Out now: Punitive Damages and Private International Law: State of the Art and Future Developments

Written by Zeno Crespi Reghizzi, Associate Professor of International Law at the University of Milan

The recognition of punitive damages represents a controversial issue in Europe. For many years, due to their conflict with fundamental principles of the *lex fori*, punitive damages have been found to be in breach of public policy by some European national courts. This has prevented the recognition and enforcement of foreign judgments awarding them, or (more rarely) the application of a foreign law providing for these damages.

More recently, the negative attitude of European courts vis-à-vis punitive damages has been replaced, at least in some States, by a more open approach. The latest example is offered by a *revirement* of the Italian Supreme Court case law as per its judgment no 16601 of 5 July 2017.

This book – edited by Stefania Bariatti, Luigi Fumagalli, and Zeno Crespi Reghizzi and published by Wolters Kluwer-CEDAM – intends to explore the relationship between punitive damages and European private international law from different angles. After introducing the topic from a comparative law perspective, the chapters of this book examine, in particular, the purpose and operation of public policy as applied to punitive damages, the solutions adopted by the case law of various European States, the treatment of punitive damages in international commercial arbitration, and the emerging trends in EU and ECHR law.

The contributions have been prepared by leading legal scholars from different jurisdictions and are based on papers presented at a conference that took place on 11 May 2018 at the Department of Italian and Supranational Public Law of the State University of Milan, with the support of the SIDI Interest Group on Private International Law and the “Rivista di diritto internazionale privato e processuale”.

Awaken the Guardian: UK damages for breach of a choice of court agreement violate Greek public policy

The Piraeus Court of Appeal refused recognition and enforcement of two English orders awarding damages for breaching a choice of court and a settlement agreement due to violation of the Greek procedural public policy.

Apostolos Anthimos

INTRODUCTION

The ruling forms part of the famous *The Alexandros T* saga. It comes as the expected step forward, after the judgment rendered by the English CoA in the case *Starlight Shipping Company v Allianz Marine & Aviation Versicherungs AG (The Alexandros T* [2014] EWCA Civ 1010. The latter decision has been already reported and criticized in our blog by *Martin Ilmer*. An extensive presentation and critical analysis of the judgment is also included in the doctoral thesis of my blog colleague, Mukarrum Ahmed, pp. 142-151. For a concise, however complete presentation of the case in its previous stages, see here. For a view in favor of the outcome in the UK courts, see here.

THE FACTS

The application for the declaration of enforceability concerned two orders issued by a judge of the High Court of England in 2014, awarding damages (amounting to 300.000 *£)* for breach of a choice of court and a settlement agreement between the parties. The orders were issued on the basis of a judgment of the High Court

[*Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* [2014] EWHC 3068 (Comm) (26 September 2014), see also [2015] 2 All E.R. (Comm) 747; [2014] 2 Lloyd's Rep. 579], which granted declaratory relief in favor of the insurers, and specific performance and damages for the solicitors' and adjuster's, on the basis that the proceedings in Greece were in breach of the settlement agreements and the exclusive jurisdiction clauses of both the settlement agreements and the underlying policies.

The Piraeus 1st Instance Court granted exequatur [Nr. 3461/2015, unreported]. The Greek shipping company appealed pursuant to the Brussels I Regulation, seeking revocation in accordance with Article 45, in conjunction with Art. 34.1 Brussels I Regulation.

THE RULING

Initially, the Piraeus CoA engaged in an analysis of the Brussels regime, starting from the Brussels Convention. It then focused on the public policy defense under Article 34.1 Brussels I Regulation. In this context, the court underlined the significance of Article 8 of the Greek Constitution, which reads as follows: *No person shall be deprived of the judge assigned to him by law against his will.* Finally, the court made reference to the institution of anti-suit injunction, concluding what is already common ground for continental legal orders, namely that recognition of such measures may not be tolerated.

With respect to the issue at stake, the reasoning of the Piraeus CoA is brief and to the point. The court stated verbatim the following:

It is true that both the English court and the Judge issuing the orders did not issue anti-suit injunctions. However, judgments hindering the progress of litigation initiated in Greece by ordering damages, and warnings for further damages against the claimants in the Greek proceedings, are included both in the ruling and the orders aforementioned. Consequently, the above contain ‚quasi' anti-suit injunctions, which pose barriers towards free access to Greek courts, in violation of Article 6.1 ECHR and Articles 8.1 & 20 of the Greek Constitution, the provisions aforementioned belonging to the core of public policy in Greece.

Piraeus Court of Appeal, Nr. 371/1.7.2019

COMMENTS

The ruling of the Piraeus court does not come as a surprise. The reasoning might be laconic, nevertheless it is crystal clear, and in line with the comments made by *Martin Ilmer & Mukarrum Ahmed*.

