Cross-border Bank Resolution and Private International Law

The following information have kindly been provided by Prof. Dr. Matthias Lehmann, University of Bonn.

Bank resolution is key to avoiding a repetition of the global financial crisis in which failing financial institutions had to be bailed out with taxpayers' money. It permits recapitalizing banks or alternatively winding them down in an orderly fashion without creating systemic risk. Resolution measures, however, suffer from a structural weakness. They are taken by nation-states with territorially limited powers, yet they target entities or groups with global activities and assets in many countries. Under traditional rules of private international law, these activities and assets are governed by the law of other states which is beyond the remit of the state undertaking the resolution.

Matthias Lehmann (University of Bonn) addresses this problem in a recent paper titled "Bail-in and Private International Law: How to Make Bank Resolution Measures Effective Across Borders". He illustrates the conflict between resolution and private international law by using the example of the European Union, where the limitations of cross-border issues are most acutely felt. He explains the techniques and mechanisms provided in the Bank Recovery and Resolution Directive (BRRD) and the Single Resolution Mechanism (SRM) Regulation to make resolution measures effective in intra-Eurozone cases, in intra-EU conflicts with non-Euro Member States and in relation to conflicts with third countries. Besides this, he also throws light on the divergences and flaws in the BRRD's transposition into national law. In this context, he discusses two recent cases, *Goldman Sachs International v Novo Banco SA* [2015] EWHC 2371 (Comm), and *BayernLB v Hypo Alpe Adria (HETA case)* Regional Court, Munich I, judgment of 8 May 2015, that have dealt with the recognition of foreign resolution acts. A brief overview of third-country regimes furthermore highlights the problems in obtaining recognition of EU resolution measures abroad.

Munich’s Institute of Comparative Law celebrates its 100th Anniversary: Conference on ‘Sales Law and Conflict of Laws from Ernst Rabel until Today’, 16-17 June 2016, LMU Munich

The following announcement has been kindly provided by Professor Dr. Stephan Lorenz, LMU Munich.

It was in 1916 that Ernst Rabel founded the ‘Institute of Comparative Law’ at Munich University – the first of its kind in Germany. The 100th Anniversary of the Institute, which still persists as a department of the Institute of International Law at Ludwig-Maximilians-University Munich, gives reason to review the influence of Ernst Rabel on both, sales law and conflict of laws and to take a current view on recent developments in these fields. As is well-known, Rabel’s work on sales law was highly influential for the development of the Hague Uniform Sales Law of 1964, the precursor of the CISG of 1980. The latter had a formative impact on EU consumer sales law and subsequently on the proposal for a Common European Sales Law (CESL). But also the current contractual conflict of laws of the EU as the Rome I-Regulation would not exist in its current form without the fundamental contributions of Ernst Rabel. The presentations of the conference cover the entire range of these topics from the beginnings of comparative law and its early years until its most recent developments:

- Dean's Greeting, *Prof. Dr. Martin Franzen*
- Introductory Speech, *Prof. Dr. Peter Kindler*
- The History of the Institute of Comparative Law, *Prof. Dr. Dagmar Coester-Waltjen, München/Göttingen*
- Welcome and Introduction, *Prof. Dr. Dr. h.c. mult. Hans Jürgen Sonnenberger, München*
- Ernst Rabel – The Munich Years, *Archivdirektor a.D. Hans-Joachim Hecker, Stadtarchiv München*
- Karl Neumeyer as a Pioneer of Comparative Law in the field of Public Law, *Prof. Dr. Peter Huber, Judge at the Federal Constitutional Court (Bundesverfassungsgericht), München*
- Rabel's Influence on the CISG and the Development of European Sales Law, *Prof. Dr. Ulrich Magnus, Hamburg*
- The Distinction between Digital and Analogous Goods – How fit for the Future are the Commission's Proposals for a Law of Contracts in the Digital Interior Market?, *Univ.-Prof. Dr. Christiane Wendehorst, LL.M. (Cambridge), Wien*
- International Contract Law and CISG, *Prof. Dr. Andreas Spickhoff, München*
- Transaction-like Party Autonomy, *Prof. Dr. Marc-Philippe Weller, Heidelberg*
- Conclusions, *Prof. Dr. Stephan Lorenz, München*

Participation in the Conference requires prior registration here.

