Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 6/2017: Abstracts

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

P. Mankowski: **The German Act on Same-Sex Marriages, its consequences and its European vicinity in private international law**

Finally, Germany has promulgated its Act on Same-Sex Marriages. In the arena of private international law the Act calls for equal treatment of same-sex marriages and registered partnerships whereas in German substantive law it aligns same-sex marriages with traditional marriages and institutionally abandons registered partnerships pro futuro. In private international law the Act falls short of addressing all issues it should have addressed in light of its purpose. In particular, it lacks provisions on the PIL of kinship and adoption – and does not utter a single word on jurisdiction or recognition and enforcement of foreign judgments. In other respects it is worthwhile to have a closer look at its surroundings and ramifications in European PIL (Brussels IIbis, Rome III, Matrimonial Property, and Partnership Property Regulations), i.e. at the coverage which European PIL exacts to same-sex marriages.

P.F. Schlosser: **Brussels I and applications for a pre-litigation preservation of evidence**

The judgement is revealing a rather narrow finding. An application for a pre-litigation preservation of evidence is within the meaning of Art. 32 Brussels Ia Regulation not tantamount to “the document instituting the proceedings or an equivalent document”. The commentator is emphasizing that this solution cannot be subject to any reasonable doubt. He further explains, however, that the Regulation is applicable to such applications and the ensuing proceedings to the effect that the outcome of such a preservation of evidence must be recognized to the same degree as a domestic preservation is producing effects in the main proceedings. In particular is it clear for him, that such recognition must not be restricted by the German numerus clausus of legally recognized means of

evidence.

T. Lutzi: **Jurisdiction at the Place of the Damage and Mosaic Approach for Online Acts of Unfair Competition**

Once again, the Court of Justice was asked to determine the place of the damage under Art. 5 No. 3 Brussels I (now Art. 7(2) Brussels Ia) for a tort committed online. The decision can be criticised both for its uncritical reception of the mosaic approach and for the way in which it applied the latter to the present case of an infringement of competition law through offers for sale on websites operated in other member states. Regardless, the decision confirms the mosaic approach as the general rule to identify the place of the damage for torts committed through the internet.

K. Hilbig-Lugani: **The scope of the Brussels IIa Regulation and actions for annulment of marriage brought by a third party after the death of one of the spouses**

The ECJ has decided that an action for annulment of marriage brought by a third party after the death of one of the spouses falls within the scope of Regulation (EC) No 2201/2003. But the third party who brings an action for annulment of marriage may not rely on the grounds of jurisdiction set out in the fifth and sixth indents of Art. 3(1)(a) of Regulation No 2201/2003. The ECJ does not differentiate between actions for annulment brought after the death of one of the spouses and an action for annulment brought by a third party. The decision raises several questions with regard to the application of Art. 3 of Regulation No 2201/2003.

J. Pirrung: **Forum (non) conveniens – Application of Article 15 of the Brussels IIbis Regulation in Proceedings Before the Supreme Courts of Ireland and the UK**

On a reference submitted by the Irish Supreme Court, the ECJ ruled that Art. 15 of Council Regulation (EC) No 2201/2003 (Brussels IIa) is applicable where a child protection application brought under public law concerns the adoption of measures relating to parental responsibility, (even) if it is a necessary consequence of a court of another Member State assuming jurisdiction that an authority of that other State thereafter commence proceedings separate from those brought in the first State, pursuant to its own domestic law and possibly relating to different factual circumstances. In order to determine that a court of

another Member State with which the child has a particular connection is better placed, the court having jurisdiction must be satisfied that the transfer of the case to the other court is such as to provide genuine and specific added value to the examination of the case, taking into account the rules of procedure applicable in the other State. In order to determine that such a transfer is in the best interests of the child, the court having jurisdiction must be satisfied that the transfer is not liable to be detrimental to the situation of the child, and must not take into account, in a given case relating to parental responsibility, the effect of a possible transfer of the case to a court of another State on the right of freedom of movement of persons concerned other than the child, or the reason why the mother exercised that right, prior to the court being seised, unless those considerations are such that there may be adverse repercussions on the situation of the child. The judgment is juxtaposed to the decision of the UK Supreme Court – pronounced some months before that of the ECJ – in re N, an Art. 15 case concerning a different situation without freedom of movement questions. Both jurisdictions have found acceptable results, the UKSC, though happily much faster than the ECJ, perhaps not entirely without one or the other risk concerning its treatment of procedural questions

A.-R. Börner: **News on the competence-competence of arbitral panels under German law – Simultaneously a note on the Federal High Court decision of August 9, 2016, I ZB 1/15**

The Federal Court of Justice of Germany has decided that the arbitration clause even survives the insolvency of a party (severability), unless stipulated to the contrary or in case of the existence of reasons for the nullity or termination of the arbitral agreement, such reasons either existing separately or resulting from the main contract. Under the German Law of Civil Procedure, the challenge to the state court that – contrary to an early decision of the arbitration panel affirming its competency – the panel has no competency, must be raised within the very short timeframe of one month, otherwise the judicial review will be forfeited. The Federal Court of Justice had held until now that in case of a (supervening) final award the state court procedure ended and that the arguments against the competency had to be raised anew in the procedure on the enforceability of the award. The Court has now accepted the criticism by the scientific literature that this places an undue burden on the challenging party. So it now holds that the second procedure (on enforceability) will be stayed until the first procedure (on

competency) is terminated, as its result takes precedence.

B. Köhler: **Dual-use contracts as consumer contracts and no attribution of consumer status of a third party to the proceedings under Brussels-I Regulation**

The determination of the scope of the provisions on jurisdiction over consumer contracts in Art. 15 to 17 Brussels I Regulation is one of the most controversial problems in international procedural law. The German Federal Supreme Court's decision raises two interesting questions in this respect. The first controversial issue concerns the classification of contracts for both professional and private purposes as consumer contracts. In its judgment Gruber, the European Court of Justice had held that such a dual-purpose contract can only be considered a consumer contract if the role of the professional purpose is marginal. However, the European legislator adopted the criterion of predominant purpose in recital 17 to the Consumer Rights Directive (2011/83/EU). Regrettably, the German Federal Supreme Court missed an opportunity to clarify the classification of dual-purpose contracts within the Brussels I Regulation. The Court applied the criterion laid down by the ECJ in Gruber without further discussion. In a second step, the Court held – convincingly – that Art. 16 (2) Brussels I Regulation presupposes that the consumer is a party to the proceedings. The capacity of consumer of a third party cannot be attributed to a defendant who, him- or herself, is not a consumer.

L. Hübner: **The residual company of the deregistered limited**

The following article deals with the consequences of the dissolution of companies from a common law background having residual assets in Germany. The prevailing case law makes use of the so-called "Restgesellschaft" in these cases. By means of three judgments of the BGH and the Higher Regional Court of Brandenburg, this article considers the conflicts of laws solutions of these courts and articulates its preference for the application of German company law on the "Restgesellschaft". It further analyses the subsequent questions as regards the legal form and the representation of the "Restgesellschaft", and the implications of the restoration of the foreign company.

