relevant insolvency practitioners based on national laws.

Hereinafter, we will refer to the insolvency practitioner appointed in the main proceedings as the "main insolvency practitioner" and to the one appointed in secondary proceedings as the "secondary insolvency practitioner".

The innovations regarding jurisdiction

Some Recitals inspired by *Eurofood* and *Interedil* have been inserted in the new EIR to clarify the concept of "centre of main interests" (COMI).

It is now stated that the COMI of individuals is to be found – presumptively – in their "principal place of business", if they are independent businessmen or professional providers, or in their habitual residence, in all other cases (Article 3(1)).

In order to avoid fraudulent or abusive forum shopping practices, these presumptions will only apply if the registered office/principal place of business/habitual residence have not been transferred to another Member State within a given period prior to the request for the opening of the insolvency proceedings.

The court requested to open the proceedings will rule on jurisdiction of its own motion, and specify in the judgment on which ground it retained jurisdiction (Article 4).

Vis attractiva over "ancillary" proceedings is now codified in Article 6. Moreover, should the "ancillary" action be related with another action based on civil and commercial law, then the insolvency practitioner is entitled to bring both claims in the court of the defendant's domicile or, in the case of several defendants, in the court of the Member State where any of them is domiciled, provided that such court has jurisdiction under the Brussels I Regulation (recast).

Coordination of proceedings

The new EIR improves the coordination among insolvency proceedings opened against the same debtor, and attempts to strike a better balance between efficient insolvency administration and protection of local creditors.

In particular, it makes the opening of secondary proceedings conditional upon both the interests of local creditors and the objectives of the main proceedings, and accordingly, strengthens the main insolvency practitioner's role in this regard.

The court of the establishment will be enabled, on request of the main insolvency practitioner, to refuse or to postpone the opening of secondary proceedings whenever this is not necessary to protect the interest of local creditors.

When ruling on a request for opening brought by local creditors, the court of the establishment should give the main insolvency practitioner the opportunity to be heard before deciding (Article 38). The main insolvency practitioner will have the opportunity to apply for refusal or postponement of the opening of secondary proceedings, while the court of the establishment will be in a position to be aware of any rescue or reorganization options explored by the main insolvency practitioner, so as to properly assess the consequences of the opening.

Based on these and other elements, the court may refuse the opening or opt for proceedings not involving the winding-up of the debtor. This differs from the current regime, which allows for the alternative proceedings option only for territorial proceedings, *i.e.* prior to the opening of main proceedings.

In line with this new broadened role in evaluating the impact of secondary proceedings upon the centralized rescue or the estate administration, the main insolvency practitioner will be entitled to challenge the decision whereby secondary proceedings are opened.

As regards the protection of local creditors, in order to avoid the opening of secondary proceedings, the main insolvency practitioner may undertake within the main proceedings, in respect of assets located in the Member State of the establishment, 'that he will comply with the distribution and priority rights under national law that [they] would have if secondary proceedings were opened' (Article 36(1)). This undertaking should remove the local creditors' concern over

seeing themselves deprived of interests and preferential rights based on the local *lex concursus* by the opening of the sole main proceedings and by the applicability of the COMI's *lex concursus*. At the same time, it will avoid the opening of secondary proceedings that may adversely affect the outcome of the main insolvency proceedings, in particular where the latter are aimed at rescue and restructuring.

In this respect, the new EIR draws inspiration from the "synthetic secondary proceedings".

If secondary proceedings are opened or the request of opening is still pending, the new EIR extends the duty to cooperate both to the courts involved and between courts and insolvency practitioners (Articles 41-43).

Courts and insolvency practitioners are also required to take account of principles and guidelines adopted by European and international organizations active in the area of insolvency law, including the UNCITRAL guidelines (Recital 48). For instance, the courts may coordinate with each other to appoint the insolvency practitioners, while courts and insolvency practitioners may enter into protocols and agreements to facilitate cross-border cooperation and to coordinate the administration and supervision of the debtor's assets and affairs.

Publishing insolvency information

Member States are required to establish publicly accessible electronic registers that contain information on cross-border cases (Article 24). All national registers will be interconnected with each other through the European e-Justice portal (Article 25).

This mandatory regime is meant to safeguard the foreign creditors' right to lodge claims and prevent the opening of parallel proceedings. As for the foreign creditors – *i.e.* those having their habitual residence, domicile or registered office in a Member State other than the State of the proceedings, including the tax authorities and social security authorities of Member States: Article 2(12) –, their right to lodge claims will be facilitated by using a standard form to be established in an implementing act of the Commission.