For the time being, no information is available on a possible final appeal lodged by the English side. I would however tend to believe that a final appeal is to be expected for the following reasons:

- In the course of proceedings initiated by the Greek side, at least three judgments issued by the Piraeus First Instance Court have incidentally recognized the same English judgments and orders, following the analysis embedded in the judgments of the High Court, the Court of Appeal and the Supreme Court of England respectively. It is therefore obvious that the Greek side will grab the chance given by the new ruling, and seek reversal in second instance.
- There is no precedent regarding the case at hand. Therefore, all cards are on the table: The Greek Supreme Court may allow or dismiss the appeal, whereas a preliminary reference to the CJEU is not to be excluded. The days of reluctance to submit preliminary questions seem to be gone for the Supreme Court [see C-436/16]. Actually, a preliminary reference would be the most prudent solution, given that the matter needs to be clarified on EU level.[contact-form][contact-field label="Name" type="name" required="true" /][contact-field label="Email" type="email" required="true" /][contact-field label="Website" type="url" /][contact-field label="Message" type="textarea" /][/contact-form]

Rivista di diritto internazionale privato e processuale (RDIPP) No 2/2019: Abstracts

The second issue of 2019 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released and it features:

Adrian Briggs, Professor at Oxford University**, Brexit and Private International Law: An English Perspective** (in English)

The effect of Brexit on private international law in England will depend on the precise terms on which the separation is made. However, if no comprehensive withdrawal agreement is concluded and adopted, the result will be that private international law in the United Kingdom will revert to its original common law structure. This will make the law and practice of dispute resolution more effective in some respects, and more problematic in others. While it is regrettable that so much time and labour has to be spent on planning for a future which the politicians are incapable of defining, it does allow the distinctions between common law legal thinking, and European legal principles, in the field of private international law to be compared and understood more clearly than they have been for many years.

Burkhard Hess, Director of the Max Planck Institute Luxembourg for Procedural Law, **Protecting Privacy by Cross-Border Injunction** (in English)

Injunctive relief is of paramount importance in the protection of privacy, especially in the context of the Internet. In the cross-border setting, injunctions entail specific problems: on the one hand, jurisdiction may lie with many courts – often worldwide due to the ubiquity of the Internet. On the other hand, injunctions operate with an extraterritorial effect, ordering or prohibiting conduct outside of the State where the court issuing the order is located. Cross-border injunctive relief does not only raise issues of jurisdiction and territorial scope: in fact, additional problems relate to its enforcement. Furthermore, the need may arise to adapt the injunction to an equivalent measure in the State of enforcement. This paper addresses the problems of cross-border injunctive relief from the perspectives of jurisdiction and territorial scope, as well as of recognition and enforcement. While actions for damages and for injunctive relief are regulated in similar ways, the Author of this paper demonstrates that the specific circumstances and necessities that characterize injunctive relief warrant additional and specific solutions.

Chiara E. Tuo, Associate Professor at the University of Genoa, **The Consequences of Brexit for Recognition and Enforcement of Judgments in Civil and Commercial Matters: Some Remarks** (in English)

This article aims at addressing some questions regarding the impact of Brexit on recognition and enforcement of judgments in civil and commercial matters with a view to investigating the rules applicable, first, in the case that Brexit occurs without any withdrawal agreement ("hard Brexit") and, second, regardless of whether such an agreement will be actually entered into, in the context of a future and renewed judicial cooperation relationship between the EU and UK. To this end and in relation to the first part of the analysis, the relevant passages of both the EU Commission's guidelines and UK statutory instruments dealing with the issue of recognition and enforcement of judgments are taken into exam and compared the ones with the others in order to assess the different extent to which they provide for the continuous post-Brexit application of the existing EU instruments. On the other hand, and in relation to the second part of the article, the options currently available for a future EU-UK cooperation are considered with the purpose of shedding some light on their respective main advantages and disadvantages.

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

Cinzia Peraro, Post-Doctoral Fellow at the University of Verona, **L'istituto della *kafala* quale presupposto per il ricongiungimento familiar con il cittadino europeo: la sentenza della Corte di giustizia nel caso *S.M. c. Entry Clearance Officer*** (*Kafala* as a Prerequisite for Family Reunification with a European Citizen: The Judgment of the Court of Justice in *S.M. v. Entry Clearance Officer*; in Italian)

The family reunification of a European citizen and a foreign minor entrusted to him by kafala has been addressed by a recent judgment of the Grand Chamber of the Court of Justice on the notion of direct descendant pursuant to Directive 2004/38 concerning the free movement of Union citizens and their family members. The Italian judges have also dealt with the issue of the recognition of this institute, widespread in most Islamic countries, in a variety of situations, where the best interests of the child and the European courts' decisions have been considered. Domestic jurisprudence appears to be in line with the interpretation given by the judges of Luxembourg, which nevertheless leaves the question of the unequal treatment between Italian citizens and third country nationals unresolved.

Mariangela La Manna, Post-Doctoral Fellow at the Universit*à* Cattolica del Sacro

Cuore, **The ECHR Grand Chamber's Judgment in the *Naït-Liman* Case: An Unnecessary Clarification of the Reach of *Forum Necessitatis* Juridsdiction?** (in English)

The Grand Chamber judgment in the *Naït-Liman v. Switzerland* case is certainly a much anticipated one. Its outcome had, however, long been foreshadowed by commentators and practitioners alike. The decision confirmed the 2016 Chamber's judgment by holding that the Swiss Federal Tribunal's decline of jurisdiction in a civil case involving reparation for torture committed outside the territory of Switzerland by foreign authorities against a foreign national did not amount to a violation of Article 6(1) ECHR. However, the Court's reasoning in the case under review is susceptible of being criticized in more than one respect. The compatibility of the conduct of the Swiss judiciary with Article 6(1) ECHR is dubious to say the least, even more so since the Federal Tribunal's restrictive interpretation of the requirements for the application of forum necessitatis jurisdiction, and especially of the "sufficient connection" requirement, managed to produce a fully-fledged denial of justice. Should such a trend gain consistency, the effectiveness of the right of access to a court may be put at risk.