Call for Papers–International Law Weekend in NY

The American Branch of the International Law Association has issued a call for papers. See here for more details.

Private International Law Newsletter

From the Private International Law Interest Group of the American Society of International Law:

We are pleased to present the second issue of "Commentaries on Private International Law," the newsletter of the American Society of International Law Private International Law Interest Group.

You may find it here and here.

Recent Scholarship

Professor Anthony Colangelo of the SMU Dedman School of Law has just posted a new article entitled *A Systems Theory of Fragmentation and Harmonization*. It blends public and private international law and has a strong dose of conflict of laws. It is well worth the read!

Also, as a friendly reminder, there is a wonderful SSRN eJournal on Transnational Litigation/Arbitration, Private International Law, and Conflict of Laws that is available here.

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.

German Constitutional Court on a Judge‘s Duty to Take the European Evidence Regulation and the Hague Evidence Convention into Account

In a recent order of 14 September 2015 – 1 BvR 1321/13, the German Federal Constitutional Court (*Bundesverfassungsgericht*) has held that the right to effective judicial protection (Article 2(1) in conjunction with Article 20(3) of the German constitution) is violated if, in a cross-border case, a court fails to investigate the facts of the case by using possibilities that have good prospects of success, in particular if it does not take into account specific institutionalised facilities and measures of judicial assistance, such as those offered by the European Evidence Regulation, the Hague Evidence Convention and the European Judicial Network in Civil and Commercial Matters. In the case before the Court, a Romanian national had sued a widow of Romanian nationality for a

share of the inheritance of her deceased husband based on the assertion that the couple had adopted him. Although it remained controversial whether such an adoption had actually taken place in Romania, the Municipal Court (*Amtsgericht*) did not request the Romanian adoption files for consultation by way of judicial cooperation. According to the Constitutional Court, the Amtsgericht ought to have considered whether the EU Evidence Regulation or the Hague Evidence Convention permit a German court to request the original case files from another Member State. An English abstract of the decision is available here.

Call for Papers: "Recent Developments in Private International Law" at Moldova State University

The following announcement has been kindly provided by Mihail Buruiana, Senior Lecturer, State University of Moldova.

The Faculty of Law of Moldova State University in Chisinau, Republic of Moldova, will host an international conference dealing with "**Recent Developments in Private International Law**" on Thursday, 20 October, and Friday, 21 October 2016. Prospective speakers are kindly invited to submit abstracts of not more than 500 words (in *Word*) addressing any aspect of the Conference theme. The abstracts should include the name(s) and affiliation(s) of the author(s) and should be submitted before **Saturday, 10 May 2016**. The Programme of the Conference will consist of a mix of plenary sessions and parallel sessions. The topics of the sessions will include, *inter alia*: Theory of Private International Law; Choice of Law and Choice of Law Clauses; Jurisdiction and Forum Clauses; Natural Persons in Private International Law; Legal Persons in Private International Law; Family (Children and Adults); Succession; Contract; Insolvency; Tort; Recognition and Enforcement; Arbitration. The languages at the Conference will be Romanian and

English (with simultaneous translation). Further information is available at the Conference website here.

Report on ERA conference on Recent case law of the ECtHRs in Family law matters

Guest post by Asma Alouane, PhD candidate at Panthéon-Assas (Paris II) University on *Private international law to the test of the right to respect for private and family life.*

On February 11 and 12 2016, the Academy of European law (ERA) hosted in Strasburg a conference on *Recent Case law of the European Court of Human Rights in Family law matters.* The Court's evolutive interpretation of the notion of family life combined with its controversial understanding has created a long series of new challenges in the field of Family law. The conference participants discussed these issues, as well as the difficulties that States may face in complying with their obligations under the Convention.

The purpose of this post is to give a succinct overview of the presentations, which were of interest from a conflicts-of-law perspective.

1. **Evgueni Boev, Setting the scene: Private and family life under the Convention**

Setting the scene of the conference, Evgueni Boev's presentation provided an answer to the question of *What is a family according to Court Cases?* Whereas the term *family* is mentioned in several provisions (art 8, art 12, art 5 of Protocol 7…), most of the cases are examined under the concept of family life of art 8. Article 12 and Protocol 7's article 5 appear as the *lex specialis* regarding marriage and equality within a married couple. Thus, article 8 is the pillar of the

case law of the Court regarding family matters.

