The fifth meeting of the Working Group charged with preparing the Hague Judgments Convention

The report of the fifth meeting of the Working Group established by the Council on General Affairs and Policy of the Hague Conference on Private International Law to prepare proposals in connection with "a future instrument relating to recognition and enforcement of judgments, including jurisdictional filters" is now available through the Conference's website (see here for an account of the previous meeting).

The Working Group proceeded on the basis that the Convention should: (*a*) be a complementary convention to the Hague Choice of Court Convention of 30 June 2005, currently in force for the EU and Mexico; (*b*) provide for recognition and enforcement of judgments from other contracting States that meet the requirements set out in a list of bases for recognition and enforcement; (*c*) set out the only grounds on which recognition and enforcement of such judgments may be refused; and (*d*) not prevent recognition and enforcement of judgments in a contracting State under national law or under other treaties, subject to one provision relating to exclusive bases for recognition and enforcement (covering matters in the fields of intellectual property rights and immovable property).

The proposed draft text of the Convention prepared by the Working Group is annexed to the report.

The Working Group recommended to the Council on General Affairs and Policy (which is expected to meet in March 2016) that the proposed draft text be submitted for consideration to a Special Commission "to be held, if possible, in June 2016".

It also recommended that matters relating to direct jurisdiction (including exorbitant grounds and *lis pendens*) be considered by the Experts' Group in charge of the Judgments Project "with a view to preparing an additional instrument". In the Working Group's view, the Experts' Group "should meet soon after the Special Commission has drawn up a draft Convention".

The ECJ on the meaning of “extrajudicial document” and on the service of such a document according to Regulation No 1393/2007

On 11 November 2015, the ECJ rendered its judgment in the case of *Tecom Mican SL* (case C-223/14). The ruling clarifies the interpretation of Regulation No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (the Service Regulation), and, more specifically, the interpretation of Article 16 (“Extrajudicial documents may be transmitted for service in another Member State in accordance with the provisions of this Regulation”).

The dispute in the main proceedings concerned an agency agreement between a German and a Spanish company. The Spanish agent asked a Spanish judicial officer to effect service of a letter of demand on the German principal, through the competent German authority, seeking payment of a goodwill indemnity and of unpaid commission, or, in the alternative, disclosure of the principal’s accounts. The letter stated that the same demand had already been addressed to the German company in a previous letter of demand certified for official purposes by a Spanish notary.

The judicial officer refused to grant the application on the basis that no legal proceedings had been brought requiring the judicial assistance sought to be granted. The Spanish company then brought proceedings in Spain for review of that refusal.

The seised court, however, decided to stay proceedings and to refer some questions to the ECJ for a preliminary ruling, regarding both the meaning of the expression “extrajudicial document” and the rules governing the service of such a

document from one Member State to another.

In its judgment, the ECJ begins by noting that, for the purposes of the Service Regulation, the expression "extrajudicial document", as already stated in *Roda Golf*, must be treated as an autonomous concept of EU law. It must be given a broad definition and cannot be limited to documents that are connected to legal proceedings alone. The Court reiterates that the concept, as suggested in the latter judgment, may include documents drawn up by notaries, but concedes that it cannot be inferred from those findings alone whether, in the absence of legal proceedings, the concept in question includes only documents drawn up or certified by a public authority or official, or whether it also encompasses private documents.

Relying, in particular, on the preparatory work leading to the adoption of the Regulation (including the explanatory report of the Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters, which never entered into force), the Court concludes that the concept of an "extrajudicial document", within the meaning of Article 16 of the Service Regulation, must be interpreted as encompassing "both documents drawn up or certified by a public authority or official and private documents of which the formal transmission to an addressee residing abroad is necessary for the purposes of exercising, proving or safeguarding a right or a claim in civil or commercial law".

The ECJ goes on to address the issue of whether, under the Service Regulation, service of an extrajudicial document can be effected pursuant to the detailed rules laid down by that Regulation even where an earlier service has already been effected through another means of transmission.

The Court examines, in the first place, the case in which the earlier service has been effected under rules not provided for in the Service Regulation. In that regard, the ECJ notes that the wording of Article 1(1) of the Regulation makes clear that that Regulation is applicable "where a[n] … extrajudicial document has to be transmitted from one Member State to another for service there". As the Court itself asserted in *Alder*, this means that the Regulation provides for only two situations in which the service of a document falls outside its scope: where the permanent or habitual residence of the addressee is unknown and where that person has appointed an authorised representative in the Member State of the

forum.

