Conference on the Brussels I Recast

On 28 and 29 November 2014, the Verona University Department of Law will host a conference on “International Litigation in Europe : the Brussels I Recast as a panacea?”. The conference will take place in Verona. The conference language will be English. Registration is possible via email: chiara.zamboni_01@univr.it

More information is available here. The programme reads as follows:

Friday, November 28, 2014

- 13.30 Registration
- 14.00 Welcome and opening remarks
  Prof. Gottardi, University of Verona
  Prof. Ferrari, University of Verona/NYU
- 14.10 Greetings
  Avv. Cristiano, AIJA National Representative, Italy

I Session: The Recast as a political compromise

- 14.20 Goals of the Recast
  Prof. Pocar, University of Milan
- 14.45 The (still limited) territorial scope of application of the new Regime
  Prof. Carbone, University of Genoa
- 15.10 The arbitration exception
  Prof. Radicati di Brozolo, University of Milan
- 15.35 Discussion

II Session: The special and mandatory rules on jurisdiction

- 15.50 A new head of jurisdiction in relation to the recovery of cultural objects
  Prof. Gebauer, University of Tübingen
- 16.15 Enhancing protection for the weaker parties: the jurisdiction over individual contracts of employment
  Prof. Cafari Panico, University of Milan)
- 16.40 The consumer’s jurisdictional privilege in the ECJ case law

Prof. Rühl, University of Jena
- 17.05 Discussion
- 17.20 Coffee Break

III Session: Party autonomy and choice-of-court agreements

- 17.50 The role of party autonomy in the allocation of jurisdiction in contractual matters
  Prof. Mankowski, University of Hamburg
- 18.15 Towards a broadened effectiveness of choice-of-court agreements in the European judicial area?
  Prof. Queirolo, University of Genoa)
- 18.40 The enforcement of choice-of-court agreements in Europe: is there any consistency in case law?
  Prof. Villata, University of Milan)
- 19.05 Discussion
- 19.20 End of first conference day
- 20.30 Dinner

Saturday, November 29, 2014

IV Session: Coordination of legal proceedings and provisional measures

- 09.00 The end of torpedoes?
  Prof. Nielsen, University of Copenhagen
- 09.25 Provisional measures in the new Regime
  Prof. Garcimartín Alférez, Autónoma University of Madrid
- 09.50 Discussion

V Session: Cross-border recognition and enforcement

- 10.05 The free circulation of judgments and the abolition of exequatur
  Prof. Pfeiffer, University of Heidelberg
- 10.30 The exceptions to recognition and enforcement
  Prof. Fumagalli, University of Milan
- 10.55 Discussion
- 11.10 Coffee break

VI Session: The Brussels I Recast in the International Arena

- 11.40 The Brussels I Recast and the Lugano Convention: which rules for the outer world?
  Prof. Malatesta, Carlo Cattaneo University
- 12.05 The Brussels I Recast and the Hague Convention on Choice of Court Agreements: convergences and divergences
  Dr. Ragno, University of Verona
- 12.30 The Brussels I Recast and the Unified Patent Court Agreement: towards an enhanced patent litigation system?
  Prof. Marongiu Buonaiuti, University of Macerata
- 12.55 Discussion

Closing remarks

- 13.10 Closing Remarks
  Prof. Pocar, University of Milan
- 13.30 End of the conference

On Unilateral Choice-of-Court Agreements and Options to Arbitrate (article)

A topic we were discussing just a few days ago at the MPI, with especial attention to a Spanish decision. Now it's Italian time. The article, by S. Ferrero, is to be found here.

Abstract:

In this work it is discussed the validity and the enforceability of unilateral choice-of-court agreements and options to arbitrate. Such clauses are very frequent in international contracts, particularly in loan agreements, where the provision is in favour of the lender, the stronger party to the contract. Whilst in various jurisdictions there are significant lines of authorities enforcing such agreements

as perfectly valid, unilateral choice-of-court agreements and options to arbitrate have been recently questioned and struck down by the French, the Russian and the Bulgarian Supreme Courts. Recognizing in these decisions a rising general tendency, at the international level, contrary to asymmetric arbitration and choice of court agreements is, perhaps, premature. Nevertheless, the arguments put forward by the mentioned decisions naturally trigger further analysis of the matter. The legal assessment will be carried out under a twofold perspective: on the one hand, the private international law, which entails the analysis of the relevant European legislation (Regulation 44/2001 and Regulation 1215/2012) and, on the other hand, the domestic substantive law, namely Italian law. Particularly, it will be considered whether, in the light of the reasoning of the foreign case law, Italian courts may change their attitude towards one-sided jurisdiction and arbitration agreements. It is submitted that the decisions against the validity and enforceability are open to criticism and Italian courts should remain in favour of asymmetric arbitration and choice of court agreements for, it is suggested, the European legislation and Italian domestic law do not lead, expressly or implicitly, to hold them invalid and/or unenforceable, except for certain limited cases.