D. Looschelders: **Temporal Scope of the European Succession Regulation and Characterization of the Rules on the Invalidity of Joint Wills in Polish**

Law

Joint wills are not recognized in many foreign legal systems. Therefore, in cross-border disputes the use of joint wills often raises legal problems. The decision of the Schleswig-Holstein Higher Regional Court concerns the succession of a Polish citizen, who died on 15 October 2014 and had drawn up a joint will along with his German wife shortly before his death. The problem was that joint wills are invalid under Polish law of succession. First, the court dealt with the question whether the case had to be judged according to the European Succession Regulation or according to the former German and Polish private international law. The court rightly considered that in Germany the new version of Art. 25 EGBGB does not extend the temporal scope of the European Succession Regulation. Hereafter the court states that the invalidity of joint wills under Polish law is not based on a content-related reason but is a matter of form. Therefore, the joint will would be valid under the Hague Convention on the Form of Testamentary Dispositions. This decision is indeed correct, but the court's reasoning is not convincing in all respects.

C. Thomale: **The anticipated best interest of the child – Strasburgian thoughts of season on mother surrogacy**

The ECtHR has reversed its opinion on Art. 8 ECHR. The protection of private and family life as stipulated therein is subject to a margin of appreciation far wider than hitherto expected. In stating this view, the ECtHR also takes a critical stand towards mother surrogacy: Restricting the human right to procreate, national legislators are given room to protect the child's best interest inter alia through deterrence against surrogacy. The article investigates some implications of this new landmark decision, which is being put into the context of ongoing debates on international surrogacy.

K. Thorn/P. Paffhausen: **The Qualification of Same-sex Marriages in Germany under Old and New Conflict-of-law Rules**

In its decision in case XII ZB 15/15 (20th April 2016) the German Federal Court of Justice recognized the co-motherhood of a female same-sex couple, registered in South Africa, for a child born by one of the women. While underlining that the result of the decision – the legal recognition of the parenthood – is right, the authors point out the methodological weaknesses of the reasoning. In their

opinion, a same-sex marriage celebrated abroad had to be qualified as a "marriage" in Art. 13 EGBGB and not – as the Court held – as a "registered life partnership" in Art. 17b EGBGB (old version). Also, they demonstrate that the Court's interpretation of Art. 17b para. 4 EGBGB (old version) as well as the reasoning for the application of Art. 19 para. 1 s. 1 EGBGB are not convincing. Following the authors' opinion, the right way to solve the case would have been the legal recognition of the parenthood (as an individual case) because of Art. 8 ECHR. As Germany recently legalized same-sex marriage, the authors also show which impacts the new law will have on Germany's international matrimonial law. In particular, they point out the new (constitutional) questions risen by the new conflict-of-law-rule for same-sex marriages in Art. 17b EGBGB (new version).

D. Martiny: **Modification and binding effect of Polish maintenance orders**

The two decisions of the German Courts of Appeal concern everyday problems in modifying maintenance orders given in the context of Polish divorce decrees. In both cases the Polish district courts ordered the fathers to pay child maintenance. At that point in time, the children already lived in Germany. The foreign orders did not state the grounds for the decision in respect of either the conflict-of-law issue or the substantive law issue. The recognition of the orders under the Maintenance Regulation in the framework of the German modification proceedings (§ 238 Family Proceedings Act – Familienverfahrensgesetz; FamFG) did not pose any difficulty. However, according to established German practice, foreign decisions have a binding effect as to their factual and legal basis. Whereas the Frankfurt court's interpretation of the Polish decision concluded that it was based on German law, the Bremen court assumed in its proceedings that the foreign decision was based on Polish law. The Bremen court stated a binding effect existed even if the foreign decision applied the incorrect law. The Bremen court then gave some hints as to how the assessment of maintenance should be made in the German proceedings under Polish substantive law.

Codification in International and EU Law – Call for Papers

The XXIII Annual Conference of the Italian Society of International and EU Law (SIDI-ISIL) will take place at the University of Ferrara on 7 and 8 June 2018.

The conference's theme is *Codification in International and EU Law*.

One session of the Conference will deal with *The coordination between different codification instruments* (8 June 2018, 9 am – 1 pm). Speakers will be selected through a call for papers.

Scholars of any affiliation and at any stage of their career are invited to submit proposals relevant to the session topic, including (but not limited to) the following:

- Relationship between codification instruments covering the same topics and promoted by different organizations or entities (e.g., the ECHR and the EU Charter of Fundamental Rights; uniform private international law instruments promoted by the Hague Conference on Private International Law and by the European Union; international environmental law and transnational criminal law instruments promoted at UN and regional levels)
- Relationship between codification instruments covering different fields (eg, human rights and other areas of international or EU law; law of international responsibility and other areas of international law)
- Succession of codification instruments in the same field.

The deadline for submitting proposals is 10 January 2018.

First and Second Issues of 2017'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 issues of the RDIPP)

The first and second issues of 2017 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) were just released.

The first issue features three articles, one comment, and two reports.

- *Franco Mosconi*, Professor Emeritus at the University of Pavia, and *Cristina Campiglio*, Professor at the University of Pavia, **'Richiami interni alla legge di diritto internazionale privato e regolamenti comunitari: il caso dei divorzi esteri'** ('Effects of EU Regulations on Domestic Private International Law Provisions: The Case of Foreign Divorces'; in Italian).

This paper inquires whether Article 65 (Recognition of foreign rulings) and the underlying private international law reference are still applicable to foreign divorces after Regulations No 2201/2003 and No 1259/2010 replaced Article 31 of Law No 218/1995 and after the recent provision submitting the dissolution of same-sex partnerships to Regulation No 1259/2010.

- *Peter Kindler*, Professor at the University of Munich, **'La legge applicabile ai patti successori nel regolamento (UE) n. 650/2012'** ('The Law Applicable to Agreements as to Successions According to Regulation (EU) No 650/2012'; in Italian).

Under Italian substantive law agreements as to succession are not admitted. The same is true, inter alia, for French and Spanish law. The idea behind this rule is deeply rooted in the dignity of the de cuius. The freedom to dispose of property upon death is protected until the last breath and any speculation on the death of the disponent should be avoided. Other jurisdictions such as German or Austrian law allow agreements as to succession in order to facilitate estate planning in

complex family situations. This is why the Succession Regulation (650/2012/EU) could not ignore agreements as to succession. Article 25 of the Regulation deals with the law applicable to their admissibility, their substantive validity and their binding effects between the parties. The Regulation facilitates estate planning by introducing the freedom of the parties to such an agreement to choose the applicable law (Article 25(3)). The Author favours a wider concept of freedom of choice including (1) the law of the State whose nationality the person whose estate is involved possesses at the time of making the choice or at the time of death and (2) the law of the habitual residence of that person at the time of making the choice or at the time of death. As to the revocability of the choice of the lex successionis made in an agreement as to succession, the German legislator has enacted a national norm which allows the parties to an agreement as to succession to establish the irrevocability of the choice of law. This is, according to the Author, covered by Recital No 40 of the Succession Regulation. The Regulation has adopted a wide notion of agreements as to succession, including, inter alia, mutual wills and the Italian patto di famiglia. The Author welcomes that, by consequence, the advantages of Article 25, such as the application of the hypothetical lex successionis and the freedom of choice, are widely applicable.