The thing that should not be: European Enforcement Order bypassing acta jure imperii

In a dispute between two Cypriot citizens and the Republic of Turkey concerning the enforcement of a European Enforcement Order issued by a Cypriot court, the Thessaloniki CoA was confronted with the question, whether the refusal of the Thessaloniki Land Registry to register a writ of control against property of the Turkish State located in Thessaloniki was in line with the EEO Regulation.

I. THE FACTS

The dispute began in 2013, when two Cypriot citizens filed a claim for damages against the Republic of Turkey before the Nicosia Disctrict Court. The request concerned compensation for deprivation of enjoyment of their property since July 1974 in Kyrenia, a city occupied by the Turkish military forces during the 1974 invasion on the island. The Kyrenia District Court **(***Eparchiakó Dikastírio Kerýneias*), which operates since July 1974 in Nicosia, issued in May 2014 its ruling, granting damages to the claimants in the altitude of 9 million €. Almost a year later, the latter requested the same court to issue a certificate of European Enforcement Order. The application was granted. Within the same year, the claimants filed an application before the Athens Court of first Instance for the recognition and enforcement of the Cypriot judgment. Prima facie it seems to be a useless step, however there was a rationale behind it; I will come back to the matter later on. The Athens court granted exequatur (Athens CFI 2407/2015, unreported).

Following almost a year of inactivity, the claimants decided to proceed to the execution of their title by attaching property of the Turkish State in Thessaloniki. Pursuant to domestic rules, the enforcement agent serves the distraint order to the debtor; afterwards, (s)he requests the order to be registered at the territorially competent land registry. Both actions are imperative by law. At this point, the chief officer of the land registry refused to proceed to registration, invoking Article 923 Greek Code of Civil Procedure (CCP) which reads as follows: *Compulsory enforcement against a foreign State may not take place without a prior leave of the Minister of Justice*. The claimants challenged the registrar's refusal by filing an application pursuant to Article 791 CCP, which aims at the obligation of the registrar to proceed to registration by virtue of a court order. The Thessaloniki 1. Instance court dismissed the application (Thessaloniki CFI 8363/2017, unreported). The claimants appealed.

II. THE RULING

The Thessaloniki CoA dismissed the appeal, confirming the first instance ruling in its entirety. It began from the right of the land registrar to a review of legality, thus the right to examine the request beyond possible formality gaps. It then referred to Articles 6.1 ECHR, 1 of the 1. Additional Protocol to the ECHR, and Articles 2.3 (c) and 14 of the 1966 International Covenant on Civil and Political Rights, in order to support the right to enforcement against a foreign State. The appellate court continued by analyzing Article 923 CCP and its importance in the domestic legal order. It emphasized the objective of the provision, i.e. to estimate potential repercussions and to avoid possible tensions with the foreign State in case of execution. The court founded its analysis on two ECHR rulings, i.e. the judgments in the *Kalogeropoulou and* Others *v. Greece and* Germany (59021/00), and *Vlastos v. Greece* (28803/07) cases, adding two rulings of the Full Bench of the Greek Supreme Court from 2002. Finally, the court concluded that there has not been a violation of the EEO Regulation, stating that the process under Article 923 CCP is not to be considered as part of *intermediate proceedings needed to be brought in the Member State of enforcement prior ro recognition and enforcement*; hence, the rule in Article 1 of the EEO Regulation is not violated.

III. COMMENTS

In general terms, one has to agree with the outcome of the case. Nevertheless, there are a number of issues to be underlined, so that the reader gets the full picture of the dispute.

- The claim before the Kyrenia District Court bears some similarities with the ruling of the ECJ in the *Apostolidis/Orams* case: The Court decided then that: *The suspension of the application of the acquis communautaire in those areas of the Republic of Cyprus in which the Government of that Member State does not exercise effective control, provided for by Article 1(1) of Protocol No 10 on Cyprus to the Act concerning the conditions of accession [to the European Union] … does not preclude the application of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to a judgment which is given by a Cypriot court sitting in the area of the island effectively controlled by the Cypriot Government, but concerns land situated in areas not so controlled.* In both cases, the

property under dispute was located in the Kyrenia district. The difference lies in the defendants: Unlike the *Orams* case, the respondent here was a foreign State. Article 4 Brussels I Regulation grants the right to claimants to avail themselves of domestic rules of jurisdiction, which is presumably what the claimants did in the case at hand.

- The issue of the EEO certificate seems to run contrary to Article 2.1 EEO Regulation. The matter was not examined by the Thessaloniki courts, which focused on the subject matter, i.e. the refusal of the land registrar on the grounds of Article 923 CCP.
- The exequatur proceedings in Greece seem to be superfluous, given that a EEO may be enforced without the need for a declaration of enforceability (Article 5 EEO Regulation). One reason which possibly triggered additional exequatur proceedings might have been the fact that, unlike the EEO Regulation, the acta iure imperii clause was not included in the Brussels I Regulation (see Article 1.1). Still, the matter was examined in the *Lechouritou* case even before the entry into force of the Brussels I bis Regulation. Hence, it would not have made a difference in the first place.
- The appellate court focused on the compatibility of Article 923 CCP with the EEO Regulation. However, the claimants carried out the execution in Greece on the grounds of the Cypriot judgment, not the EEO certificate.