Dutch Private International Law journal, 2014 second and third issue published

The second issue of 2014 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* (published in June) includes scholarly articles on the Unamar ruling of the European Court of Justice and the reform of the European Insolvency Regulation.

Jan-Jaap Kuipers & Jochem Vlek, 'Het Hof van Justitie en de bescherming van de handelsagent: over voorrangsregels, dwingende bepalingen en openbare orde', p. 198-206. The English abstract reads:

In Unamar, the Court of Justice of the European Union decided that national rules providing protection to commercial agents going beyond the mandatory floor laid down by the Agency Directive can be qualified as overriding mandatory provisions. This article discusses the decision of the CJEU and its articulation with another case involving the Agency Directive: Ingmar. Subsequently, the article addresses two wider issues relating to overriding mandatory provisions and the Agency Directive that, even after Unamar, remain to be resolved. The first is whether rules primarily protecting the weaker party, such as the agent, can at all be qualified as overriding mandatory provisions. The second is whether a choice of court or arbitration clause should be set aside or invalidated because of the applicability of an overriding mandatory provision.

Laura Carballo Piñeiro, 'Towards the reform of theEuropean InsolvencyRegulation: codification rather than modification', p. 207-215. The abstract reads:

The European Insolvency Regulation has largely succeeded in providing a framework for cross-border insolvency. But after serving for more than a decade, the time is ripe to give it 'a new facelift', as suggested by Mrs. Viviane Reding. This paper provides a critical overview of the Proposal amending the Regulation issued by the European Commission on 12 December 2012. While its inputs are backed up by a broad consensus as it mostly reflects developments in national insolvency laws and codifies the Court of Justice of the European Union's case law, the Proposal is a missed opportunity to modify some rules which do not properly contribute in their current wording to achieving the insolvency proceedings' goals. This is particularly remarkable in view of the extension of the Regulation's scope of application to include proceedings with reorganization, adjustment of debt or rescue purposes and hence, aiming to enhance their cross-border effects and ultimate goals.

The recently published third issue of 2014 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* contains the following three articles on: the (English) court language in international litigation, the recognition and enforcement of provisional and protective measures and international matrimonial property law in Turkey.

Johanna L. Wauschkuhn, 'Babel of international litigation: Court language as leverage to attract international commercial disputes', p. 343-350. The abstract reads:

Ever since the disappearance of Latin from European courtrooms, it has been commonly understood that each nation would use its own language(s) in its own courts of law. However, in the last few years, discussions have arisen among politicians and legal scholars as to the possibility of introducing foreign languages as court languages. Whereas politicians are mostly driven by economic considerations, many academics are more reluctant as they fear an infringement of the principle of the publicity of proceedings and a contamination of the native legal system. The present article analyses whether offering the option of using a non-national language as court language in civil and commercial litigation is an effective, feasible and efficient leverage to make a jurisdiction (or court) more attractive for international commercial dispute resolution. The article therefore addresses, firstly, why and how lawmakers would try to attract legal disputes and, secondly, why and how parties to a dispute choose a particular jurisdiction. Here, special attention is paid to the role of language in the choice of court. Following this, the most prominent and most frequently expressed practical and constitutional objections regarding competition by means of court language are summarised. After this theoretical presentation, the jurisdictions of Germany and Switzerland are analysed, as examples, as to their standing in the present discussion and their role on the market for international dispute resolution. It is concluded that the objections against introducing a non-national court language outweigh the mostly economic arguments in favour, especially considering the only minimal positive effects.

Carlijn van Rest, 'Erkenning en tenuitvoerlegging van (ex parte) voorlopige en bewarende maatregelen op grond van de EEX-Verordening en de Herschikking van de EEX-Verordening. Een analyse aan de hand van de Engelse Freezing Order', p. 351-356. The English abstract reads:

An English Freezing Order is an interim prohibitory injunction, which is almost invariably granted ex parte and which restrains a party from disposing or dealing with its assets. On the basis of the Brussels I Regulation it is possible to recognize and enforce an English Freezing Order in the Netherlands. This is

only possible if the Freezing Order has been granted on an inter partes basis, because ex parte decisions cannot generally be enforced. This article discusses what a (worldwide) Freezing Order exactly is and under what conditions it can be ordered by the English courts. A comparison will be made with the Dutch garnishee order (conservatoir derdenbeslag). Furthermore, this article discusses the problems with the recognition and enforcement of provisional and protective measures which have been granted ex parte under the Brussels I Regulation (Regulation No. 44/2001) and the consequences for the recognition and enforcement of ex parte decisions under the Recast of the Brussels I Regulation (Regulation No. 1215/2012).