The Regulation did not (and could not) introduce the agreement as to succession at a substantive law level. It does not interfere with the legislative competence of the Member States. According to the author this is why member states such as Italy are free to consider their restrictive rules on agreements as to succession as part of their public policy within the meaning of Articles 35 e 40 litt. a of the Regulation.

- *Cristina Campiglio*, Professor at the University of Pavia, **'La disciplina delle unioni civili transnazionali e dei matrimoni esteri tra persone dello stesso sesso'** ('The Regulation of Cross-Border Registered Partnerships and Foreign Same-Sex Marriages'; in Italian).

With Law No 76/2016 two new types of pair bonds were regulated: civil unions between same-sex persons and cohabitation. As for transnational civil unions, the Law merely introduced two provisions delegating to the Government the amendment of Law No 218/1995 on Private International Law. The change is laid down in Legislative Decree 19 January 2017 No 7 which, however, has not solved all the problems. The discipline of civil unions established abroad is partial, being

limited to unions between Italian citizens who reside in Italy. Some doubt remains moreover in regulating the access of foreigners to civil union in Italy as well as in identifying the law applicable to the constitution of the union, its effects and its dissolution; finally, totally unresolved – due to the limitations of the delegation – remains the question of the effect in Italy of civil unions established abroad between persons of opposite sex. With regard to same-sex marriages celebrated abroad the fate of Italian couples is eventually clarified but that of mixed couples remains uncertain; in addition, no information is provided as to the effects of marriages between foreigners.

In addition to the foregoing, the following comment is featured:

- *Domenico Damascelli*, Associate Professor at the University of Salento, **'Brevi note sull'efficacia probatoria del certificato successorio europeo riguardante la successione di un soggetto coniugato o legato da unione non matrimoniale'** ('Brief Remarks on the Evidentiary Effects of the European Certificate of Succession in the Succession of a Spouse or a Partner in a Relationship Deemed to Have Comparable Effects to Marriage'; in Italian).

This article refutes the doctrinal view according to which the European Certificate of Succession (ECS) would not produce its effects with regard to the elements referred to therein that relate to questions excluded from the material scope of Regulation EU No 650/2012, such as questions relating to matrimonial property regimes and property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage. This view is rejected not only on the basis of its paradoxical practical results (namely to substantially depriving the ECS of any usefulness), but mainly because it ends up reserving the ECS a pejorative treatment compared to that afforded to the analogous certificates issued in accordance with the substantive law of the Member States (the effects of which, vice versa, have to be recognized without exceptions under Chapter IV of the Regulation). The rebuttal is strengthened considering the provisions contained in Chapter VI of the Regulation, from which it emerges that, apart from exceptional cases (related, for example, to the falsity or the manifest inaccuracy of the ECS), individuals to whom is presented cannot dispute the effects of ECS.

Finally, the first issue of 2017 of the *Rivista di diritto internazionale privato e*

processuale features the following reports:

- *Katharina Raffelsieper*, Attorney at Thewes & Reuter Avocats à la Cour, '**Report on Recent German Case-Law Relating to Private International Law in Civil and Commercial Matters'** (in English).
- *Stefanie Spancken*, Associate at Freshfields Bruckhaus Deringer LLP, Düsseldorf, **'Report on Recent German Case-Law Relating to Private International Law in Family Law Matters'** (in English).

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The second issue of 2017 of the *Rivista di diritto internazionale privato e processuale* features three articles and one report.

- *Costanza Honorati*, Professor at the University of Milan-Bicocca, **'La proposta di revisione del regolamento Bruxelles II-*bis*: più tutela per i minori e più efficacia nell'esecuzione delle decisioni'** ('The Proposal for a Recast of the Brussels IIa Regulation: More Protection for Children and More Effectiveness in the Enforcement of Decisions'; in Italian).

The present essay is a first assessment of the Proposal for a recast of the Brussels IIa Regulation (COM(2016)211). After a short explanation of the reasons for not touching on the highly controversial grounds for divorce, the essay develops on the proposed amendments in the field of parental responsibility and international abduction of children. It further analyses the amendments proposed to the general criterion of the child's habitual residence and to prorogation of jurisdiction (par. 3) and the new provision on the hearing of the child (par. 4). Major attention is given to the new chapter on abduction of children, that is assessed into depth, also in regard of the confirmation of the much-discussed overriding mechanism (par. 5-7). Finally, the amendment aiming to the abolition of exequatur, counterbalanced by a new set of grounds for opposition, is assessed against the cornerstone of free circulation of decision's principle. Indeed, new Article 40 will allow to refuse enforcement when the court of the state of enforcement considers this to be prejudicial to the best interest of the child, thus overriding basic EU principles (par. 8-9).

- *Lidia Sandrini*, Researcher at the University of Milan, **'Nuove prospettive per una più efficace cooperazione giudiziaria in**

materia civile: il regolamento (UE) n. 655/2014' ('New Perspectives for a More Effective Judicial Cooperation in Civil Matters: Regulation (EU) No 655/2014'; in Italian).

Regulation (EU) No 655/2014 – applicable from 18 January 2017 – established a European Account Preservation Order procedure (EAPO) to facilitate cross-border debt recovery in civil and commercial matters. In order to give a first assessment of the new instrument, the present contribution aims at identifying the peculiarity that could make the EAPO preferable to the creditor vis-à-vis equivalent measures under national law. It then scrutinizes the enactment of this new piece of European civil procedure law in light of the principles governing the exercise of the EU competence in the judicial cooperation in civil and commercial matters as well as its compliance with the standard of protection of the creditor's and debtor's rights resulting from both the EU Charter of Fundamental Rights and the ECHR. Finally, it analyses the rules on jurisdiction as well as on the applicable law, provided for by the Regulation, in order to identify hermeneutical solutions to some critical issues raised by the text and clarify its relationship with other EU instruments.

- *Fabrizio Vismara*, Associate Professor at the University of Insubria, **'Legge applicabile in mancanza di scelta e clausola di eccezione nel regolamento (UE) n. 2016/1103 in materia di regimi patrimoniali tra i coniugi'** ('Applicable Law in the Absence of a Choice and Exception Clause Pursuant?to Regulation (EU) No 2016/1103 in Matters of Matrimonial Property Regimes'; in Italian).

This article analyzes the rules on the applicable law in the absence of an express choice pursuant to EU Regulation No 2016/1103 in matters of matrimonial property regimes. In his article, the Author first examines the connecting factors set forth under Article 26 of the Regulation, with particular regard to the spouses' first common habitual residence or common nationality at the time of the conclusion of the marriage and the closest connection criteria, then he proceeds to identify the connecting factors that may come into play in order to establish such connection. The Author then focuses on the exception clause under Article 26(3) of the Regulation by highlighting the specific features of such clause as opposed to other exception clauses as applied in other sectors of private international law and by examining its functioning aspects. In his conclusions, the Author underlines some critical aspects of such exception clause as well as some

limits to its application.