Finally, two more points which should not be left without a comment.

- Throughout the proceedings, the Turkish State demonstrated buddhistic apathy. There was not a single remedy brought forward, neither in Cyprus nor in Greece. It was a victory in absentia. A reason for this stance was surely the following: The property of the Turkish state in Thessaloniki hosts one of its General Consulates in Greece. This is not just another Turkish Consulate around the globe: It is built upon the place where the father of the Turkish Republic (Mustafa Kemal Atatürk) was born. It also includes the house where he was raised.
- The Thessaloniki CoA emphasized that a potential refusal of the Greek Minister of Justice to grant leave for execution would not harm the essence of the Cypriot judgment: Enforceability and res iudicata remain untouched; hence, the claimants may seek enforcement of the judgment in the foreign country, i.e. Turkey… The argument was ‘borrowed’ by the

ruling of the ECJ in the *Krombach* case (which is cited in the text of the decision); therefore, it is totally alien to the case at hand. Even if the claimants were to find any assets of the Turkish Republic in the EU, like the Villa Vigoni in Italy, the ruling of the ICJ in the case *Germany v. Italy: Greece intervening)* would serve as a tool to grant jurisdictional immunity to the Turkish state.

IV. CONCLUSION

Article 923 CCP is the first line of defence for foreign states in Greece. In the unlikely event that the Greek Minister of Justice grants leave for execution, a judgment creditor will be confronted with a second hurdle, if (s)he's aiming at the seizure of property similar to the case discussed here: the maxim ne impediatur legatio (ad hoc see Greek Supreme Court, 29 November 2017, decision no. 1937/2017, reported in English here). Hence, the chances to capitalize on the enforceable title are close to zero.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2019: Abstracts

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

R. Wagner: **Twenty Years of Judicial Cooperation in Civil Matters**

With the Treaty of Amsterdam entering into force on 1 May 1999 the European Union has obtained the legislative competence concerning the judicial cooperation in civil and commercial matters. This event's 20th anniversary gives ample reason to pause for a moment to briefly appreciate the achievements and to look ahead. This article follows the contribution of the author in this journal in

regard to the 15th anniversary of the entry into force of the Treaty of Amsterdam (IPRax 2014, 217).

E. Jayme/C.F. Nordmeier: **The Freedom to Make a Will as a European Human Right? – Critical Considerations on the West Thrace Decision of the European Court of Human Rights**

The article critically examines the decision of the ECHR of 19 December 2018, Molla Sali v. Greece, which deals with the special legal regime applicable to Muslims in West Thrace, a region in northern Greek. The Court considers Art. 14 ECHR in conjunction with Art. 1 of the Additional Protocol No. 1 to be violated if the will of a Muslim testator of this region, drawn up according to Greek state law, is measured against religious law. The authors are of the opinion that a human rights-protected election to state law is not permissible for individual areas of law or single legal questions. It opens up an arbitrary mixture of state and religious law, which can lead to inconsistent overall results. This is particularly the case when legal positions of third parties are affected. In addition, overarching political aspects of the protection of minorities, especially in Western Thrace, are not sufficiently taken into account in the decision.

J. Schulte: **A Wii bit illegal? International jurisdiction and applicable law for the infringement of a Community Design by several tortfeasors (ECJ C-24, 25/16 – Nintendo)**

On 27 September 2017 the European Court of Justice decided on the international jurisdiction and applicable law with regards to the infringement of a unitary Community intellectual property right, when Nintendo Inc. sued a mother and a daughter company for replicating, advertising and selling Wii console accessories. The Court's judgement clarifies many important issues ranging from the member state courts' scope of competence in case of several defendants, to the difficult relationship between Rome II's conflict of law rules and the ones in the regulations on Community intellectual property rights as well as to the applicable law for infringing acts via the internet. Most notably, the ruling establishes a central act theory in case of multiple places of acts of infringements in the sense of Art. 8(2) Rome II.

P. Mankowski: **Choice of law clauses in the Standard Terms and Conditions of airlines**

Choice of law clauses in the Standard Terms and Conditions of airlines are commonplace in international air travel. Art. 5 (2) subpara. 2 Rome I Regulation "limits" freedom of choice in passenger contracts. Yet the CJEU's Amazon judgment has raised questions whether choice of law clause in Standard Terms and Conditions might also be challenged under the aegis of the Unfair Contract Terms Directive.