Zeynep Derya Tarman & Ba?ak Ba?o?lu, 'Matrimonial property regime in Turkey', p. 357-363. The abstract reads:

As the number of marriages between spouses from different nations is increasing the issue of the matrimonial property regime has become significant. The aim of this article is to examine the possible problems when claims regarding the matrimonial property regime with a foreign element are brought before a Turkish court. In this regard, both the private international law and the substantive law aspects of the matrimonial property regime in Turkey will be explained: namely the jurisdiction issue in matrimonial property cases, the conflict of law rules regarding the applicable law in the matrimonial property regime before the competent Turkish courts and, finally, the matrimonial property regime under the Turkish Civil Code. Accordingly, both the legal matrimonial property regime and three contractual matrimonial property regimes that the spouses may choose under Turkish law will be described.

ISDS in the TTIP?

The question whether the Transatlantic Trade and Investment Partnership (TTIP) should include an Investor-State Dispute Settlement (ISDS) provision clause has triggered a lively debate where opinions are clearly opposed. As I am not an expert in the field I can only report on the fact and refer to what has been already said elsewhere. In this regard I would recommend to have a look at J. Garcia Olmedo's post of last Friday. It contains info and interesting links to further contributions, in particular to the responses to the EC public consultation on the matter in March 2014 (ended on 13 July 2014). The author comments focus especially in the response submitted by professors from several universities such as Sciences Po Paris, the University of Kent, the School of Oriental and African Studies, and Osgoode Hall Law School. Some other contributions can be found online: click here, or here). The Preliminary Report of the Commission, which provides a statistical overview, was published in July 2014; the EC does not expect to have its final analysis ready before November this year. Considering the success of the public consultation, with almost 150.000 answers, stakeholders will be certainly waiting for it.

Second 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 second issue of 2014 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features one article and three comments.

Angela Del Vecchio, Professor at LUISS – Guido Carli University, addresses

recent cases of conflict of criminal jurisdiction and piracy in **"Il ricorso all'arbitrato obbligatorio UNCLOS nella vicenda dell'*Enrica Lexie*"** (Recourse to UNCLOS Compulsory Arbitration in the *Enrica Lexie* Case)

> *The* Enrica Lexie *incident has given rise to two disputes between Italy and India, one concerning the violation of the United Nations Convention on the Law of the Sea ("UNCLOS") rules on piracy and criminal jurisdiction in the case of an incident of navigation on the high seas, and the other concerning the violation of the international rules on the sovereign functional immunity of military personnel abroad. Regarding the first dispute, there is a difference of opinion between Italy and India as to the interpretation of the UNCLOS provisions that govern the jurisdiction of domestic courts to adjudicate on the merits of the case. This has led to a conflict of jurisdiction between the two States that, as examined in this article, could be resolved by recourse to the compulsory arbitration provided for in Annex VII to UNCLOS. Such arbitration may be commenced even by just one of the parties. By contrast, as concerns the second dispute recourse to compulsory dispute resolution mechanisms would appear quite problematic as a result of the gradual erosion of the principle of sovereign functional immunity of State organs.*

Georgia Koutsoukou, Research Fellow at the Max Planck Institute Luxembourg, and *Nikolaos Askotiris*, Ph.D. Candidate at the International Investment Law Centre Cologne, examine waivers of sovereign immunity in light of the most recent jurisprudence in **"Tightening the Scope of General Waivers of Sovereign Immunity from Execution"** (in English)

> *The establishment, under international law, of the proper interpretive approach to broadly phrased waivers of sovereign immunity from execution is an unsettled issue, which was not addressed in legal theory or practice until recently. However, this issue became practically relevant in the wake of certain hedge funds' strategy to seek the collection of defaulted sovereign debt in any available jurisdiction. Most important in this respect are the recent judgments of the French Court of Cassation in* NML v. Argentine Republic*, where the Court held, in fact, that, under customary international law, waivers of execution immunity may not extend to a particular category of state assets, unless expressly referred to. The present article examines the accuracy of the Court's proposition in light of the major parameters for the determination of the relevant standards of interpretation: the 2004 UN*