Finally, the second issue of 2017 of the *Rivista di diritto internazionale privato e processuale* features the following report:

- *Federica Favuzza*, Research fellow at the University of Milan, **'La risoluzione n. 2347 (2017) del Consiglio di Sicurezza e la protezione dei beni culturali nei conflitti armati e dall'azione di gruppi terroristici'** ('Resolution No 2347 (2017) of the Security Council on the Destruction, Smuggling of Cultural Heritage by Terrorist Groups'; in Italian).

Indexes and archives of RDIPP since its establishment (1965) are available on the website of the Rivista di diritto internazionale privato e processuale.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2017: Abstracts

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

C. Kohler: **Limits of mutual trust in the European judicial area: the judgment of the ECtHR in Avotin?š v. Latvia**

In Avoti?š v. Latvia the European Court of Human Rights opposes the consequences of the principle of mutual trust between EU Member States which the Court of Justice of the European Union highlighted in Opinion 2/13. The ECtHR sees the risk that the principle of mutual trust in EU law may run counter to the obligations of the Member States flowing from the ECHR. In the context of judgment recognition the State addressed must be empowered to review any serious allegation of a violation of Convention rights in the State of origin in order to assess whether the protection of such rights has been manifestly deficient.

Such a review must be conducted even if opposed by EU law. The author evaluates the Avoti?š judgment in the light of the recent case-law of the CJEU which gives increased importance to the effective protection of fundamental rights. In view of that case-law the opposition between the two European courts seems less dramatic as their competing approach towards the protection of fundamental rights shows new elements of convergence.

S. L. Gössl: **The Proposed Article 10a EGBGB: A Conflict of Laws Rule Supplementing the Proposed Gender Diversity Act (Geschlechtervielfaltsgesetz)**

In 2017 the German Institute for Human Rights published an expertise for the Federal Ministry of Family Affairs, Senior Citizens, Women and Youth on the topic of "Gender Diversity in Law". The expertise proposed several legal changes and amendments, including a conflict of laws rule regarding the determination of the legal sex of a person (art. 10a EGBGB). The proposal follows the current practise to use the citizenship of the person in question as the central connecting factor. In case of a foreigner having the habitual residence in Germany, or a minor having a parent with a habitual residence in Germany, a choice of German law is possible, instead. The rule reflects the change of substantive law regarding the legal sex determination from a binary biological-medical to a more open autonomy-based approach.

R. Geimer: **Vertragsbruch durch Hoheitsakt: „Once a trader, not always a trader?" – Immunitätsrechtlicher Manövrierspielraum für Schuldnerstaaten?**

A debtor state's inability to invoke state immunity: The issuance of bonds constitutes an actus gestionis, which cannot be altered to an actus imperii by legislative changes that unilaterally amend the terms of the bonds.

P. Mankowski: **Occupied and annected territories in private international law**

Private international law and international law are two different cups of tea. Private international law is not bound in the strict sense by the revelations of international law. An important point of divergence is as to whether occupied territories should be regarded as territories reigned by the occupying State or not. Private international law answers this in the affirmative if that State exerts

effective power in the said territory. Private parties simply have to obey its rules and must adapt to them, with emigration being the only feasible exit. The State to whom the territory belonged before the occupation has lost its sway. This applies regardless whether UNO or EU have for whichever reasons uttered a different point of view. For instance, East Jerusalem should be regarded as part of Israel for the purposes of private international law, contrary to a recent decision of the Oberlandesgericht München.

F. Eichel: **Cross-border service of claim forms and priority of proceedings in case of missing or poor translations**

In recent times, there has been a growing number of inner-European multifora disputes where the claimant first lodged the claim with the court, but has lost his priority over the opponent's claim because of trouble with the service of the claim forms. Although Art. 32 (1) (a) Brussels Ibis Regulation states that the time when the document is lodged with the courts is decisive on which court is "the court first seised" in terms of Art. 29 Brussels Ibis Regulation, there has been dissent among German Courts whether the same is true when the service has failed due to a missing or poor translation under the EU Service Regulation (Regulation EC No 1393/2007; cf. also the French Cour de Cassation, 28.10.2008, 98 Rev. Crit. DIP, 93 [2009]). Although the claimant is responsible for deciding whether the claim forms have to be translated, the author argues that Art. 32 (1) (a) Brussels Ibis Regulation is applicable so that the claimant can initiate a second service of the document after the addressee has refused to accept the documents pursuant to Art. 8 para. 1 EU Service Regulation. The claimant does not loose priority as long as he applies for a second service accompanied by a due translation as soon as possible after the refusal. In this regard, following the Leffler decision of the ECJ (ECLI:EU:C:2005:665), a period of one month from receipt by the transmitting agency of the information relating to the refusal may be regarded as appropriate unless special circumstances indicate otherwise.

P. Huber: **A new judgment on a well-known issue: contract and tort in European Private International Law**

The article discusses the judgment of the ECJ in the Granarolo case. The core issue of the judgment is whether an action for damages founded on an abrupt termination of a long-standing business relationship qualifies as contractual or as a matter of tort for the purposes of the Brussels I Regulation. The court held that

a contract need not be in writing and that it can also be concluded tacitly. It stated further that if on that basis a contract was concluded, the contractual head of jurisdiction in Art. 5 Nr. 1 Brussels I Regulation will apply, even if the respective provision is classified as a matter of tort in the relevant national law. The author supports this finding and suggests that it should also be applied to the distinction between the Rome I Regulation and the Rome II Regulation.

D. Martiny: **Compensation claims by motor vehicle liability insurers in tractor-trailer accidents having German and Lithuanian connections**

The judgment of the ECJ of 21/1/2016 deals with multiple accidents in Germany caused by a tractor unit coupled with a trailer, each of the damage-causing vehicles being insured by different Lithuanian insurers. Since in contrast to Lithuanian law under German law also the insurer of the trailer is liable, after having paid full compensation the Lithuanian insurer of the tractor unit brought an indemnity action against the Lithuanian insurer of the trailer. On requests for a preliminary ruling from Lithuanian courts, the ECJ held that Art. 14 of the Directive 2009/103/EC of 16/9/2009 relating to insurance against civil liability in respect of the use of motor vehicles deals only with the principle of a "single premium" and does not contain a conflict rule. According to the ECJ there was no contractual undertaking between the two insurers. Therefore, there exists a "non-contractual obligation" in the sense of the Rome II Regulation. Pursuant to Art. 19 Rome II, the issue of any subrogation of the victim's rights is governed by the law applicable to the obligation of the third party – namely the civil liability insurer – to compensate that victim. That is the law applicable to the insurance contract (Art. 7 Rome I). However, the law applicable to the non-contractual obligation of the tortfeasor also governs the basis, the extent of liability and any division of his liability (Art. 15 [a] [b] Rome II). Without mentioning Art. 20 Rome II, the ECJ ruled that this division of liability was also decisive for the compensation claim of the insurer of the tractor unit. A judgment of the Supreme Court of Lithuania of 6/5/2016 has complied with the ruling of the ECJ. It grants compensation and applies also the rule of German law on the common liability of the insurers of the tractor unit and trailer.