Since it is common ground that the Regulation does not provide for any other exception, the Court concludes that, in the case considered, the cross-border service of an extrajudicial document pursuant to the means of transmission of the Service Regulation remains possible.

Secondly, as regards the consequences related to the case in which an applicant effects an earlier service pursuant to the detailed rules laid down by Regulation No 1393/2007, the Court notes that the Regulation lays down various means of transmission applicable to the service of extrajudicial documents exhaustively.

The Regulation states in Article 2 that the service of judicial documents is, in principle, to be effected between the transmitting agencies and the receiving agencies designated by the Member States. However, it also provides, in Section 2, for other means of transmission, such as service by diplomatic or consular agents or service by postal services.

As the Court already observed in *Plumex*, the Service Regulation does not establish a hierarchy between the various means of transmission that it put in place. Besides, in order to ensure an expedient cross-border transmission of the relevant documents, the Regulation neither entrusts the transmitting or receiving agencies, nor the diplomatic or consular agents, the judicial officers, officials or other competent persons of the Member State addressed with the task of determining whether the reasons for which an applicant may wish to effect service of a document through the means of transmission laid down are appropriate or relevant.

Consequently, in the Court's view, service of an extrajudicial document pursuant to one of the means laid down by Regulation No 1393/2007 remains valid, even where an earlier transmission of that document has already been effected by a means other than those laid down therein.

The last question addressed by the ECJ is whether Article 16 of Regulation No 1393/2007 must be interpreted as meaning that it is necessary to ascertain, on a case-by-case basis, whether the service of an extrajudicial document has cross-border implications and is necessary for the proper functioning of the internal market.

The Court observes that the Service Regulation falls precisely within the area of judicial cooperation in civil matters that have cross-border implications, and that, pursuant to Article 1(1), it applies where a document has to be transmitted "from one Member State to another" for service there.

As a result, since the cross-border implications of the transmission of a document constitute an objective condition for the applicability of the Regulation, "those implications must be considered, without exception, to be necessarily satisfied where the service of such a document falls within the scope of that Regulation", and must therefore be effected in accordance with the system established by the Regulation itself.

As regards the proper functioning of the internal market, it is common ground that that element constitutes the primary objective of the system of service laid down by the Regulation. Thus, in so far as all the means of transmission of judicial and extrajudicial documents envisaged therein have been put in place expressly in order to obtain that objective, it is reasonable to consider that, once the conditions for the application of those means of transmission are satisfied, the service of such documents necessarily contributes to the proper functioning of the internal market.

In the end, where the conditions of Article 16 are satisfied, it is not necessary to ascertain, on a case-by-case basis, whether the service of an extrajudicial document has cross-border implications and is necessary for the proper functioning of the internal market.

The first Austrian Commentary on the European Regulations on the Law of Succession

— Astrid Deixler-Hübner and Martin Schauer (eds), *Kommentar zur EU-Erbrechtsverordnung*, MANZ'sche Verlags- und Universitätsbuchhandlung GmbH,

2015, ISBN: 9783214075156, pp. XXVI+738, 148 Euros.

The adoption of the Regulation No 650/2012 and of the Implementing Regulation No 1329/2014 are a major step towards facilitating cross-border successions. They have had an impact on intergenerational wealth planning, on the Austrian 'probate procedure' (*Verlassenschaftsverfahren*) and on disputes concerning the inheritance and the compulsory portion. The new law is characterised by the habitual residence as the central connecting factor in applicable law and international jurisdiction, by the principle of a single global estate and by a limited choice of law concerning legal succession upon death.

A major concern was not only the focus on the regulation a such, but to also consider the regulatory environment of the national law, which also includes the adjustment provisions established in the Act on the Amendment of Succession Law of 2015 (*ErbRÄG 2015*).

The editors, Professor Astrid Deixler-Hübner, head of the Institute for European and Austrian Civil Procedure Law at the Johannes Kepler University in Linz and Professor Martin Schauer, deputy head of the Institute for Civil Law at the University of Vienna, and the authors, being academics or practitioners, are leading experts in the field of succession law.

For further information, see here.