Certain protective rules concerning the personal data have been inserted on

account of the fact that, as noted above, the new Regulation will also apply to proceedings opened against persons who do not carry out an independent business or professional activity: see Articles 78-83. Having these cases in mind, Recital 80 strikes a balance with the creditors' right to lodge the claims by calling Member States to ensure both that the relevant information is given to creditors by individual notice and that claims of creditors who have not received the information are not affected by the proceedings.

Groups of companies

The revision also addresses the management of multiple insolvency proceedings relating to groups of companies, introducing a specific Chapter (V). This strives to ensure the efficiency of the insolvency administration, whilst respecting each group member's separate legal personality.

In this regard, the new EIR draws inspiration from the UNCITRAL Model Law and related Legislative and Practice Guides.

Firstly, should more proceedings be opened in different Member States, the new EIR requires all the actors involved (insolvency practitioners and courts) to comply with the duties of cooperation and communication applicable when main and secondary insolvency proceedings are opened against the same debtor (Chapter V, Section 1).

An important innovation is that an insolvency practitioner is now allowed to request the opening of a "group coordination proceeding", which should further facilitate, in particular, the restructuring of groups (Chapter V, Section 2). The participation of the other insolvency practitioners (hence, the other proceedings) rests on a voluntary basis.

A "coordinator" will be appointed to propose and implement the coordination plan (Articles 71-72).

All the advantages of the "coordination proceedings" should be worth the costs. In other words, the costs of the coordination should be sustainable and adequate having regard to the purpose of each proceedings involved.

The introduction of groups-of-companies oriented rules will not prevent a court

from opening insolvency proceedings for several companies in a single State if the court finds a common COMI therein (Recital 53).

What about the applicable law?

The revision only marginally addresses the issue of applicable law.

However, Article 11(2) and Article 13(2) of the new texts are noteworthy in this respect, in that they manage, as regards contracts relating to immovable property and contracts of employment, the effects of the insolvency stemming from the (local) *lex contractus* when the insolvency being handled abroad in the main proceedings.

Article 18 extends to pending arbitration proceedings the existing rule whereby the effects of insolvency proceedings on a pending lawsuit concerning assets or rights included in the debtor's insolvency estate must be governed by the law of the Member State where the lawsuit is pending (the law of the seat of the arbitration will apply).

Finally, all the rules whose functioning depends on the concept of "Member State in which assets are situated" will benefit from the broader and more detailed definition provided by Article 2(9), which refers, among other "assets", to registered shares in companies, financial instruments, cash held in credit institutions accounts and copyrights.

Conference: Provisional Measures in European Civil Litigation

The renowned German legal periodical „Recht der Internationalen Wirtschaft" (RIW; International Business Law Review) will host a conference on „Provisional Measures in European Civil Litigation" in Frankfurt/Main on Wednesday, 17 June 2015. This event is the second in a series of workshops that was successfully

launched in 2014 and that aims at bringing together high-level academics and practitioners. The conference language is German. Registration is still possible. Further information is available here. The programme will be as follows:

10.30–10.35 Welcoming the participants

Dr. Roland Abele

10.35–10.45 Introduction

Prof. Dr. Jan von Hein, University of Freiburg (Germany)

10.45–11.30 Provisional Measures under Article 35 Brussels I*bis*

Prof. Dr. Jan von Hein, University of Freiburg (Germany)

11.30–11.45 Coffee Break

11.45–12.30 The European Account Preservation Order

Prof. Dr. Tanja Domej, University of Zurich

12.30–13.15 Discussion

13.15–14.15 Lunch

14.15–15.00 Provisional Measures concerning Intellectual Property Rights

Prof. Dr. Christian Heinze, LL.M. (Cambridge), University of Hanover

15.00–15.20 Discussion

15.20–15.45 Coffee Break

15.45–16.30 Provisional Measures and Arbitration

Prof. Dr. Jens Adolphsen, University of Gießen

16.30–16.50 Discussion

16.50–17.00 Conclusion

Prof. Dr. Jan von Hein, University of Freiburg (Germany)

17.00 End of Conference

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Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2015: Abstracts

The latest issue of the *"Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)"* features the following articles:

Jochen Hoffmann, **"Button-click" Confirmation and Cross Border Contract Conclusion**
Section 312j paragraph 3 and 4 of the German Civil Code (BGB) addresses and secures effective consumer protection with regard to the issue of internet-related "cost traps". Cost traps are websites that are designed to lead to the conclusion of contracts without the consumer's awareness of an obligation to pay. At the same time this regulation transposes Art. 8 par. 3 of the Consumer Rights Directive into German law. In effect, this provision ensures that an e-commerce contract between a trader and a consumer cannot be concluded if the trader does not ensure that the consumer is made aware, prior to placing his order, that he is assuming an obligation to pay, in connection with internet contracts specifically

by using an unambiguously labelled button. Since this regulation is applicable to all e-commerce contracts it not only applies to “cost traps”, but also to legitimate internet trading. This article addresses the problems arising from the new provision for cross border contracts in the light of the applicable conflict of laws rules.

Jan von Hein, **Authorization Requirements for a Guardian’s Transaction Concerning a Vulnerable Adult’s Immovable Property – Jurisdiction and Conflict of Laws**

The Court of Justice excluded, in Case C-386/12 – Siegfried Janós Schneider, the applicability of the Brussels I-Regulation to a court’s authorization that an adult’s guardian required for a transaction concerning immovable property belonging to the adult (Article 1(2)(a) of the Regulation). In his case note, von Hein agrees with the Court’s ruling because the authorization requirement was the main object of the proceedings. If the necessity to obtain an authorization arises merely as an incidental question in litigation related to property, however, the Regulation, including the forum rei sitae, remains applicable. Moreover, the author analyses which court is competent to rule on granting an authorization to an adult’s guardian for the sale of immovable property and which law is applicable to this question. He looks at this problem both from the point of view of autonomous German PIL and of the Hague Convention on the International Protection of Adults. The article shows that autonomous PIL and the Hague conflicts rules differ considerably and that in the Hague Convention’s framework, authorization requirements are treated in a very differentiated manner.

Astrid Stadler, **A uniform concept of consumer contracts in European civil law and civil procedure law? – About the limits of a comprehensive approach**

In “Vapenik”, the ECJ had to decide whether Article 6 para 1 lit. d of Regulation 805/2004 prevents the confirmation of a judgment by default as a European enforcement order if the judgment was based on a c2c-relation and the plaintiff had not sued the defendant in the Member State where he was domiciled but in the courts where the contractual obligation had to be fulfilled. The question raised was whether Article 6 para 1 lit. d applied only to b2c situations or also to cases in which both parties were consumers. The ECJ denied the application of the provision based on the reasoning that the defendant was not a “weaker party”. This interpretation of the EEO Regulation was deduced from the rationale

of “consumer contracts” in the Brussels I Regulation, the Rom I Regulation and Directive 93/13. The ECJ, however, provided only a very cursory comparison of the underlying policies of consumer protection. Particularly the idea of granting consumers a preferential treatment with respect to international jurisdiction differs from the purpose of consumer protection in substantive law and conflict of laws. With respect to Regulation 805/2004 the ECJ’s decision does not adequately balance the interests of the two consumers involved and unnecessarily privileges the plaintiff. It increases the defendant’s risk to suffer from a deficient cross-border service of documents without the chance of objecting to the enforcement of the judgment by raising grounds for non-recognition.

Jörg Pirrung, **Brussels IIbis Regulation and Child Abduction: Stones Instead of Bread ? – Urgent preliminary ruling procedure regarding the habitual residence of a child aged between four and six years**

After twelve mostly satisfactory decisions on the interpretation of the Brussels IIbis Regulation with respect to parental responsibility cases, the ECJ has given only conditional answers to the questions referred to it by the Irish Supreme Court. In this case it was not adequate to use the urgent preliminary ruling procedure instead of an expedited procedure. In substance, the Court interprets Articles 2 (11), 11 of the Regulation as meaning that, where a child was removed in accordance with a judgment later overturned by an appeal judgment fixing the child’s residence with the parent living in the Member State of origin, the failure to return the child to that State following the latter judgment is wrongful, if it is held that the child was still habitually resident in that State immediately before the retention, taking into account the (subsequent) appeal and that the judgment authorising the removal was (only) provisionally enforceable. If it is held, conversely, that the child was at that time no longer habitually resident in the Member State of origin, a decision dismissing the application for return based on Article 11 is without prejudice to the application of the rules established in Chapter III of the Regulation relating to the recognition and enforcement of judgments given in a Member State. On the whole, the opinion of Advocate General Szpunar stating expressly that the fact that proceedings relating to the child’s custody were still pending in the State of origin is not decisive as habitual residence is a factual concept and not depending on whether or not there are legal proceedings, seems more convincing than the judgment itself.