P.-A. Brand: **Jurisdiction and Applicable Law in Cartel Damages Claims**

It can be expected that the number of cartel damages suits in the courts of the EU member states will substantially increase in the light of the EU Cartel Damages

Directive and its incorporation in the national laws of the EU member states. Quite often the issues of jurisdiction and the applicable law play a major role in those cases, obviously in addition to the issues of competition law. The District Court Düsseldorf in its judgement on the so-called "Autoglas-cartel" has made significant remarks in particular with regard to international jurisdiction for claims against jointly and severally liable cartelists and on the issue of the applicable law before and after the 7th amendment of the German Act against Restraints of Competition (GWB) on 1 July 2005. The judgement contributes substantially to the clarification of some highly disputed issues of the law of International Civil Procedure and the Conflict of Law Rules. This applies in particular to the definition of the term "Closely Connected" according to article 6 para 1 of the Brussels I Regulation (now article 8 para 1 Brussels I recast) in the context of international jurisdiction for law suits against a number of defendants from different member states and the law applicable to cartel damages claims in cross-border cartels and the rebuttal of the so-called "mosaic-principle".

A. Schreiber: **Granting of reciprocity within the German-Russian recognition practice**

Germany and the Russian Federation have not concluded an international treaty which would regulate the mutual recognition of court decisions. The recognition according to the German autonomous right requires the granting of reciprocity pursuant to Sec. 328 para. 1 No. 1 of the German Code of Civil Procedure. The Higher Regional Court of Hamburg has denied the fulfilment of this requirement by (not final) judgement of 13 July 2016 in case 6 U 152/11. The comment on this decision shows that the estimation of the court is questionable considering the – for the relevant examination – only decisive Russian recognition practice.

K. Siehr: **Marry in haste, repent at leisure. International Jurisdiction and Choice of the Applicable Law for Divorce of a Mixed Italian-American Marriage**

An Italian wife and an American husband married in Philadelphia/Pennsylvania in November 2010. After two months of matrimonial community the spouses separated and moved to Italy (the wife) and to Texas (the husband). The wife asked for divorce in Italy and presented a document in which the spouses agreed to have the divorce law of Pennsylvania to be applied. The Tribunale di Pordenone accepted jurisdiction under Art. 3 (1) (a) last indent Brussels II-Regulation and

determined the applicable law according to Rome III-Regulation which is applicable in Italy since 21 June 2012. The choice of the applicable law as valid under Art. 5 (1) (d) Rome III-Regulation in combination with Art. 14 lit. c Rome III-Regulation concerning states with more than one territory with different legal systems. The law of Pennsylvania was correctly applied and a violation of the Italian ordre public was denied because Italy applies foreign law even if foreign law does not require a legal separation by court decree. There were no effects of divorce which raised any problem.

M. Wietzorek: **Concerning the Recognition and Enforcement of German Decisions in the Republic of Zimbabwe**

The present contribution is dedicated to the question of whether decisions of German courts – in particular, decisions ordering the payment of money – may be recognized and declared enforceable in the Republic of Zimbabwe. An overview of the rules under Zimbabwean statutory law and common law (including a report on the interpretation of the applicable conditions, respectively grounds for refusal, in Zimbabwean case law) is followed by an assessment of whether reciprocity, as required by section 328 subsection 1 number 5 of the German Civil Procedure Code, may be considered as established with respect to Zimbabwe.

A. Anthimos: **Winds of change in the recognition of foreign adult adoption decrees in Greece**

On September 22, 2016, the Plenum of the Greek Supreme Court published a groundbreaking ruling on the issue of the recognition of foreign adult adoption decrees. The decision demonstrates the respect shown to the judgments of the European Court of Human Rights, especially in the aftermath of the notorious Negrepontis case, and symbolizes the Supreme Court’s shift from previous rulings.

InDret, Extraordinary Issue (April 2017)

Dr. Nuria Bouza Vidal, Professor of Private International Law at University of Barcelona and Pompeu Fabra University, retired in 2015; currently she is a member of the Unidroit Governing Council. As a kind of tribute to a life devoted to Private International Law the Spanish legal e-review *InDret* (www.indret.com) has just published an extraordinary issue collecting the presentations made at a ceremony held in her honor entitled "Internal, European and International Public Policy".

The issue contains the following articles:

- **José Carlos FERNÁNDEZ ROZAS, "The Public Policy of Arbitrator in the International Commercial Arbitration" (**"El orden público del árbitro en el arbitraje comercial internacional", pp. 5-69).

English abstract : Party autonomy in international commercial arbitration is the most compelling reason for the contracting parties to enter into arbitration agreement, rather than opting for litigation. However, arbitration functionalities may be hindered by several factors, one of which is arbitrability and public policy. The concept of public policy exists in almost all legal systems. Yet, it is one of the most elusive concepts in law given the contradictory case law and convoluted literature. The scope of public order is more than a mere tool of judicial review, upon completion of the proceedings before the arbitrators. It is manifested throughout the arbitration process which influence the determination of competence of arbitrators, in the substantiation of the arbitration proceedings and in determining the law applicable to the arbitration agreement, leading to a sort of "public order of the arbitrator". Consequently, the appreciation of public policy does not relate exclusively to the judges. The arbitrators are as competent as the judges to inquire about the content of the underlying public policy of a particular law, regulation or in an arbitration practice.

- **Núria BOUZA VIDAL, "The Safeguard of Public policy in International contracts: Private International Law approach and its adjustment in European law" ("La salvaguarda del orden público en los contratos internacionales: enfoque de derecho internacional**

privado y su adaptación en el derecho europeo", p. 70-101).

English abstract: This study analyses the ways to safeguard public policy in international contracts with the purpose to analyze and evaluate its meaning and function in the Private International Law of the Member States of European Union and in the substantive law of the European Union. In the first place, the different tools of Private international law aimed at safeguarding internal and international public policy of states are examined. In second place, the tools of Private international law to safeguard public policy must conform to the primary and secondary legislation of the European Union. These tools cannot restrict the freedom of movements in the internal European Market except for the reasons justified on the ground of public policy or overriding requirements of the public interest. Special attention should be paid to these notions because its meaning are not the same in European Law and in Private International Law. Also, some harmonization European Directives contains provisions about their geographic scope. Often these provisions are improperly considered overriding mandatory provisions.

- **Juan José ÁLVAREZ RUBIO, "Liability for damage to the marine environment: channels of international procedural action**" (**"Responsabilidad por daños al medio marino: cauces de actuación procesal internacional",** p. 102-138).