From the broad perspective of the ECtHR cases, Boev demonstrated that the concept has expanded in two different directions: in a horizontal way between partners and in a vertical way between parent and child. In both directions, only the substantive reality matters. For instance, in the relationship between partners, family life exists regardless of whether there is legal recognition of the situation (e.g. *Abdulaziz, Cabales and Balkandali v. the United Kingdom*). The extension of the concept of family life to same-sex *de facto* couples in the *Schalk and Kopf v. Austria* case is another illustration of the broad scope of the family life. In the other direction, between parent and child, what matters most is not the biological link and in these cases too the Court emphasises the substantive relationship (e.g. *Nazarenko v. Russia)*.

Thus, only the substantive situation is relevant. However, the recognition of family life does not necessarily lead to a right to respect such family life. The questions of whether there is an interference with or a failure to comply with art 8 obligations are linked to the particular circumstances of the case, especially through the proportionality test.

As pointed out by Boev, the broad understanding of what is a family gives rise to new trends regarding for instance the recognition of non-traditional forms of family life or the international dimension of family ties, especially as in matters of child care. The following presentations focused on these two broad topics.

2. **Thalia Kruger, International Child Abduction**

Thalia Kruger showed in her presentation how the goals of the international child abduction instruments are disturbed when put to the test of the human rights perspective. Following the assumption that it is in the interest of the child not to be abducted, the 1980 Hague Child Abduction Convention and the Brussels II bis Regulation (No. 2201/2003) aim to facilitate the return of the child to his or her habitual residence. A return order must be issued within a period of six weeks. Only exceptional circumstances allow the State of the retention of the child not to order the return. Moreover, article 11 of Brussels II bis permits a second chance procedure to obtain return. Looking at the situation from the perspective of human rights, the Court considered that national authorities have to look into the

particular situation of the child (see *Neulinger v. Switzerland*). Thus, the Court makes the best interests of the child the leading principle. The Court shifts from an *in abstracto* conception of the best interests of the child to an *in concreto* appreciation. Even though the Court explained later that it is possible to read the Hague Convention and the ECHR as aligned (*X. v. Latvia*), Kruger noted that the ECHR cases create sensitive dilemmas for the contracting States, for instance how to comply with the speedy proceeding obligation while taking into account all issues raised with respect to the best interests of the child.

According to Kruger, the Court's interpretation also shows that the Brussels II bis enforcement rules may not be compatible with the best interests of the child.

The *Bosphorus* doctrine assumes compatibility of EU law with the ECHRs, but this applies only when courts have no discretionary power (for instance the abolition of exequatur; see *Povse v. Austria*). The application of the *Bosphorus* doctrine in the current context is problematic. Kruger concluded by noting that the on-going recast of Brussels II bis and the continuing efforts of the Hague Conference, such as its promotion of mediation, may provide a way to ensure the compatibility of the child abduction goals and the human rights standard.

3. **Marilisa D'Amico and Costanza Nardocci, LGBT rights and the way forward:**

From the perspective of the *Oliari v. Italy* case and the specific Italian experience, Costanza Nardocci presented an overview of the LGBT family rights. The last step in a long series of cases, *Oliari* illustrates the long path of same-sex couples before the ECtHR. A significant step was accomplished in 2010 with *Schalk and Kopf v. Austria*, when the Court recognized that same-sex couples are just as capable of enjoying family life as opposite-sex couples. The Court found that article 12 could be applicable to same-sex couples, but that at this stage the question of whether same-sex couples can marry is left to regulation by national law. However, referring to the large margin of appreciation of contracting States, it considered that there is no positive obligation to introduce same-sex marriage. Then, in 2013, embracing this new interpretation, the Court considered in *Vallianatos and Others v. Greece* that opening civil unions to opposite-sex couples

only was a violation of articles 8 and 14. In the *Oliari* case, the Court held that there was a violation of article 8. It considered that Italy had violated its positive obligation to grant legal protection to same-sex couples. Recalling the specific situation of LGBT rights in Italy, Nardocci emphasized the contrast between the lack of legislative activity and the judicial and administrative activism for the recognition of same-sex couples, if only in a symbolic way. Thus, the condemnation of the Italian government in the *Oliari* case was not unexpected considering the previous warnings of by the Constitutional Court, which had urged the legislator to intervene. Although *Oliari* is specific to the Italian situation, it has to be considered an important step for same-sex couples in their pursuit of legal recognition. In other words, since the *Oliari* case the contracting States are now compelled to ensure a core legal protection for same-sex couples in a stable committed relationship.