Convention on Jurisdictional Immunities of States and Their Property as well as the pre-existing state practice, i.e. *the settled case law regarding the interpretation of general immunity waivers in light of the diplomatic and consular law principle* ne impediatur legatio*, and the submission of execution immunity waivers to certain restrictions under domestic statutes. The Authors take the view that the interpretive criteria of the Vienna Convention on the Law of Treaties are applicable by analogy to immunity waivers inserted in government bonds, leading to the adoption of a rather narrow approach. It is further suggested that, under the well-established principle that the plaintiff bears the burden of proof with respect to any exception to execution immunity, the "asset specificity" requirement may reasonably be seen as the allocation of the risk of ambiguity of immunity waivers to the judgment creditor. Finally, the Authors argue that the restrictive interpretation of general immunity waivers may serve as a functional substitute for lacking clear-cut international law rules on state insolvency, insofar as no international law rule protecting good faith restructuring procedures from the speculative tactics of vulture funds is yet in force.*

Antonio Leandro, Researcher at the University of Bari, addresses the impending reform of EC Regulation No 1346/2000 in **"Amending the European Insolvency Regulation to Strengthen Main Proceedings"** (in English)

EC Regulation No 1346/2000 on insolvency proceedings allows for the coexistence of different proceedings with respect to the same debtor. This engenders certain problems in terms of efficiency of the insolvency administration within the European Judicial Space, thus menacing the "effet utile" of the Regulation. This article focuses on such problems, explaining the shortcomings which affect the Regulation and wondering whether ECJ managed a solution for them. As a matter of principle, preventing the opening of secondary proceedings seems in several cases to be a suitable means for protecting the main proceedings' purposes. However, at the same time, not opening secondary proceedings could hamper the interests of local creditors, which rely on them to safeguard rights and priorities on the grounds of the local lex concursus*. The Author addresses the main aspects of this tension. The Regulation is under revision as result of the 2012 Proposal of the European Commission, which,* inter alia*, aims to strike a balance between the aforesaid interests at odds. In this paper, the Author carries out a critical*

appraisal of the envisaged amendments, taking also into account the recent reactions of the other European Institutions, so as to ascertain whether they could really achieve such a balance.

Arianna Vettorel, Fellow at the University of Padua, discusses the protection of the unity of one's personal name in **"La continuità transnazionale dell'identità personale: riflessioni a margine della sentenza *Henry Kismoun*"** (Pesonal Identity's Continuity across Borders: Remarks on the *Henry Kismoun* Judgment")

This paper focuses on the novelties introduced by the European Court of Human Rights' judgment in Henry Kismoun v. France*, which concerns the issue of transnational continuity of names: in* Henry Kismoun v. France *the Court recognized the need of protecting the unity of a personal name on the basis of Article 8 ECHR, also with regard to the secondary name conferred on a person, in the State of the person's second citizenship. The novelties introduced by this judgment could influence the future jurisprudence of the European Court of Justice which has granted protection to the unity of the name firstly attributed on the basis of the EC Treaty (now TFEU) without referring to fundamental human rights. At the domestic level, fundamental human rights have been used to grant protection to transnational continuity of names of non EU citizens by the Italian courts, first, and by the Minister for Internal Affairs, then. Moreover, Article 8 ECHR constituted the legal basis to grant new Italian citizens the right to maintain the name they were assigned abroad. In addition to introducing new interpretational perspectives about the issue of continuity of name across borders, the above mentioned judgment and the new Italian practice seem to constitute an additional step in the direction of the establishment of the "method of recognition" based on the vested rights theory, and bear a great impact on the issue of continuity of personal status across borders.*

Indexes and archives of RDIPP since its establishment (1965) are available on the website of the Rivista di diritto internazionale privato e processuale. This issue is available for download on the publisher's website.

Volume on Private International Law in Mainland China, Taiwan and Europe

Jürgen Basedow and Knut B. Pißler, both from the Max Planck Institute for Comparative and International Private Law in Hamburg, have edited a book on "Private International Law in Mainland China, Taiwan and Europe". The book has been published by Mohr Siebeck.