English abstract: This article analyzes the international procedural dimension linked to disputes arising from marine casualties for Oil spillage, and analyzes the interaction between the various regulatory blocks in the presence, and in particular the conventional dimension over domestic legislation and the institutional, from the European legislator. The criminal legal remedy becomes ineffective for the analysis of the complexity inherent in the realization of civil liability and its subjective and quantitative scope, and the international conventions in force establish a system of limitation of liability that is difficult to justify and sustainable today.

- **Estelle GALLANT, "International prenuptial agreements and anticipation of financial consequences of a divorce: which public policy?" (**"Contrats nuptiaux internationaux et anticipation des conséquences financières du divorce : ¿quel ordre public?", p. 139-164).

English abstract: In some jurisdictions the law allows spouses not only to regulate

their matrimonial property regime by agreement, but also to anticipate the financial consequences of their divorce, either by fixing the amount that such spouses may be allowed to claim to each other, or by ruling out any possibility of claiming any financial compensation. The receipt of a prenuptial agreement governed by a foreign law in a less lenient legal system raises the question of the role of international public policy as far as party autonomy is concerned, especially in a context where Maintenance Regulation and the Hague Protocol seek to balance the parties' forecast with a form of maintenance justice.

- **Santiago ÁLVAREZ GONZÁLEZ, "Surrogacy and Public Policy (ordre public)"** ("Gestación por sustitución y orden público", pp. 165-200).

English abstract: This paper deals with the role of public policy (ordre public) in light of international surrogacy cases. The author analyzes several judgments held by the supreme courts of Germany, Spain, France, Italy and Switzerland. This analysis shows that, even when faced by a series of common elements, the domestic ordre public remains different in each country. Equivalent situations receive different answers by law. This outcome is due to an also different idea about the ordre public scope, to a different view on the paramount interest of children, to a different understanding of the ECHR's jurisprudence and, last but not least, to the different possibilities of reconstruction of the family ties that each national law offers. The author concludes that this ordre public exception, linked so far to each national law, will no longer have a preeminent place on the international surrogacy issues, among other reasons, because it is not possible to achieve a satisfactory solution to the wide range of problems around surrogacy from the point of view of a sole national law.

- **Ana QUIÑONES ESCÁMEZ, "Surrogacy arrangements do not establish parenthood but a public authority intervention in accordance to law (Recognition method for foreign public acts and Conflict of laws for evidence and private acts)"** ("El contrato de gestación por sustitución no determina la filiación sino la intervención de una autoridad pública conforme a ley (Método del reconocimiento para los actos públicos extranjeros y método conflictual para los hechos y los actos jurídicos privados)", pp. 201-251).

English abstract : The present article focuses on Private International Law issues

raised by international surrogacy arrangements. I will examine the resolution methods offered by Private International Law: mandatory rules, conflict of laws and recognition of decisions and legal situations. Attention will be focused on the possibilities offered by the recognition method regarding a parenthood link between a child and the commissioning parents already established by a foreign public authority. Based on the principle that a child's parenthood cannot be subject to private autonomy, in cases where we are only faced with facts (reproductive practice) and private acts (surrogacy arrangements) the child's parenthood will not be established yet (conflict of Laws method), in order to serve her best interest. Giving some examples, I will show that solutions offered to international surrogacy arrangements in the USA or the EU are not so different, and that the surrogacy arrangement is not treated as a current arrangement in any other country. Finally, I will make some proposals at both domestic and international levels which, by means of respecting legislative diversity, foresee international limits when citizens from other countries access to this practice abroad. This solution aims at avoiding "limping situations" and guaranteeing that children conceived through surrogacy will not be delivered to unknown foreign citizens. Last but not least, I advocate for controlling relocation strategies of legal and procreative industry at international level, whose clients are recruited at their respective markets.

- **Esther FARNÓS AMORÓS, "Public policy and donor anonymity" (**"¿Deben los donantes de gametos permanecer en el anonimato?", pp. 252-273).

English abstract: This article highlights the tension between the anonymity of the donor and the donor conceived individuals' right to know one's origins. The study of legal systems that recognize this right spurs us to further examine the hypotheses, quite widespread today, which consider outdated traditional arguments for anonymity. In this regard, the article also shows the different treatment granted to adopted children and donor conceived children by legal systems such as the Spanish one. Beyond the possible conflicting rights of children, donors and parents, arguments provided by anonymity supporters, such as the moral damage resulting from disclosure or the possible link between disclosure and a decrease in the number of donors, should be also taken into account. However, these arguments require absolute empirical evidence, which is not currently conclusive. Last but not least, disclosure of the donor's identity is

consistent with the ever-growing trend to dissociate biological, social and legal spheres of parentage.

- **Mònica VINAIXA MIQUEL, "The party autonomy in the new EU Regulations on Matrimonial Property Regimes (2016/1103) and Property consequences of Registered Partnesrships (2016/1104) (**"La autonomía de la voluntad en los recientes reglamentos UE en materia de regímenes económicos matrimoniales (2016/1103) y efectos patrimoniales de las uniones registradas (2016/1104)", pp. 274-314).

English abstract: On June 24, 2016, with the aim of facilitating the citizens and international couples' life, in particular, in cross-border situations to which they may be exposed, the Council adopted by way of the enhanced cooperation, the Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (2016/1103 Regulation) and the Regulation on jurisdiction, applicable law, recognition and enforcement of decisions regarding the property consequences of registered partnerships (2016/1104 Regulation). With their approval an important gap in the current EU Private International Law on Family matters have been covered. Both of them are Private International Law instruments through which EU seeks to establish a clear and uniform legal framework on the subject. The new Regulations do not affect the substantive law of the Member States on Matrimonial Property Regimes and Property consequences of Registered Partnerships. The party autonomy has enormous advantages in the field of applicable law, unlike the subsidiary connecting factors applicable in the absence of choice of law by the parties, particularly in procedures about the liquidation of matrimonial/registered partnership property regime as a result of its breakdown or because of the death of one of the partners. As we will see, choice of law is the best connecting factor for the coordination of the different EU Regulations that can be applied in the same procedure, for example, the 1259/2010 Regulation on divorce and legal separation, the 650/2012 Regulation on successions and the 2016/1103 or the 2016/1104 Regulations recently adopted. If the parties choose one law as applicable to the different claim petitions, the competent court will have to apply only one law. The problem is that different Regulations do not contain uniform rules on choice of law. However, this result it is more difficult to be achieved through the objective connecting factors of the different UE Regulations as they are fixed in different periods. While the 1259/2010 and 650/2012 Regulations fix

the connecting factors at the end of the couple´s life, the new Regulations fixes them at its beginning (immutability rule). The aim of this contribution is party autonomy, however it is also taken into account the influence of the overriding mandatory provisions (such as certain rules of the primary matrimonial regime) which are applicable irrespective of the law otherwise applicable to the matrimonial or registered partnership property regime under the Regulations, the protection of third party rights as well as the role of the public policy in this field, which particularly operates when the applicable law is that of a third state.

- **Albert FONT I SEGURA, "The delimitation of the public policy reservation and evasion of law in Succession Regulation (EU) 650/2012"** ("La delimitación de la excepción de orden público y del fraude de ley en el Reglamento (UE) 650/2012 en materia sucesoria", pp. 314-365).