Marianne Andrae, **First decisions of the ECJ to the Interpretation of Article**

12(3) Regulation (EC) No 2201/2003, Comment to Cases C 436/13 and C 656/13

Article 12 (3) of Council Regulation (EC) No 2201/2003 of 27 November 2003 applies to separated matters of parental responsibility. The ECJ classifies this rule as a prorogation of jurisdiction for the holders of parental responsibility. This paper submits several arguments against this judgment. The jurisdiction of the courts is always justified for the particular application and it does not continue after pending proceedings have been brought to a close. This acceptance must be obtained at the time the matter is seized to the courts including the specific issues of the proceeding. An agreement, after the matter was brought to court, does not justify jurisdiction. The tight time requirements must be transferred to the jurisdiction under Article 8 (1) of that regulation. An interpretation whereupon the requirements of the jurisdiction can be fulfilled after pendancy and which orientates to the best interests of the child remains for an amendment of the regulation.

Tobias Helms, **The independent contestability of interlocutory judgments on international jurisdiction in family law cases**

The Stuttgart Higher Regional Court correctly held in its judgment of May 6, 2014 that, contrary to the wording of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG), German courts can pass interlocutory judgments on questions of their international jurisdiction in all family law cases. This conclusion can rightly be reached – in light of the statutory history of the FamFG – by way of an analogous application of Sec. 280 of the Code of Civil Procedure (ZPO).

Rainer Hüßtege, **Grenzüberschreitende Wohngeldzahlungen**

Wulf-Henning Roth, **Applicable contract law in German-Danish trade**

Given the opt-out of Denmark from the Area of Freedom, Security and Justice, Danish courts do not apply the conflict rules of the Rome I-Regulation, but still the EC Convention on the Law Applicable to Contractual Obligations of 1980 (Rome Convention). As Germany has not yet given notice of a termination of the Rome Convention, it appears to be not beyond doubt whether in settings relating to Denmark German courts have to apply the conflict rules of the Rome I-Regulation, given its call for universal application (Article 2) and in the light of Article 24 (1), whereby the Rome Convention shall ("in the Member States") be deemed replaced by the Rome I-Regulation. In contrast, the OLG Koblenz,

pointing to Article 1 (4), holds Article 24 (1) to be inapplicable in the specific case as Denmark may not be regarded as a "Member State". The Appellate Court applies the Rome Convention despite the fact that the German legislator has explicitly excluded the direct applicability of the Rome Convention.

Malte Kramme, **Conflict law aspects of the successor's responsibility for debts of the acquired business, before and after the Rome-Regulations**
The German Federal Court of Justice deals, in its decision of 23 October 2013, with several current questions in the field of private international law. Firstly, the court adopts a position on the question of which conflict rule applies to the liability claim against the successor to a mercantile business carrying on the business under an identical trade-name (section 25 para. 1 sentence 1 German Commercial Code). Furthermore, the court decided which law applies to forfeit and limitation of claims underlying the United Nations Convention on Contracts for the International Sale of Goods. As the court applied the old legal regime prior to the entry into force of the Rome-Regulations, the article focuses on the question of how the case has to be solved under the new legal regime. This analysis shows that the Regulations "Rome I" and "Rome II" do not cover the law of obligations in an exhaustive manner. Remaining gaps need to be filled applying nonunified German private international law.

Dieter Henrich, **Children of Surrogate Mothers: Whose Children?**
The legal parentage of children, born by surrogate mothers and handed over to the intended parents, is a highly debated question. Strictly forbidden in Germany, surrogacy is allowed in other countries. In a case of children born by a surrogate mother in California the German intended fathers (a same sex couple) applied for recognition of the decision of the California court, which established a parent-child relationship between the child and the couple. While the lower courts in Germany denied the application because of incompatibility with German public policy (cf KG IPRax 2014, 72) the Bundesgerichtshof (the Federal Court of Justice) decided in favour of the applicants, but restrained explicitly the recognition on cases of foreign court decisions and to cases, where at least one of the intended parents is the biological parent of the child. So the recognition of foreign birth certificates (e.g. from the Ukraine) is still an open question as well as the recognition of parentage decisions, if neither of the intended parents is a biological parent.