The official abstract reads as follows:

> *Over the last decades, private international law has become the target of intense codification efforts. Inspired by the stimulating initiatives taken by some European countries, by the Brussels Convention and the Rome Convention, numerous countries in other regions of the world started to enact comprehensive legislation in the field. Among them are Taiwan and mainland China. Both adopted statutes on private international law in 2010. In light of the rising significance of the mutual economic and societal relations between the jurisdictions involved and of the legal innovations laid down in the new instruments, the Max Planck Institute for Comparative and International Private Law convened scholars to present the conflict rules adopted in Europe, in mainland China and in Taiwan across a whole range of private law subjects. This book collects the papers of the conference and presents them to the public, together with English translations of the acts of Taiwan and mainland China.*
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> *Survey of contents:*
> ***Part 1: Jurisdiction, Choice of Law, and the Recognition of Foreign Judgments in Recent*** *Legislation Jin Huang: New Perspectives on Private International Law in the People's Republic of China – Rong-Chwan Chen: Jurisdiction, Choice of Law and the Recognition of Foreign Judgments in Taiwan – Stefania Bariatti: Jurisdiction, Choice of Law and the Recognition of Foreign Judgments in Recent EU Legislation*

Part 2: Selected Problems of General Provisions

Weizuo Chen: Selected Problems of General Provisions in Private International Law: The PRC Perspective – Rong-Chwan Chen: General Provisions in the Taiwanese Private International Law Enactment 2010 – Jürgen Basedow: The Application of Foreign Law – Comparative Remarks on the Practical Side of Private International Law

Part 3: Property Law

Huanfang Du : The Choice of Law for Property Rights in Mainland China: Progress and Imperfection – Yao-Ming Hsu: Property Law in Taiwan- Louis d'Avout: Property Law in Europe

Part 4: Contractual Obligations

Qisheng He: Recent Developments of New Chinese Private International Law With Regard to Contracts – David J.?W. Wang: The Revision of Taiwan's Choice-of-law Rules in Contracts – Pedro A. De Miguel Asensio: The Law Applicable to Contractual Obligations. The Rome I Regulation in Comparative Perspective

Part 5: Non-Contractual Obligations Guoyong Zou: The Latest Developments in China's *Conflicts Law for Non-contractual Obligations – En-Wei Lin: New Private International Law Legislation in Taiwan: Negotiorum Gestio, Unjust Enrichment and Tort – Peter Arnt Nielsen: Non-Contractual Obligations in the European Union: The Rome II Regulation*

Part 6: Personal Status (Family Law/Succession Law)

Yujun Guo: Personal Status in Chinese Private International Law Reform – Hua-Kai Tsai: Recent Developments in Taiwan's Private International Law on Family Matters – Katharina Boele-Woelki: International Private Law in China and Europe:A Comparison of Conflict-of-law Rules Regarding Family and Succession Law

Part 7: Company Law

Tao Du: The New Chinese Conflict-of-law Rules for Legal Persons: Is the Middle Way Feasible? – Wang-Ruu Tseng: Private International Law in Taiwan – Company Law – Marc-Philippe Weller: Companies in Private International Law – A European and German Perspective

Part 8: International Arbitration

Song Lu: China – A Developing Country in the Field of International Arbitration

– Carlos Esplugues Mota: International Commercial Arbitration in the EU and the PRC: A Tale of Two Continents or 28+3 Legal Systems

Further information ist available here.

Is an International Arbitral Tribunal the Answer to International Human Rights Litigation?

I just was alerted to a proposal that was put forward to create an International Arbitral Tribunal on business and human rights. The authors of the proposal are Claes Cronstedt, Robert C Thompson, Rachel Chambers, Adrienne Margolis, David Rönnegard and Katherine Tyler, all (save for Ms Margolis, a journalist, and Dr Rönnegard, a philosopher and economist) one-time or current private practice lawyers with a background and/or practice in human rights and CSR.

The initiative seeks to respond, in part, to the US Supreme Court's decisions in *Kiobel v Royal Dutch Petroleum* and *Daimler AG v Bauman*. In short, it is now difficult to plead international human rights violations against corporations in U.S. courts. As I discuss in a forthcoming article, foreign courts may move in to fill the gap. This proposal raises another question: Are international tribunals the right forum for such cases?

Latest Issue of RabelsZ: Vol. 78 No 3 (2014)

The latest issue of "Rabels Zeitschrift für ausländisches und internationales Privatrecht – The Rabel Journal of Comparative and International Private Law" (RabelsZ) has recently been released. It contains the following articles:

- *Klaus Bartels,* **Zum Rückgriff nach eigennütziger Zahlung auf fremde Schuld – Anleihen bei DCFR und common law für das deutsche Recht** (Recourse After Self-serving Payment on Another's Debt – German Law Borrowing From the DCFR and the Common Law) pp. 479-507(29)

Under German law, the self-serving payment on another's debt must be regarded as a performance (Leistung) of the payer to the creditor. The payment leads to a discharge of the debt (§ 267 of the German BGB). A cessio legis, being incompatible with discharge, takes effect only under the exceptions provided by law. A third party may claim reimbursement from the original debtor only under the regime of benevolent intervention in another's affairs (Geschäftsführung ohne Auftrag). But the criteria for determining the meaning of concepts such as "another's affairs" and the "intention of benefiting another" are widely challenged. And having a recourse plan in mind, also positive effects on the debtor's issues, which could support the criteria of § 683 sentence 1 BGB, are regularly missed.