B. Heiderhoff: **Jurisdiction based on Art. 12 (3) Brussels IIbis and its consequences**

The Saponaro judgment concerns the judicial authorisation for a renouncement of succession by the parents of a minor heir whose habitual residence is not within the state of the succession proceedings. The Court confirmed that this issue falls within the scope of the Brussels IIbis Regulation and gave details on the prerequisites of jurisdiction under Art. 12 (3) Brussels IIbis Regulation. In particular, the ECJ needed to clarify the meaning of the requirement of having been "accepted expressly or otherwise in an unequivocal manner by all the parties". As Greek law, in order to secure the rights of the child, provides that a prosecutor is a party to the proceedings, the ECJ held that the acceptance of the prosecutor is necessary. The Court does not, however, even mention the necessity of the agreement of the child, an omission which must be criticised. This contribution additionally raises the question of the applicable law. Here, we see a number of difficulties. Firstly, the prorogated jurisdiction under Art. 12 (3) Brussels IIbis Regulation poses problems for the synchronous operation of the Brussels IIbis Regulation and the 1996 Hague Convention. Secondly, the approval procedure is a constellation where the distinction between protective measures (under Article 15 of the 1996 Convention) and the exercise of parental responsibility (under Article 17 of the 1996 Convention) becomes necessary. Thirdly, the strong interlinkage between the substantive law of parental responsibility and the procedural measures to protect the child make it very complicated to combine the approaches that the different legal systems take. All in all, it generally seems easier to institute the judicial authorisation in the state of the child's habitual residence.

U.P. Gruber: **The habitual residence of infants and small children**

The ECJ has stressed in several decisions that for the purpose of Article 8(1) of Regulation No 2201/2003, a child's place of "habitual residence" has to be

established by considering all the circumstances specific to each individual case. However, in a new case, the ECJ has opted for a more conclusive weighing of selected criteria. The ECJ based its assessment on the fact that the child was permanently resident in Belgium. Furthermore, the ECJ pointed to the fact that the mother, who – in practice – had custody of the child, and also the father, with whom the child also had regular contract, both lived in Belgium. Other circumstances were expressly deemed to be "not decisive", especially the stays of mother and child in Poland in the context of leave periods or holidays, the mother's cultural ties to Poland and her intention of settling in Poland in the future. In summary, it can be said that for a rather typical fact pattern, the ECJ has given valuable guidance as to where the habitual residence of children is located.

U.P. Gruber/L. Möller: **The admissibility of a custody order after the return of the child under the Hague Abduction Convention**

The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction seeks to provide a rapid procedure for the return of the child to the country of the child's former residence. Pursuant to Art. 16 of the Convention, a court in the state of refuge is not permitted to decide on the merits of any custody issue until it has been decided that there exists a reason for not ordering the return of the child, or the application for the return of the child is not lodged within a reasonable time. This provision is based on the assumption that a procedure dealing with custody issues in the state of refuge might delay or otherwise impair the procedure on the return of the child in that state. The OLG Bremen had to decide whether Art. 16 of the Convention was still applicable when the conclusive order to return the child had already been carried out, i.e. the child had been given back to the holder of the right of custody and had returned to its state of residence prior to its removal. The court concluded that in this situation the prohibition in Art. 16 of the Convention had ceased and that therefore German courts could decide on the rights of custody. The decision is correct: When the status quo ante has been fully restored, the objectives of the Convention have been reached; therefore, there is no more need to protect the procedure on the return of the child against influences of parallel proceedings on custody issues. Subsequently, the court also assumed jurisdiction as, under German law, jurisdiction can be based solely on the German nationality of the child. At closer look, the case illustrates that German jurisdictional rules are not

well-suited for child abduction cases and there is need for reform.

K. Siehr: **International jurisdiction of German courts to take measures in order to enforce the right of access of the mother to meet her children living abroad**

A German couple had two sons. The couple divorced and the father got custody for the two children and moved with them to Beijing/China. The Magistrate Court of Bremen (Amtsgericht Bremen) awarded to the mother, still living in Germany, rights of access to the children and obliged the father to cooperate and send the children from Beijing to Germany in order to visit their mother. The father did not cooperate and did not send the children to Germany. The Magistrate Court of Bremen fixed a monetary penalty (Ordnungsgeld) of e 1000,00 in order to sanction the father's misbehavior. The father lodged an appeal against this decision and the Court of Appeal of Bremen (Oberlandesgericht Bremen) vacated the decision of the Magistrate Court because of lack of international jurisdiction. The Federal Court for Civil and Criminal Matters (Bundesgerichtshof) corrected the Court of Appeal of Bremen and upheld the order for monetary penalty awarded by the Magistrate Court of Bremen. German courts are allowed to sanction their decision by awarding monetary penalties against a party living abroad.

P. Kindler/D. Paulus: **Entry of Italian partnerships into the German land register**

Under German law, following a judgment of the Federal Court of Justice (BGH) of 29 January 2001, even non-commercial partnerships (the „Gesellschaft bürgerlichen Rechts", GbR) under certain circumstances – and without being regarded a legal entity – have an extensive legal capacity. On 4 December 2008, in a second step, the Federal Court of Justice held that a GbR can not only acquire ownership of land or other immovable property or rights but may also be entered in the German land register (Grundbuch – „formelle Grundbuchfähigkeit"). Subsequently, as of 18 August 2009, the German legislator implemented a new § 899a to the German Civil Code (BGB) as well as a new section 2 to § 47 of the German Land Register Code (GBO), stating that if a GbR is to be registered, its partners must also be entered into the land register. In its judgment of 9 February 2017 concerning an Italian società semplice, the

German Federal Court of Justice held that also foreign non-commercial partnerships can be entered into the German land register. Prerequisite for this is not a full legal capacity but only that the respective partnership, according to its company statute, at least has a partial legal capacity with regard to the acquisition of real estate („materielle Grundbuchfähigkeit"). In order to determine this, a judge has to investigate foreign law ex officio. This includes not only the determination of the law itself but also of its concrete application in the respective foreign legal practice. To this end, the judge must make full use of the legal sources available to him. The authors share the position of the German Federal Court of Justice but point out that the applicable Italian law of business associations even provides for a full legal capacity of non-commercial partnerships.