Susanne Lilian Gössl, **Constitutional Protection of ‚Limping' Marriages and**

the ‚Principle of Approximation'
The Court decides how to treat a "limping" marriage which is not valid under German law but nevertheless falls in the scope of and is therefore protected by the concept of "marriage" of the German Constitution (Art. 6 para. 1 Basic Law). The article examines how the German status registration law over the last four decades has subsequently been adapted to the needs of cross-border status questions.

Susanne Lilian Gössl, **Adaptation of Status Registration Rules in Cases of ‚Limping' Status**
The subject of this article is how to handle the birth registration of a child born by a surrogate mother according to German and Swiss law. Both legal systems are absolutely opposed to surrogacy but also under the obligation to protect the child's right to know his/her decent. The Swiss Court found a possibility to resolve the resulting legal tension. The author shows that the court's resolution, an adaptation of the national civil status registry law, is a mechanism which has already been frequently used by German courts in other situations of "limping" status. She proposes to extend that existing jurisprudence to cases of cross-border surrogacy.

Alexander R. Markus, **Jurisdiction in Matters Relating to a Contract Under the Brussels/Lugano Regime: Agreements on the Place of Performance of the Obligation in Question and the Principle of Centralisation of Jurisdiction**
According to the Swiss Federal Supreme Court, parties can by agreement only specify the place of performance of the characteristic obligation under article 5(1)(b) of the 2007 Lugano Convention; contractual specifications of the place of performance of non-characteristic obligations are irrelevant in terms of jurisdiction.

Jörn Griebel, **Investment Arbitration Awards in Setting Aside Proceedings in the US – Questions Regarding the Review of Local Remedies Clauses Within Investment Treaties**
National setting aside proceedings are more and more often concerned with investment arbitration awards. This is due to a constant rise of investment arbitration proceedings. Although two thirds of all investment disputes are adjudicated according to the ICSID rules, which provide for a special review mechanism, the remaining awards may be subject to review before national

courts. The US Supreme Court decision had to decide on the degree of review in a dispute concerning local remedies clauses within an investment treaty and the possible impact of such clauses on the consent to arbitrate. The Court held that it had no competence to review the award in respect of such clauses.

Fourth Issue of 2014's Rivista di diritto internazionale privato e processuale

(I am grateful to Prof. Francesca Villata – University of Milan – for the following presentation of the latest issue of the RDIPP)

The fourth issue of 2014 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features two articles and five comments.

Francesco Salerno, Professor at the University of Ferrara, examines fundamental rights in a private international law – and namely a public policy – perspective in "**I diritti fondamentali della persona straniera nel diritto internazionale privato: una proposta metodologica"** (Fundamental Rights of the Foreigner in Private International Law: A Methodological Proposition; in Italian).

Namely focusing on the role of public policy, this paper examines how personality rights of foreign individuals are ensured under the Italian private international law system. While personality rights are meant to reflect the identity of an individual at a universal level, private international law is aimed at ensuring the continuity of an individual's rights and status across borders. Art. 24 of the Italian Statute on Private International Law (Law No 218/1995) underlies this concern in that it provides, as regards personality rights, for the application of the law of nationality of the individual in question. However, as a result of the fact that personality rights are closely intertwined with human rights, it becomes inevitable to explore the link between the somehow neutral technique

traditionally employed by conflict-of-law provisions and the fundamental values shared within the international community, in particular those values safeguarded by international obligations regarding the protection of human rights. As this paper portrays, the tension between personality rights under an individual's national law and fundamental rights is crucial to Art. 24 of the Italian Statute, as shown, in particular, by the process with which rights are characterized as falling within the scope of the provision: where a given right is perceived as fundamental by the *lex fori*, that right should enjoy protection in the forum regardless of its status according to the law of nationality of the concerned individual (proceedings on sex reassignment provide some significant examples in this respect). This approach embodies a "positive" expression of the notion of public policy: cross-border uniformity is foregone, here, as a means to ensure the primacy of the fundamental policies of the forum. However, as the paper illustrates, the role of public policy in ensuring fundamental rights goes even further: in fact, public policy may also serve as a guide whenever the need arises to adapt the applicable foreign law, should such law fail to provide solutions that are equivalent to those enshrined in the *lex fori*.