The prevailing German doctrine is comfortable with the Rückgriffskondiktion (§ 812 (1) sentence 1, alternative 2 BGB), hereby enabling, subsidiarily, recourse to the benefit of the true debtor. The common law has traditionally been averse to this approach. And the Draft Common Frame of Reference avoids this condictio entirely. It is obvious that the English rules on legal compulsion (with their reservation vis-à-vis full restitution as under continental regimes) are substantially convincing. And despite its cautious approach, the Draft Common Frame of Reference offers similar solutions regarding payments

of a third party, who did not consent freely (Art. VII.-2:101(1)(b) DCFR). In cases involving, for instance, an "execution interest", a corresponding interpretation is needed, perhaps even an analogous application of this rule. A similar approach is taken by the German doctrine following § 814 alternative 1 BGB by lowering the restitution barrier for cases of pressure caused by a conflict or compulsion. The already very narrow scope of application of the German Rückgriffskondiktion is thus further and markedly circumscribed: The law of unjust enrichment recognizes gratuitous interference in another's affairs only if the intervener presents substantial reasons to let his conduct be regarded as consistent.

- *Tanja Domej*, D**ie Neufassung der EuGVVO – Quantensprünge im europäischen Zivilprozessrecht** (The Recast Brussels I Regulation – Quantum Leaps in European Civil Procedure) pp. 508-550(43)

In November and December 2012, the European Parliament and the Council adopted the recast Brussels I Regulation (Regulation 1215/2012). The main feature of the reform is the abolition of the exequatur procedure. With this step, one of the main political goals in the field of European judicial cooperation, the abolition of ,,intermediate procedures" standing in the way of cross-border enforcement of judgments, has been achieved – at the price, however, of retaining the grounds for refusal of recognition and enforcement. In other respects as well, the changes introduced by the recast Regulation are modest, compared to the Commission's original political intentions. Instead of a "great leap forward", the European legislator chose incremental change. The plans to extend the rules on jurisdiction to third-state defendants were largely abandoned. The attempt to create new rules on the interface with arbitration was also unsuccessful. The changes with regard to jurisdiction agreements and provisional measures turned out more moderate than proposed by the Commission. This article discusses the innovations introduced by the recast Regulation. It analyses the upsides and downsides of the new rules and points out lost opportunities and avenues for further reforms.

- *Claudia Mayer*, **Ordre public und Anerkennung der rechtlichen Elternschaft in internationalen Leihmutterschaftsfällen** (Ordre public and Recognition of Legal Parenthood in International Surrogacy

Cases), pp. 551-591(41)

Through the use of gestational surrogacy modern artificial reproductive technology provides infertile couples with new opportunities to become parents of children who are genetically their own. While surrogacy is lawful under certain circumstances in a limited number of countries worldwide, in others – including Germany – it is prohibited. Consequently, international surrogacy tourism to countries that allow surrogacy, such as India, the United States, or Ukraine, is booming. However, there is no legal regulation at the international level regarding this matter.

Due to the current legal situation in Germany, infertile couples face severe difficulties in view of the recognition by German courts or by public authorities of their legal parenthood of a child born abroad through surrogacy: Not only is surrogacy illegal in Germany, its prohibition is also considered as part of the German ordre public. Based on this perception, German authorities deny the recognition of existing foreign judgments conferring legal parenthood upon the intended parents, as well as the application of more liberal foreign substantive law, thus paving the way for a recourse to German law: According to the relevant German provisions, the woman who gave birth to the child – i.e. the surrogate mother – is to be considered as the legal mother, and her husband is the legal father. As a consequence, in many cases the child does not acquire German nationality by birth and is thus denied the right to a German passport and the right to enter Germany. In the worst case, the child does not acquire any nationality at all, leaving him or her stateless, which constitutes an unacceptable situation. This article shows that the German ordre publicshould not be considered as an obstacle to the procedural recognition of foreign decisions on legal parentage, nor should it hinder the application of foreign substantive law (designated by the German conflict of law rules) conferring legal parentage on the intended parents. Instead, already de lege lata the welfare of the child must be considered the primary and decisive concern in surrogacy cases. This also results from Article 8 of the European Convention on Human Rights, guaranteeing the right to respect for one's family life.

Regulation at the international level is overdue, and it is to be welcomed that international institutions have started to give attention to the matter. However, until an international consensus is reached, the national legislator should be

called upon to revise the German law on descent, and to provide provisions legalizing surrogacy under certain conditions.