K. Duden: **Jurisdiction in case of multiple places of performance: preparatory work vs. its implementation on site**

In the case of a contract for the provision of services, Art. 7 (1) (b) of the Brussels Ibis Regulation establishes jurisdiction at the place where the service is provided. In light of a decision of the Austrian Supreme Court on an architect's contract this paper analyses how jurisdiction at a single place of performance can be identified if the performance actually is provided in several places. In doing so, it is argued that a distinction should be drawn between services that have an internal as opposed to an external variety of places of performance. Regarding architects' contracts the author agrees with the Austrian Supreme Court that the courts at the building site have jurisdiction as the courts at the place of the main performance. Furthermore, the paper discusses where jurisdiction generally should be located for services that consist of extended preparatory work at one place that culminates in its implementation at another place, but where those services do not necessarily have a comparatively strong link with the place of implementation. Finally, cases will be considered in which the place where the service is mainly provided cannot be determined. It is argued that amongst the approaches taken in such cases by the ECJ it is more convincing to grant the claimant a choice amongst the places which could be considered as the place of main performance, rather than give preference – amongst various potential places of main performance – to the jurisdiction at the seat of the characteristic performer.

L. Hübner: **Existential disputes as a case for Art. 24 no. 2 Brussels 1a**

Regulation – the doctrine of fictivité in the European law of jurisdiction

The decision of the Cour de cassation deals with the exclusive jurisdiction for company-related disputes in Art. 24 No. 2 Brussels 1a Regulation. The Cour de cassation confirms the strict interpretation in accordance with the parameters of the ECJ. The subject-matter of the action is not a dispute regarding deficiencies in resolutions, which frequently is the subject-matter of action in connection with Art. 24 (2) Brussels 1a Regulation, but a so-called existential dispute arising from the French doctrine of fictivité.

P. Schlosser: **Prescription as Lack of jurisdiction of an arbitral tribunal**

In view of the expropriation of gold mines the claimant instituted arbitral proceedings on the basis of the Bilateral Agreement between Canada and Venezuela according to the Additional Facility Rules of the Word Bank Centre. The Canadians were successful. The Cour d'Appel de Paris, however, invalidated the calculation of the award, but not the further elements of the ruling. The reason therefor was a term in the Bilateral Investment Treaty, that the tribunal had only competence to consider events no more than three years prior to the institution of arbitral proceedings. In validating the damage of the Canadians, however, the tribunal had taken into consideration events of a prior occurrence. Normally the claimant had to institute new proceedings because in France the case cannot be referred back to the arbitrators. But since the parties had found a settlement agreement no further proceedings were necessary.

The European Court of Human Rights delivers its advisory opinion concerning the recognition in

domestic law of legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother.

As previously reported on Conflicts of Laws, the ECtHR was requested an advisory opinion by the French Court of Cassation.

On April 10th, the ECtHR delivered its first advisory opinion. It held that:

“In a situation where a child was born abroad through a gestational surrogacy arrangement and was conceived using the gametes of the intended father and a third-party donor, and where the legal parent-child relationship with the intended father has been recognised in domestic law,

1. the child’s right to respect for private life within the meaning of Article 8 of the European Convention on Human Rights requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the “legal mother”;
2. the child’s right to respect for private life does not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; another means, such as adoption of the child by the intended mother, may be used”.

For a brief summary of the advisory opinion and the case background see the Press Release.

For further details see the Advisory Opinion.

New Article on Current Developments in Forum access: European Perspectives on Human Rights Litigation

Prof. Dr. Dr. h.c. Burkhard Hess and Ms. Martina Mantovani (Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law) recently posted a new paper in the MPI*Lux* Research Paper Series, titled *Current Developments in Forum Access: Comments on Jurisdiction and Forum Non Conveniens – European Perspectives on Human Rights Litigation*.

The paper will appear in F. Ferrari & D. Fernandez Arroyo (eds.), *The Continuing Relevance of Private International Law and Its Challenges* (Elgar, 2019).

Here is an overview provided by the authors.

"The paper analyses the legal framework governing the exercise of civil jurisdiction over claims brought before European courts by victims of mass torts committed outside the jurisdiction of European States.

The first part of the paper focuses on the private international law doctrine of the forum of necessity, often used by foreign plaintiffs as a "last resort" for accessing a European forum. Ejected from the final version of the Brussels I^{bis} Regulation and thus arguably unavailable in cases involving EU-domiciled defendants, this doctrine has recently been subjected, in domestic case law, to formalistic interpretations which further curtail its applicability *vis-à-vis* non-EU domiciled defendants. The *Comilog* saga in France and the *Naït Liman* case in Switzerland are prime examples of this approach.