Jurisdiction for a claim for damages resulting from a breach of a choice of court agreement under Brussels I

Mukarrum Ahmed, a barrister at Lincoln's Inn and a doctoral researcher at the Centre for Private International Law (University of Aberdeen), has just published

a working paper on “Recovering Damages for the Tort/Delict of Inducing Breach of a Choice of Court Agreement against a Claimant’s Legal Advisers: The English Court of Appeal Adjudicates on Whether England is the Place Where the Economic Loss Occurred under Article 5(3) of the Brussels I Regulation?” The insightful article is the fourth paper in the Working Paper Series of the Aberdeen Centre for Private International Law.

The author has kindly provided us with the following abstract:

> “This paper examines the recent significant ruling of the Court of Appeal on jurisdiction to adjudicate upon a claim for damages for the tort/delict of inducing breach of an English exclusive choice of court agreement against a claimant’s legal advisers. The determination of the issue of jurisdiction hinges on whether England is the place where the economic loss occurred pursuant to Article 5(3) of the Brussels I Regulation. It will be argued that the CJEU authorities on allocation of jurisdiction in tort/delict claims lend support to the conclusion that Germany was the place where the ‘harmful event’ occurred and the damage was also suffered in Germany. Therefore, it is submitted that the decision of the Court of Appeal was correct according to established EU private international law rules of allocation of jurisdiction. A more pragmatic approach to the jurisdictional issue premised on the private law rights and obligations of the parties to the choice of court agreement may end up compromising these principles by according dubious jurisdictional precedence to the place where the indirect consequences of the economic loss occur. Moreover, if it were held that the English courts possess jurisdiction over the matter then the legality and legitimacy of the damages remedy in light of the principle of effectiveness of EU law (*effet utile*) and the principle of mutual trust would be implicated which may have necessitated a reassessment of Longmore LJ’s controversial decision in *Starlight Shipping Co* v *Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2014] EWCA Civ 1010.”

The full content is now available on the Centre’s website (please see here).

Procedural Science at the Crossroads of Different Generations: a New Book published in the MPI Luxembourg Book Series

Barely one month after the publication of the third volume of the MPI collection of Studies another volume has been released, edited by Prof. Loïc Cadiet (Université Paris I, IAPL), and Prof. Burkhard Hess and Marta Requejo Isidro (MPI).

The book is one of the outcomes of first Post-doctoral Summer School in procedural law, which was held in July 2014 at the Max Planck Institute Luxembourg under the auspices of the International Association of Procedural Law and the Max Planck Institute itself. It reflects both the philosophy of the School and the contents of its first edition. As stated in the Foreword, "modern procedural law is characterized by its opening to comparative and international perspectives", and "the opening of procedural science also requires a new approach of research which has to be based on comparative methodology". The common will of the IAPL and the Max Planck Institute for Procedural Law to support modern research in procedural law, backing particularly young researchers, led to the School one year ago, and achieves another goal with this volume.

The book collects most of the papers which were presented by the students in July 2014, after having been reworked in the light of the discussions of last summer and the advice of the attending professors. Many different areas of procedural law, ranging from regulatory approaches to procedural law, to comparative procedural law, arbitration and ADR, as well as the Europeanisation of civil procedure, are addressed. In this way the treatise demonstrates the current trends of scientific research in procedural law and the specific approach of an incoming generation of researchers.

The contributions of the professors to the School are also to be found in the book. They constitute a kind of homage to an academic work or an author considered as a milestone in the development of procedural and comparative procedural law. In this way also former generations of proceduralists joined the meeting of the different generations: thus the title of the book.

As one of the editors I would like to thank all the authors, and to encourage other young researchers to apply to the next edition of the IAPL-MPI Summer School, July next year.

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Rechtslage – James Goldschmidt 1925 Proceedings As a Sequence of Judicial Situations – A Critique of the Procedural Doctrine; PROF. DR. EDUARDO OTEIZA, Linn Hammergren. Envisioning Reform. Improving Judicial Performance in Latin America; PROF. DR. MARTA REQUEJO ISIDRO, Francisco Beceña González; PROF. DR. DRES. H.C. ROLF STÜRNER, Einführung in die Rechtsvergleichung – Konrad Zweigert und Hein Kötz 3. Auflage 1996. Comparative Civil Procedure and Comparative Legal Thought .

For further information click here.