- *A. (Teun) Struycken V.M.*, **The Codification of Dutch Private International LAw- A Brief Introduction to Book 10 BW**, pp. 592-614(23)

English Court of Appeal confirms Damages Award for Breach of a Jurisdiction Agreement

By Martin Illmer

In a recent decision, the English Court of Appeal confirmed a damages award for breach of a jurisdiction agreement ([2014] EWCA Civ 1010); another judgment in the Alexandros T saga, which has been unfolding before the English courts. The judgment was delivered after the Supreme Court had, in November 2013 ([2013] UKSC 70), on appeal from an earlier Court of Appeal judgment in the Alexandros T saga, held that arts 27 and 28 of Brussels I did not apply in relation to the 2006 proceedings, vis-à-vis the 2011 proceedings (see the facts below) because the claims in those proceedings did not concern the same cause of action, but merely arose out of the same factual setting and might raise common issues.

Facts

In May 2006, the vessel Alexandros T, owned by Starlight Shipping Company, sank. Starlight filed a claim with their insurers, who initially denied liability, primarily on the basis that, to Starlight's knowledge, the vessel was unseaworthy. Starlight disputed this argument and in turn alleged that the insurers had

improperly influenced witnesses, had spread false and malicious rumors and, in failing to comply with their obligations to pay Starlight under the insurance policies, had caused them consequential financial loss. Accordingly, in 2006, Starlight brought an action against the insurers before the English High Court under the exclusive jurisdiction clauses in the insurance policies. Shortly before the trial, the parties settled the claim on the basis of Tomlin Orders which provided for a stay of the action save for the purposes of carrying into effect the agreed terms of the settlement. The settlement agreements were expressed to be in full and final settlement of all and any claims under the insurance policies, and contained English choice of law and exclusive English jurisdiction clauses. In addition, Starlight agreed to indemnify the insurers in respect of any claims which might be made against them in relation to the loss of the vessel or under the policies. In 2011, however, Starlight brought proceedings in Greece against the insurers, alleging breaches of the Greek Civil and Criminal Code, relying on the factual allegations concerning witness evidence and loss made in the 2006 proceedings. In response to that claim, the insurers sought to lift the stay of the 2006 proceedings under the Tomlin Orders, and commenced proceedings before the English High Court seeking (1) a declaration that the Greek claims are covered by the releases of the settlement agreements, (2)a declaration that bringing the Greek claims was a breach of the releases in the settlement agreements as well as a breach of the jurisdiction clauses in both the policies and settlement agreements, and, (3) payments based on the indemnity clauses and damages for breach of the release and jurisdiction clauses. At first instance the High Court granted summary judgment on the insurers' claims. Starlight appealed to the Court of Appeal.

Judgment

The relevant passages of the judgment of the Court of Appeal read as follows:

> ***'Do the claims for damages infringe EU law?***

[15] The owners assert that these claims for damages interfere with the jurisdiction of the Greek court to determine its own jurisdiction and, if appropriate, the merits of the owners' claims. For this purpose they rely on Turner v Grovit [2004] 2 Lloyds Rep. 169. This reliance is, however, misplaced

because Turner v Grovit related to anti-suit injunctions and no such injunction is claimed in the present case. The vice of anti-suit injunctions is that they render ineffective the mechanisms which the Jurisdiction and Judgments Regulation provides for dealing with lites alibi pendentes and related actions. One of those mechanisms is provided by Article 27 which requires any court other than the court first seised to stay proceedings involving the same cause of action. Our earlier decision did precisely that because we considered that the Greek proceedings did involve the same cause of action as the English proceedings but the Supreme Court has now held that we were wrong about that and has also refused a stay under Article 28. There is therefore no question of any interference with the jurisdiction of the Greek court.

[16] The Greek court is free to consider the Greek claims; it will, of course, have to decide whether to recognise any judgment of the English court that the Greek claims fall within the terms of the Settlement Agreement and have therefore been released. It will also have to decide whether to recognise any judgment awarding damages for breach of the Settlement Agreements and the jurisdiction clauses in both the settlement agreements and the insurance policies. But that is not an interference with the jurisdiction of the Greek court but rather an acknowledgment of the Greek court's jurisdiction. In these circumstances there is no infringement of EU law, nor is there any need for a reference to the Court of Justice of the European Union despite the owners' repetition of their request for such a reference in their new solicitors' letter of 26th June 2014.