English abstract: The outstanding differences among the Member States on succession matters determine the intended coincidence between forum and ius in Regulation 650/2012. However, the combination of the rules of competition and the conflict rules provided for in the European instrument can sometimes lead to the application of foreign law. Under these circumstances the application of public policy reservation or the evasion of law can be taken which results in the application of lex fori, with the main purpose of ensuring the protection of public order. This contribution, above the limits and shortcomings of Regulation 650/2012, highlights the effective restrictions and potential constraints that can be or may be submitted to national jurisdictions. The author suggests mechanisms for the EUCJ to provide guidelines for interpretation and articulation between the two figures.

- **Jonathan FITCHEN, "Public Policy in Succession Authentic Instruments: Articles 59 and 60 of the European Succession Regulation"**, pp. 366-396.

The abstract reads: This chapter indicates the scope for difficulties in establishing the meaning of the public policy exceptions provided by Article 59(1) and Article 60(3) of the European Succession Regulation. Though EU jurisprudence from other EU Regulations concerning public policy exceptions for judgments offers some guidance, the lack of jurisprudence concerning the public policy of authentic instruments, diversity among national succession laws

and the novelty of Article 59's obligation of 'acceptance' may pose problems for authentic instruments in the Succession Regulation. The high probability of the Succession Regulation being operated by non-contentious probate practitioners, rather than by the courts more usually empowered by such European Regulations, is also suggested to potentially add to these difficulties. For those and other reasons it is suggested that cases involving the public policy exceptions should be capable of diversion to domestic or European courts for the determination of the public policy points at issue.

Brexit and PIL, Over and Over

The abandonment of the EU by the UK is at the root of many doubts concerning the legal regime of cross-border private relationships. Little by little the panorama begins to clear up as the expectations and objectives of the UK are made public. Regarding cross-border civil and commercial matters, several Evidence Sessions have been held from December to January at the House of Lords before the Select Committee on the European Union, Justice Sub-committee (transcripts are available here); the Final Report was published yesterday.

At the end of January, the Minister of State for Courts and Justice gave the Committee details as to the hopes on the side of the UK of the post-Brexit best case scenario, which in a nutshell would rely on two main pillars: a set of common rules -either the regulations themselves, incorporated into the Great Repeal Act; or new agreements with the EU taking up the contents of the European rules- to ensure mutuality and reciprocity; and the absence of any post-Brexit role for the Court of Justice.

To what extent is this workable?

Taking the risk of repeating what other colleagues have already said let me share some basic thoughts on the issue from the continental point of view; in light of the documents above mentioned one feels there is a need to insist on them. The ideas are complemented and developed further in a piece that will be published in a collective book – *Diversity & Integration: Exploring Ways Forward,* to be edited

by Dr. Veronica Ruiz Abou-Nigm and Prof. Maria Blanca Noodt Taquela.

It is indeed sensible to have solutions on cross-border jurisdiction and recognition and enforcement of decisions which enhance certainty for the continental citizens with interests in third States; this is a general truth. The British negotiators would have to prove (with qualitative and quantitative arguments) what is so particular about the UK that an EU/UK convention is of the essence for the post-Brexit time. Moreover, and more important, the UK will have to convince the EU that the particular solutions to be agreed are those currently contained in the European regulations; and also, about the CJEU not being part of the agreement. For the endeavor to succeed fundamental obstacles must be overcome, all related to the systemic nature of the EU. Among the most obvious ones I would like to point to the following:

.- The inadequacy of the solutions. Certain mechanisms and technical solutions of the EU civil procedural law instruments – and the way we understand and apply them- have been endorsed only for integration. There are reasons to be skeptical about the "exportability" of the far-reaching solutions, in terms of removal of obstacles to the circulation of judgments, of the current EU procedural regulations to a context not presided by the philosophy of integration. Within the EU, the sacrifices imposed by mutual trust to the right to due process of individuals are endurable in the name of integration as a greater, common good. In the absence of any integration goal there is no apparent reason for an all-embracing blind reciprocal trust (neither of the EU MS in the UK nor vice versa. By the way, the fact that the UK is considering leaving the ECHR as well will not help to automaticaly trusting the UK decisions in the future).

.- The systemic character of the *acquis communautaire.* The EU legal instruments complement and reinforce one another: any proposal to reproduce single, isolated elements of the system in a bilateral convention EU/UK ignores this fact. Ties and links among the components of legal systems may be stronger or looser. When confronted with a proposal such as the UK, one of the unavoidable questions to be answered is to what extent the PIL EU instruments can have a separate, independent life one from each other.

.- In a similar vein: the EU PIL system does not start, nor does it end, in a few regulations – those which typically come to mind. Many conflict of laws and procedural rules for cross-border cases are set in EU acts with a broader content

and purpose; they interact with the PIL instruments. What about this setting?

.- MS are actors in the system: they must keep loyal to it; they cannot escape from it. When applying their laws and when legislating they are subject to the overarching obligation of making it in a way that preserves the *effet utile* of the EU rules. This creates from the outset a structural imbalance to any international agreement between the MS (the EU) and third countries: the MS enjoy very little -if at all- leeway to deviate from the constraint of keeping EU-consistent. Indeed, a similar situation would arise in connection to any other international agreement, but it is likely to be more problematic in the case of conventions which replicate the contents of the EU regulations but not their (EU) inspiration, nor their objectives.

.- International agreements concluded by the European Union (as opposed to those signed by the MS) form an integral part of its legal order and can therefore be the subject of a request for a preliminary ruling by the MS. *De iure,* once the UK is no longer an EU MS the CJEU findings will not be binding on it. The fact remains that diverging interpretations -one for the MS, another from the side of the UK- of the same bilateral instrument will jeopardize its very purpose (and I would say the Justice sub-committee has understood it, as we can read in the Final Report above mentioned: *The end of the substantive part of the CJEU's jurisdiction in the UK is an inevitable consequence of Brexit. If the UK and the EU could continue their mutually-beneficial cooperation in the ways we outline earlier without placing any binding authority at all on that Court's rulings, that could be ideal. However, a role for the CJEU in respect of essentially procedural legislation concerning jurisdiction, applicable law, and the recognition and enforcement of judgments, is a price worth paying to maintain the effective cross-border tools of justice discussed throughout our earlier recommendations. (Paragraph 35).*

New Publication in the Oxford Private International Law Series: Human Rights and Private International Law

By James J Fawcett FBA (Professor of Law Emeritus, University of Nottingham), Máire Ní Shúilleabháin (Assistant Professor in Law, University College Dublin) and Sangeeta Shah (Associate Professor of Law, University of Nottingham)
Human Rights and Private International Law is the first title to consider and analyse the numerous English private international law cases discussing human rights concerns arising in the commercial and family law contexts. The right to a fair trial is central to the intersection between human rights and private international law, and is considered in depth along with the right to freedom of expression; the right to respect for private and family life; the right to marry; the right to property; and the prohibition of discrimination on the ground of religion, sex, or nationality.