Save the Date: German-speaking young scholars' conference on "Politics and Private International Law" in April 2017

The following announcement has been kindly provided by Dr. Susanne L. Gössl, LL.M., University of Bonn:

"As a group of doctoral and post-doctoral students with a keen interest in private international law (PIL), we are trying to improve the exchange between young scholars in this field. To further this aim, we have undertaken to organize a conference for all German-speaking young scholars (i.e. doctoral and post-doctoral students) with an interest in private international law.

PIL is understood broadly, including international jurisdiction and procedure, ADR, uniform and comparative law, as long as there is a connection to cross-border relationships.

The conference – which we hope to develop into a recurring event – will take place at the University of Bonn on 6 and 7 April 2017. It will be dedicated to the topic

Politics and Private International Law

– German title: Politik und Internationales Privatrecht –

Choice-of-law rules established in continental Europe have since Savigny traditionally been regarded as 'neutral' as they only coordinate the law applicable in substance. However, the second half of the last century was marked by a realisation that choice-of-law rules may themselves promote or prevent certain substantial results. In the US, this has led to a partial abolishment of the classic understanding of the conflict of laws, and to its replacement by an analysis of the particular governmental interests concerned. Other legal systems have also seen traditional choice-of-law rules changed or limited by governmental or other political interests. The conference is dedicated to discussing the different aspects of this interplay between private international law and politics as well as their merits and demerits.

We welcome contributions which focus on classic political elements of private international law, such as *lois de police*, *ordre public* or substantial provisions within choice-of-law systems, but also comparisons to methodical alternatives to PIL or contributions discussing more subtle political influences on seemingly neutral choice-of-law rules. Examples range from the ever increasing influence of the European Union over national or international political agendas to questions of 'regulatory competition' (which may be relevant in establishing a national forum for litigation or arbitration) or other regulatory issues (such as the regulation of the allegedly international internet). By the same token, international family law and questions of succession are constantly increasing in relevance, the current growth of international migration making it a particularly important field for governmental regulation.

We are glad to announce that Professor Dagmar Coester-Waltjen (University of Göttingen) has accepted our invitation to inaugurate our conference on 6 April 2017. The afternoon will be dedicated to academic discourse and discussion and conclude with a dinner. The conference will continue on 7 April. We plan to publish all papers presented in a conference volume.

We intend to accommodate 6 to 10 papers in the conference programme, each of which will be presented for half an hour, with some additional room for discussion. We will publish a Call for Papers in early 2016 but invite everyone

interested to note down the conference date already and consider their potential contributions to the conference topic (in German language).

For further information please visit https://www.jura.uni-bonn.de/institut-fuer-deutsches-europaeisches-und-internationales-familienrecht/ipr-tagung/.

Questions may be directed at Dr. Susanne L. Gössl, LL.M. (sgoessl(at)uni-bonn.de)."

"RIW Fachkonferenz" on Private Enforcement of Competition Law and the Regulation 2014/104/EU at Frankfurt am Main on 26 November 2015

Matthias Weller is Professor for Civil Law, Civil Procedure and Private International Law at the EBS University for Economics and Law Wiesbaden and Director of the EBS Law School Research Center for Transnational Commercial Dispute Resolution (www.ebs.edu/tcdr).

The enforcement of competition law by means of civil proceedings is becoming more and more important. The European legislator recently has tried to incentivize private enforcement actions by enacting Regulation 2014/104/EU which harmonizes the law of the Member States with respect to cartel damage claims. Courts all around Europe deal with private enforcement claims. In May this year, for the first time the CJEU has dealt with central issues on international jurisdiction according to the Brussels I-Regulation in the CDC-proceedings. As a consequence, this area of law is shifting into the focus of both competition law and civil procedure experts.