Having taken stock of the *Naït Liman* judgment of the Grand Chamber of the European Court of Human Rights, which leaves an extremely narrow scope for reviewing said formalistic interpretations under article 6 ECHR, the second part

of the paper assesses alternative procedural strategies that foreign plaintiffs may implement in order to bring their case in Europe.

A first course of action may consist in suing a non-EU domiciled defendant (usually a subsidiary) before the courts of domicile of a EU domiciled co-defendant (often the parent company). Hardly innovative, this procedural strategy is recurrent in recent case law of both civil law and common law courts, and allows therefore for a comparative assessment of the approach adopted by national courts in dealing with such cases. Particular attention is given to the sometimes-difficult coexistence between the hard-and-fast logic of the Brussels I^{bis} Regulation, applicable vis-à-vis the anchor defendant, and the domestic tests applied for asserting jurisdiction over the non-domiciled co-defendant, as well as to the ever-present objections of *forum non conveniens* and of "abuse of rights".

A second course of action may consist in suing, as a single defendant, either a EU domiciled contractual party of the main perpetrator of the abuse (as it happened in the *Kik* case in Germany or in the *Song Mao* case in the UK), or a major player on the international market (e.g. the *RWE* case in Germany). In these cases, where the Brussels I^{bis} Regulation and its hard-and-fast logic may deploy their full potential, the jurisdiction of the seised court is undisputable in principle and never disputed in practice.

Against this backdrop, the paper concludes that, where the Brussels I^{bis} Regulation is triggered, establishing jurisdiction and accessing a forum is quite an easy and straightforward endeavor. Nevertheless, the road to a judgment on the merits remains fraught with difficulty for victims of an extraterritorial harm. Firstly, there are several other procedural hurdles, concerning for example the admissibility of the claim, which may derail a decision on the merits even after jurisdiction has been established. Secondly, the state of development of the applicable substantive law still constitutes a major obstacle to the plaintiff's success. In common law countries, where the existence of a "good arguable case" shall be proven already at an earlier stage, in order to establish jurisdiction over the non-EU domiciled defendant, the strict substantive test to be applied for establishing a duty of supervision of the parent company, as well as its high evidentiary standard, have in most cases determined to the dismissal of the entire case without a comprehensive assessment in the merits, despite the undisputable existence of jurisdiction *vis-à-vis* the domiciled parent company. In civil law

countries, the contents of the applicable substantive law, e.g. the statute of limitations, may finally determine an identical outcome at a later stage of the proceedings (as proven by the extremely recent dismissal of the case against *Kik*)."

Sweden: New rules on non-recognition of underage marriages

Written by Prof. Maarit Jänterä-Jareborg, Uppsala University, Sweden

On 1 January 2019, new restrictions came into force in Sweden's private international law legislation in respect of marriages validly concluded abroad. The revised rules are found in the Act (1904:26 p. 1) on Certain International Relationships on Marriage and Guardianship, Chapter 1 § 8a, as amended by SFS 2018:1973. The content of the new legislation is, briefly, the following: no marriage shall be recognised in Sweden if the spouses or either one of them was under the age of 18 years at the time of the marriage. By way of exception, this rule may be set aside once both parties are above 18 years of age, if there are exceptional reasons to recognise the marriage.

The law reform is in line with a recent European trend, carried out in e.g., Germany, Denmark and Norway, to protect children from marrying and, one could claim, to 'spare' people who married as a child (or with a child) from their marriage.[1] The requirement of 18 years of age has been introduced not only as the minimum marriage age for concluding a marriage in the State's own territory, i.e., as a kind of an internationally mandatory rule, but also as a condition for the recognition of a foreign marriage.

The new Swedish legislation constitutes perhaps the most extreme example on how to combat the phenomenon of child marriages. The marriage's invalidity in Sweden does not require a connecting factor to Sweden at the time of the marriage, or that the spouses are underage upon arrival to Sweden. Theoretically, the spouses may arrive to Sweden decades after marrying, and find out that their

marriage is not recognised in Sweden. The later majority of the persons involved does not repair this original defect. The only solution, if both (still) wish to be married to each other, will be to (re)marry!

It remains to be seen whether the position taken in the Government Bill, claiming that the new law conforms with EU primary law and the ECHR, is proportionate and within Sweden's margin of appreciation, will be shared by the CJEU and the ECtHR. Swedish Parliament, in any case, shared this view and did not consider that EU citizens' free movement within the EU required exempting underage spouses from the rule of non-recognition. The new law applies to marriages concluded as of 1 January 2019. It does not affect the legal validity of marriages concluded before that date.

To understand the effects of the Swedish law reform, the following needs to be emphasised. One of the special characteristics of Swedish family procedure law is that is does not provide for decrees on marriage annulment or the invalidity of a marriage. Divorce and death are in Sweden the only ways of dissolving a marriage! This position has applied since 1 January 1974, when the right to immediate divorce became the tool to dissolve any marriage concluded in Sweden against a legal obstacle to the marriage, e.g., a spouse's still existing marriage or duress to marry. A *foreign* marriage not recognised in Sweden is, however, invalid directly by force of Swedish private international law legislation. It follows that it cannot be dissolved by divorce – as it does not exist as a marriage in the eyes of Swedish law. It does not either produce any of the legal effects of marriage, such as the right to maintenance or property rights. It does not qualify as a marriage obstacle, with the result that both 'spouses' are free to marry each other or anyone else.