[17] In fact the owners appear almost to recognise that this is the position since they expressly accept that the claim for an indemnity pursuant to the Settlement Agreements is not contrary to EU law (see their supplemental skeleton, para 48). That is plainly right (see also the observations of Lord Neuberger at para 132 of his judgment in the Supreme Court). But if the claims to an indemnity do not infringe EU law, it is very hard to see why claims to damages should infringe that law.'

Short Note

The judgment of the Court of Appeal raises a number of interesting questions, which cannot all be addressed here. From a European perspective, the crucial aspect is the compatibility of such a damages award with the ECJ's judgment

in *Turner v Grovit,* and potentially also West Tankers (although the latter concerned an arbitration agreement, raising the additional problem that arbitration is excluded from the Regulation's substantive scope). Although the Court of Appeal's judgment builds partially upon the prior decision of the Supreme Court on the issue of arts 27 and 28 of Brussels I – in particular, the finding of the Supreme Court that the claims in the two proceedings did not concern the same cause of action – it is likely that the Court of Appeal would have reached the same decision irrespective of the Supreme Court's prior decision. What is most striking about the Court of Appeal's judgment is the fact that Longmore LJ, in the first sentence of para 15, refers to the Greek court's right to determine its own jurisdiction whereas subsequently, after having explained the Supreme Court's decision on jurisdiction, the court simply refers to an interference with the Greek court's jurisdiction, which is of course not the same. Even though the Supreme Court held that arts 27 and 28 of Brussels I do not apply, a damages claim may still interfere with the right of the Greek court to determine its jurisdiction, or, more generally speaking, the threat of such a damages claim may deter parties from even bringing a claim in a foreign forum which would have the same effect as an anti-suit injunction. One may well argue that if an anti-suit injunction that amounts to specific performance of the jurisdiction agreement should no longer be granted, damages may equally not be awarded.

In light of the principle of effectiveness, the ECJ might well find an incompatibility of a damages award with the Brussels I Regime, and it is therefore somewhat surprising that the Court of Appeal did not refer the matter to the ECJ for a preliminary ruling. The Court of Appeal simply held, by way of its own interpretation, that there is no infringement of EU law, even though the matter has not yet been decided by the ECJ nor resolved by EU legislation. It is mentioned, in passing, that the English courts, in the litigation that followed the ECJ's West Tankers ruling, appear to be very reluctant to refer matters to the ECJ for a preliminary ruling (see also the issue of enforcement of an arbitral award by entering judgment in terms of the award under section 66(2) Arbitration Act 1996 in West Tankers v Allianz [2011] EWHC 829, confirmed by [2012] EWCA Civ 27). It seems that certain of the ECJ's decisions, such as West Tankers, Turner, and Gasser were so shocking to English courts that they want to avoid a repetition by all means. Moreover, the English courtsequally do not want to see the alternatives to anti-suit injunctions that are provided by English law (some even exclusively by

English law) to be destroyed by the ECJ for an incompatibility with the Brussels I Regime.

The matter is somewhat different with regard to arbitration agreements, since arbitration is excluded from the Regulation's scope and there is consequentially no lis pendens mechanism that applies to it. While a state court appears to be barred from granting damages for breach of an arbitration agreement for incompatibility with the ECJ's West Tankers judgment, an arbitral tribunal may well award such damages. While arbitral tribunals are bound by substantive EU law (see ECJ Case C-126/97 Eco Swiss v Benetton [1999] ECR I-3055), they are not bound by procedural EU law that is specifically intended and designed to apply only to the Member States' courts. Consequently, the procedural principles underlying the Brussels I regime do not bind arbitral tribunals even if seated in a Member State, so as to foster mutual trust in other Member States' courts, by allowing them to rule independently on their jurisdiction. The matter was recently heard before the English High Court, which held that the Brussels I Regulation does not apply to an arbitral tribunal, and accordingly that it may award damages for breach of an arbitration agreement free from any restraints due to the principles of the Brussels I Regime (West Tankers v Allianz [2012] EWHC 854). Interestingly, the Swiss Supreme Court reached the same result, (although it was of course not restrained by EU law) when it dealt with an arbitral award rendered by a tribunal whose members included Lord Hoffmann.

Save the Date: Next Conference of the German Academic Association for International Procedural Law

The next biannual conference of the German Academic Association for International Procedural Law (Wissenschaftliche Vereinigung für Internationales Verfahrensrecht e.V.) will take place from 25 to 28 March 2015 in Luxemburg. It will be hosted by the Max Planck Institute for International, European and

Regulatory Procedural Law and will be dedicated to three topics:

- The European Court System
- International Dimensions of European Procedural Law
- International Commercial Arbitration

The conference language will (for the most part) be German. More information is available here.