Focusing on, though not confined to, the human rights set out in the ECHR, the work also examines the rights laid down under the EU Charter of Fundamental Rights and other international human rights instruments.

Written by specialists in both human rights and private international law, this work examines the impact, both actual and potential, of human rights concerns on private international law, as well as the oft overlooked topic of the impact of private international law on human rights.

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15: The right to property, foreign judgments, and cross-border property disputes
16: Overall conclusions

For further information, see here.

Opening of the European and Private International law Section in Blog Droit Européen

Many thanks to Alexia Pato, PhD candidate at the Universidad Autónoma, Madrid, for this piece of news. And my best wishes!

Today, blog droit européen officially celebrates the opening of its European and private international law section (hereafter, EU and PIL section), which is edited and coordinated by Karolina Antczak (Ph.D. candidate at Université de Lille), Basile Darmois (Ph.D. candidate at Université Paris Est Créteil) and Alexia Pato (Ph.D. candidate at Universidad Autónoma de Madrid). In a recently published inaugural post (available here), they present their project in detail. In particular,

they expose the positive interactions between PIL and European law, as well as their friction points. Undoubtedly, the increasingly tight links that are forged between these two disciplines encourage legal experts to collaborate and exchange their views. The creation of the mentioned section in blog droit européen contributes to the achievement of this objective.

The Content of the European and Private International Law Section

Although the EU and PIL section has just been inaugurated, more food for thought will be uploaded soon. Readers will find articles diving into PIL issues, and we will be covering additional areas such as international civil litigation, as well as the internal market and its four freedoms. Don't miss our upcoming co-signed article on Brexit, highlighting its legal consequences from an international perspective. Also, on its way is a post discussing the EU's competence to adopt minimum standards of civil procedure. Additionally, the team plans to upload interviews with professors and legal experts, who debate fundamental EU and PIL matters. These interviews will be available in video format. Lastly, readers will be able to stay updated by reading our posts on the latest legal news.

Contribute to the European and Private International Law Section

In order to foster constructive debates and extract the merits of collaborative learning, we welcome any Ph.D. candidate, professor, or legal professional to voice his/her opinion on the EU and PIL section. You may submit your ideas in the form of a post (approximately 1.000 words), which consists of a critical assessment on a particular topic. Working papers, video conferences and tutorials are equally welcome (for more information on how to contribute, click here). Articles can be written in either French or English.

What is blog droit européen?

Blog droit européen is a website that provides information with an interactive touch on a broad range of legal topics such as: digital single market, Economic and monetary Union, competition law, and so on. In particular, its purpose is to gather together students, investigators, professors, and legal experts who share a common and enhanced interest for European law at large (EU, ECHR, impact of European law on States' public and private laws). The originality of blog droit européen lies in two essential features: firstly, the blog delivers high quality and varied contents, including interviews (of ECJ members and professors), call for

papers and conferences, not to mention working papers and legal columns, which critically analyse EU law. Secondly, the use of e-techniques of information sharing, like Facebook, Twitter, and YouTube make this blog interactive and user friendly. From an organizational perspective, blog droit européeen is run and edited by young investigators from different legal backgrounds in different Universities across Europe (for an overview of our team, click here). Thanks to Olivia Tambou (Lecturer at Université Paris-Dauphine), our dedicated team leader and creator/editor of the blog, for connecting us and making this project possible.

See you soon on blog droit européen!

Avotinš v. Latvia: Presumption of Equivalent Protection not Rebutted

The much awaited decision Avotinš v. Latvia of the Grand Chamber of the ECtHR was finally delivered yesterday. The decision can be found here. A video of the delivery is also available.

The European Court of Human Rights held by a majority that there had been no violation of Article 6 § 1 (right to a fair hearing) of the European Convention on Human Rights. The Court reiterated that, when applying European Union law, the Contracting States remained bound by the obligations they had entered into on acceding to the European Convention on Human Rights. Those obligations were to be assessed in the light of the presumption of equivalent protection established by the Court in the *Bosphorus* judgment and developed in the *Michaud* judgment. The Court did not consider that the protection of fundamental rights had been manifestly deficient such that the presumption of equivalent protection was rebutted in the case at hand.

While at first sight the decision comes as a relief for all those who have been holding breath, fearing the worst after the CJEU Opinion 2/13, a careful reading

(immediately undertaken by the academia: the exchange of emails has already started here in Luxembourg) reveals some potential points of friction. Following the advice of both Patrick Kinsch and Christian Kohler I would like to draw your attention in particular to para. 113-116.

Judge Lemmens and Judge Briede expressed a joint concurring opinion and Judge Sajó expressed a dissenting opinion, all three annexed to the judgment.

Thomale on Surrogate Motherhood

Chris Thomale from the University of Heidelberg has written a private international critique of surrogate motherhood (Mietmutterschaft, Mohr Siebeck, 2015, X+ 154 pages). Provocatively entitled "mothers for rent" the book offers a detailed and thorough (German language) analysis of the ethical and legal problems associated with gestational surrogacy.

The author has kindly provided us with the following abstract:

> *Surrogacy constitutes an intricate ethical controversy, which has been heavily debated for decades now. What is more, there are drastic differences between national surrogacy rules, ranging from a complete ban including criminal sanctions to outright legalisation. Hence, on the one hand, surrogacy constitutes a prime example of system shopping. On the other hand, however, we are not simply dealing with faits accomplis but rather enfants accomplis, i.e. we find it hard to simply undo the gains of system shopping at law as the "gain" levied by the parties is in fact a party herself, the child.*
>
> *In his new book, "Mietmutterschaft – Eine international-privatrechtliche Kritik" (Mohr Siebeck Publishers, 2015), Chris Thomale from the University of Heidelberg, Germany, provides a fully-fledged analysis of surrogacy as a social and legal phenomenon. Starting from an ethical assessment of all parties' interests (p. 5-18), the treatment of foreign surrogacy arrangements before the*

courts of a state banning surrogacy is discussed both on a conflict of laws level (p. 19-40) and at the recognition stage with respect to foreign parental orders based on surrogacy contracts (p. 41-52). The essay follows up with investigating the implications of EU citizenship (p. 53-58) and human rights (p. 59-72) for the international legal framework of surrogacy, ensued by a brief sketch of the boundaries of judicial activism in this regard (p. 73-80). Finally, proposals for legislative reform on an international, European and national level are being developed (p. 81-99).

Thomale looks at both the empirical medical background of surrogacy and the economic, political and ethical arguments involved. It is from this interdisciplinary basis that he engages the legal questions of international surrogacy in a comparative fashion. His main conclusion is that surrogacy in accordance notably with human rights and recent jurisprudence by the European Court of Human Rights as well as the principle of the superior interest of the child can and should be banned at a national level. At the same time, according to Thomale, national legislators should reform their adoption procedures, building on the well-developed private internatioal law in that field, in order e.g. to offer an adoption perspective also to couples who cannot procreate biologically, such as notably gay couples. In the essay, recent international case-law on surrogacy, including notably Mennesson et Labassée and Paradiso et Campanelli (both ECHR), is discussed in great detail.