Fabrizio Vismara, Associate Professor at the University of Insubria, discusses agreements as to successions and family pacts in **"Patti successori nel regolamento (UE) n. 650/2012 e patti di famiglia: un'interferenza possibile?"** (Agreements as to Succession in Regulation (EU) No 650/2012 and Family Pacts: A Possible Interference?; in Italian).

Law No 55 of 14 February 2006 enacted the regime on family pacts and amended Art 458 of the Italian Civil Code repealing the prohibition against agreements as to succession. This article analyzes the relationship between family agreements and agreements as to succession with reference to the regime enacted by Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. After examining the different solutions with respect to the characterization of family agreements (donation, division, contract), this article highlights how family agreements may be referred to the application of Regulation (EU) No 650/2012 as a form of waiver agreement as to succession. In this respect, family agreements may be governed by Regulation (EU) No 650/2012 and, in particular, by the rules on the determination of the applicable law

provided therein.

In addition to the foregoing, the following comments are also featured:

Michele Nino, Researcher at the University of Salerno, examines State interests in labor disputes in "**State Immunity from Civil Jurisdiction in Labor Disputes: Evolution in International and National Law and Practice"** (in English).

This article examines the evolution of the international rule on State immunity from civil jurisdiction in labor disputes. After having shed light on the notion and content of the international rule at issue, this article examines the relevant international legal instruments (such as the 1972 European Convention on State Immunity and the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property), the national practice of civil law and common law States, as well as the case law of the European Court of Human Rights and of the European Court of Justice. In light of this analysis, this papers illustrates that, although an important trend aimed at promoting in labor disputes stable criteria of jurisdiction of the State of the forum (such as the nationality or the residence of the worker and the place of the execution of the employment relationship), the criterion based on the distinction between *acta jure imperii* and *acta jure gestionis* continues to be applied rather permanently in such disputes. As a result, in the conclusions, solutions are put forth so that the application of such criterion be subject to revision, at national and international levels, and that, as a consequence, an effective protection of workers be guaranteed in labor disputes against the need to safeguard State interests.

Giulia Vallar, Fellow at the University of Milan, addresses the topic of intra-EU investment arbitration in "**L'arbitrabilità delle controversie tra un investitore di uno Stato membro ed un altro Stato membro. Alcune considerazioni a margine del caso *Eureko/Achmea v. The Slovak Republic*"** (Arbitrability of Disputes between an Investor from a Member State and another Member State. Some Remarks on *Eureko/Achmea v. The Slovak Republic*; in Italian).

The present paper deals with one of the issues that has recently been considered within the *Eureko/Achmea v. The Slovak Republic* case, namely the arbitrability of the so called intra-EU BITs disputes. In essence, it focuses on whether the investor of an EU member state can rely on the compromissory clause contained

in a BIT that its country of origin had signed with another country that, in turn, at a later time, became an EU member State. To such a question arbitral tribunals have answered in the positive, while the EU in the negative, without however adopting a normative act in this sense. Throughout the paper, an analysis is conducted of those aspects of international law and of EU law that come into play in relation to the matter at hand. It is submitted that, in the absence of a definite/hard law solution, the way out should consist, for the time being, in applying soft law principles and, in particular, that of comity; nevertheless, the EUCJ and the arbitral tribunals do not appear to be very much keen to act in this sense. EU member states, on their part, are more and more frequently opting for the termination of the relevant BITs, allegedly on the basis of a law and economics analysis. This attitude, however, might produce negative effects on the economy of these states, since investors, seeking the protection of a BIT, could be encouraged to move their seats in third countries.

Giovanna Adinolfi, Associate Professor at the University of Milan, tackles the issue of financial instruments and State immunity from adjudication in **"Sovereign Wealth Funds and State Immunity: Overcoming the Contradiction"** (in English).