However, as pointed out by Nardocci, the progress of same-sex couples' right to family life has not gone hand in hand with similar advances for transgender persons. Even though the recognition of a positive obligation to provide legal protection is a huge step forward compared to past cases, the absence of a positive obligation to enact same-sex marriages could adversely affect transgender persons' right to family life. As in *Hämäläinen v/ Finland*, transgender individuals still have to choose between their former marital life and the legal recognition of the new gender. Nardocci considered that a better use of the distinguishing technique between positive and negative obligations could provide more flexibility and lead to better protection of transgender persons.

4. **Michael Wells-Greco, Spectrum of Reproductive Rights and the Challenges**

Reproductive rights are one of the most sensitive and challenging topics the Court has had to deal with. The increasing use of medical technology in Europe has led to the emergence of a discussion as to their influence on reproductive choices The spectrum of reproductive rights is wide: it encompasses such issues as abortion (*A.B. C; v. Ireland*), home birth (*Ternovszky v. Hungray; Dubskà and Krejzovà v. Czech Republic*), embryo donation for scientific research (*Parrillo v. Italy*) and

surrogacy (*Mennesson and Labassée v. France*; *Paradiso and Campanelli v. Italy*). In the ECHR, reproductive rights fall within the right to respect of private life. Considering the diversity of national policies and the ethical and moral issues these questions may raise, there is no consensus between contracting States. As a result, the Court generally leaves States a wide margin of appreciation.

Surveying each of these topics in turn, Michael Wells-Greco considered the existence of emerging trends. He showed that the Court has made a gradual evolution: an isolated national position regarding one issue does not necessarily come into conflict with the ECHR, as reproductive rights are deeply connected to national identities. However, once a contracting State takes the step to grant more rights in this field, it has to respect certain procedural guaranties (e.g. *A.B.C. v. Ireland*). Wells-Greco criticized this "all or nothing approach" that leaves no room for a potential future consensus and widens even more the divisions between contracting States. Conversely, it appears that the margin of appreciation is smaller when it comes to cross-border situations (e.g. *Mennesson and Labassée v. France*). How ever, as the PIL response may not take into consideration the human rights response, Wells-Greco advocates resorting to soft law to address the diversity of reproductive rights.

5. **Klaudiuz Ryngielewicz, Contents of an individual application**

Concluding the Conference, Klaudiuz Ryngielewicz explained the correct way to lodge an application (see the video) especially with regards to the new formalistic article 47 of the Rules of the Court (see the Report on the revised rule). The increasing number of applications have forced the Court to set strict criteria. After explaining how to fill in the application form, Ryngielewicz insisted on the fact that only a valid application can interrupt the 6-month time-limit set in article 35 of the Convention.

Out now: Volume on Cross-border Litigation in Europe

In November 2014 scholars from all over Europe met at the University Verona to discuss the impact of the Brussels I Recast on cross-border litigation in Europe (see our previous post). The conference volume, edited by Franco Ferrari (NYU Law School/University of Verona) and Francesca Ragno (University of Verona), has now been published by Wolters Kluwer Italy (Cross-border Litigation in Europe: the Brussels I Recast Regulation as a panacea?).

The table of contents reads as follows:

Luigi FUMAGALLI, Refusal of Recognition and Enforcement of Decisions under the Brussels I Recast Regulation: where the Free Circulation meets its Limits

Francesca RAGNO, The Brussels I Recast Regulation and the Hague Convention: Convergences and Divergences in relation to the Enforcement of Choice-of-Courts Agreements

Fabrizio MARONGIU BUONAIUTI, The Brussels I Recast Regulation and the Unified Patent Court Agreement: towards an Enhanced Patent Litigation System