What, then, is the impact of the legislation's exception enabling, in exceptional circumstances, to set aside the rule of non-recognition? This is an assessment which is aimed to take place *ad hoc,*usually in cases where the 'marriage's' validity is of relevance as a preliminary issue, whereby each competent authority makes an independent evaluation. It is required that non-recognition must produce exceptional hardships for the parties (or their children). The solution is legally uncertain and unpredictable and has been subject to heavy criticism by Sweden's leading jurists.

The 2019 law reform follows a series of reforms carried out in Sweden since

2004. According to the established main rule, a marriage validly concluded in the State of celebration or regarded as valid in States where the parties were habitually resident or nationals at the time of the marriage, is recognised in Sweden, Chapter 1 § 7 of the 1904 Act. Since a law reform carried out in 2004, an underage marriage is, nevertheless, invalid directly by force of law in Sweden, if either spouse had a connection to Sweden through habitual residence or nationality at the time of the marriage. (The 2019 law reform takes a step further, in this respect.) Recognition can, in addition, be refused with reference to the *ordre public* exception of the 1904 Act, Chapter 7 § 4. The position taken in Swedish case law is that *ordre public* captures *any* marriage concluded before both parties were 15 years of age. Forced marriages do not qualify for recognition in Sweden, since the 2004 reform. The same applies to marriages by proxy, since 2014, but only on condition that either party to the marriage had a connection to Sweden through habitual residence of nationality at the time of the marriage.

The 2019 legislation differs in several respects from the proposals preceding it, for example the proposed innovation of focusing on the underage of a spouse at the time of either spouse's arrival to Sweden. A government-initiated inquiry is currently pending in Sweden, the intention being to introduce rules on non-recognition of polygamous marriages validly concluded abroad.

[1] See M. JÄNTERÄ-JAREBORG, 'Non-recognition of Child Marriages: Sacrificing the Global for the Local in the Aftermath of the 2015 "Refugee Crisis"', in: G. DOUGLAS, M. MURCH, V. STEPHENS (eds), *International and National Perspectives on Child and Family Law, Essays in Honour of Nigel Lowe*, Intersentia 2018, pp. 267-281.

Grand Chamber judgment: case of Molla Sali v. Greece (application

no. 20452/14)

In a much anticipated outcome, the Grand Chamber of the European Court of Human Rights held unanimously that there had been a violation of Article 14 (prohibition of discrimination) of the European Convention on Human Rights, read in conjunction with Article 1 of Protocol No. 1 (protection of property) to the Convention.

The case concerned the application by the domestic courts of Islamic religious law (Sharia) to an inheritance dispute between Greek nationals belonging to the Muslim minority, contrary to the will of the testator (a Greek belonging to the Muslim minority, Ms Molla Sali's deceased husband), who had bequeathed his whole estate to his wife under a will drawn up in accordance with Greek civil law.

The full text of the decision may be found here.

The press release of the Court is available here.

For the recent amendments in pertinent Greek legislation, see here.

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

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

surrogate mother. More specifically, it concerns the intended mother's legal relationship with the child.

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

Previous developments in the *Mennesson* case:

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

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

As a last resort, The Mennesson family brought a claim before the ECtHR. They claimed that the refusal to transcribe the birth certificate violated their right to respect for private and family life. While the Court considered that the parent's right to family life was not infringed, it ruled that the refusal to transcribe the birth certificates violated the children's right to identity and was not in their best interest. As a consequence, it ruled that the refusal to establish the legal parentage of the indented parents was a violation of the children's right to private life, particularly so if the indented father was also the biological father.

After the ECtHR ruling: the French landscape

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

14-21323 et n°15-50002).

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

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

In 2016, the legislator adopted a new procedure to allow for the review of final decisions in matter of personal status in cases where the ECtHR had ruled that a violation of the ECHR had occurred. The review is possible when it appears that the consequences of the violation of the Convention are serious and that the just satisfaction awarded on the basis of article 41 ECHR cannot put an end to the violation (see articles L.452-1 to L.452-6 of the *Code de l'organisation judiciaire*).

Current situation:

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

on the ground that the children were born of a surrogate mother was discriminatory and infringed article 14 ECHR.

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

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

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

- By refusing to transcribe into civil status registers the birth certificate of a child born abroad from a surrogate mother inasmuch as it refers to the intended mother as the "legal mother", while the transcription has been accepted when the intended father is the biological father of the child, does a State Party exceed its margin of appreciation under article 8 ECHR? In this respect, is it necessary to distinguish between whether or not the child is conceived with the gametes of the intended mother?
- If the answer to one of the two preceding questions is in the affirmative, does the possibility for the intended mother to adopt her husband's biological child, which constitutes a mean of establishing parentage open to her, comply with the requirements of article 8 of the Convention?

As the *Cour de Cassation* indicates on the press release accompanying the request of an advisory opinion, it seized the opportunity of initiating a judicial dialogue between national jurisdictions and the ECtHR. However, it looks more

like a sign of caution on the part of the French court, in a particularly sensitive case. Depending on the answer it receives, the *Cour de Cassation* will adapt its case law.

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

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