The increasing number of sovereign wealth funds (SWFs) and the growth in the value of their assets are among the main current trends in the global financial markets. The governments of recipient States have voiced their concerns, contending that SWFs are financial vehicles used by States to pursue general public aims but acting like private economic agents. The question this contribution tackles is whether SWFs, as "sovereign" investment vehicles, come within the scope of international and national rules on sovereign immunity. This topic will be analyzed from three perspectives. As a starting point, the definition of "foreign State" given by immunity legal regimes will be investigated in order to define in which circumstances SWFs meet it. Next, the issue of SWSs' immunity from adjudication will be ascertained. In this regard, the main point is whether SWFs investments are to be understood as actions engaged in within the exercise of sovereign authority, or as mere commercial activities, over which immunity from judgment on the merits is removed. As it may not be excluded that courts render judgments against SWFs, the rules on immunity from pre-judgement and post-judgement measures of constraint are to be considered, so as to identify the property against which jurisdictional rulings may be enforced for the full

satisfaction of the legitimate expectations of judgment creditors. The enquiry mainly focuses on the rules established under the UN and the Council of Europe conventions; the content and practice under national regimes is also considered, mainly the US Foreign Sovereign Immunities Act and the UK State Immunity Act. The main result is that there is no univocal answer to the question whether rules on sovereign immunity are helpful in overcoming the contradiction between the different but complementary public and private natures of SWFs. The form through which funds have been established and the content of the specific legal regime on the basis of which courts have to judge in their regard are the fundamental variables, and their combination in each case may lead to different results in terms of immunity from both the adjudicative process and enforcement measures.

Laura Carpaneto, Researcher at the University of Genoa, examines the interface of the Brussels II-*bis* Regulation and the European Convention of Human Rights in **"In-Depth Consideration of Family Life v. Immediate Return of the Child in Abduction Proceedings within the EU"** (in English).

The paper focuses on the EU regime on child abduction provided by Regulation No 2201/2003 and, in particular, on its Art. 11(8) expressly providing for the replacement of a Hague non return order by a subsequent judgment (the so called "trumping order") imposing the return of the child made by the courts of the State where the child was habitually resident prior to the wrongful removal or retention. Starting from the analysis of some recent decisions of the European Court of Human Rights, stating that some return orders held by domestic courts in applying the 1980 Hague Convention (*Neulinger and Shuruk v. Switzerland and X v. Latvia*) as well as the Brussels II-*bis* Regulation (*Sneersone and Kampanella v. Italy*) were not in compliance with Art. 8 of ECHR, the paper is aimed at demonstrating the that a too strict "Art. 8 ECHR's test" is capable of undermining the functioning of the Brussels II-*bis* trumping order and that a specific human rights' test for intra-EU child abduction should be carried out. In this light, the paper firstly highlights the added value of the Brussels II-*bis* regime on child abduction compared to the 1980 Hague Convention; it goes on to critically analyze the recent decisions of the European Court of Human Rights on the return orders in child abduction cases, and it finally proposes a possible human rights test capable of protecting the "effet utile" of the EU regime on child abduction.

Matteo Gargantini, Senior Research Fellow at the Max Planck Institute Luxembourg, examines and shares some considerations on the AG's Opinion in *Kolassa* in "**Jurisdictional Issues in the Circulation and Holding of (Intermediated) Securities: The Advocate General's Opinion in *Kolassa v. Barclays*"** (in English).

This article addresses the Advocate General's Opinion in *Kolassa v. Barclays* (released on September 3, 2014, in the case C-375/13) from the perspective of financial markets law. The case raises some issues on the establishment of jurisdiction in disputes concerning securities offerings. The article suggests that a restrictive interpretation should be given of the Opinion (as well as of the CJEU decision on the case, which substantially follows the Opinion). On the one hand, the interpretation affirmed by the Advocate general may in fact, if read extensively, rule out the possibility that investors enjoy the protective regime of Brussels I Regulation *vis-à-vis* the issuer if they purchase securities on the secondary market, as it denies the possibility of establishing jurisdiction on the basis of Articles 15 and 16 of the Brussels I Regulation where a consumer has purchased a security not from the issuer but from a third party that has in turn obtained it from the issuer. On the other hand, the Opinion may expose offering companies to the risk of being sued by professional investors in multiple jurisdictions on the basis of tortious liability, even in cases where a prospectus was not published and, therefore, such companies did not intend to conduct any activity in other countries, on the basis that no contractual relationship can be identified in *Kolassa* between the issuer of the certificate and the final investor. Tortious liability, which is admitted by the Opinion, may therefore sometimes be an imperfect substitute for contractual liability. Hence, the article proposes that the Advocate General's (and the CJEU's) reasoning should be narrowly interpreted so as to confine its purview to the issues raised by the holding of certificates through trusts and other similar devices. On the contrary, further reflections are needed before a conclusive position is taken on the effects of circulation of securities under the Brussels I Regulation.

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