Taking this development into account, the German Legal Journal “Recht der Internationalen Wirtschaft” (“RIW”) hosts a conference (conference language: German) that takes a closer look at the current trends in private enforcement of competition law:

Welcome speech

Dr. Roland Abele, RIW

Introduction to the subject

Prof. Dr. Matthias Weller, Mag.rer.publ., EBS Law School, Wiesbaden

Legal framework of the Private Enforcement Regulation 2014/104/EU

Prof. Dr. Heike Schweitzer, LL.M. (Yale), Freie Universität Berlin

International civil procedural law and the CDC-case of the CJEU

Prof. Dr. Matthias Weller, Mag.rer.publ., EBS Law School Wiesbaden

Presumption of loss

Prof. Dr. Stefan Thomas, University of Tübingen

Relationship between joint and several debtors

Prof. Dr. Friedemann Kainer, University of Mannheim

Private Enforcement from the appeal instance

Rechtsanwalt beim Bundesgerichtshof *Dr. Thomas Winter, Karlsruhe*

Discussion Panel with experts from legal practice

Chair: Rechtsanwalt *Dr. Georg Weidenbach, M.Jur. (Oxford)*, Latham & Watkins, Frankfurt

We would like to cordially invite you to join our discussion! Detailed information about the conference can be accessed here.

Third Issue of 2015's Rivista di diritto internazionale privato e processuale

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

The third issue of 2015 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features one article and two comments.

In his article *Reiner Hausmann*, Professor at the University of Konstanz, examines general issues of private international law in a European Union perspective addressing, *i.a.*, connecting factors and the questions of characterization and interpretation, in **"Le questioni generali nel diritto internazionale privato europeo"** (General Issues in European Private International Law; in Italian).

> *This article tackles general issues in European private international law, and namely issues of connecting factors, characterization and renvoi, to portray, on the one hand, how and in which direction this area of the law has emancipated from the domestic legal systems of the EU Member States and to illustrate, on the other hand, which are the underlying principles that encouraged and made this transformation possible. As far as connecting factors are concerned, the paper shows that the recent development in European private international law – as opposed to the solution in force in many Member States – is characterized by (i) an extension of party autonomy to family and succession law; (ii) a systematic substitution of nationality with habitual residence as the primary objective connecting factor in international family and succession law, and (iii) the promotion of lex fori as objective and subjective connecting factor, in particular in cross-border divorce and succession law. Therefore, the primary objective of the European legislation in the field of private international law is not to identify the closest factual connecting element of a case to the law of a*

certain country but, rather, to accelerate and improve the legal protection of European citizens and to reduce the costs in cross-border disputes by allowing parties and courts to opt for the lex fori and thus to avoid, to a large extent, the application of foreign law. Moreover, the paper illustrates that while the introduction of renvoi into European private international law by means of Article 34 of the Regulation on cross-border successions appears to be in conflict with the principle of unity of the succession, which is a main pillar of the Regulation itself, the practical importance of renvoi is limited, because renvoi is mainly restricted to cases where the deceased had his last habitual residence in a third State and left property in a Member State. As suggested in the paper, in order to avoid difficult problems of characterization when marriage ends by the death of one of the spouses, it would appear sensible to follow the example of Article 34 of the Succession Regulation in the forthcoming EU regulation on matrimonial property.

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

Arianna Vettorel, Research fellow at the University of Padua, discusses recent developments in international surrogacy in **"International Surrogacy Arrangements: Recent Developments and Ongoing Problems"** (in English).

This article analyses problems occurring in cross-border surrogacy, with a particular focus on problems associated with the recognition of the civil status of children legally born abroad through this procreative technique. The legal parentage between the child and his or her intended parents is indeed usually not recognized in States that do not permit surrogacy because of public policy considerations. This issue has been recently addressed by the European Court of Human Rights on the basis of Article 8 of the ECHR and in light of the child's best interests. Following these judgments, however, some questions are still open.

Cinzia Peraro, PhD candidate at the University of Verona, tackles the issues stemming from the *kafalah* in cross-border settings in **"Il riconoscimento degli effetti della kafalah: una questione non ancora risolta"** (Recognition of the Effects of the *Kafalah*: A Live Issue; in Italian).

The issue of recognition in the Italian legal system of kafalah, the instrument

used in Islamic countries to take care of abandoned children or children living in poverty, has been addressed by the Italian courts in relation to the right of family reunification and adoption. The aim of this paper is to analyse judgment No 226 of the Juvenile Court of Brescia, which in 2013 rejected a request to adopt a Moroccan child, made by Italian spouses, on the grounds that the Islamic means of protection of children is incompatible with the Italian rules. The judges followed judgment No 21108 of the Italian Supreme Court, issued that same year. However, the ratification of the 1996 Hague Convention on parental responsibility and measures to protect minors, which specifically mentions kafalah as one of the instruments for the protection of minors, may involve an adjustment of our legislation. A bill submitted to the Italian Parliament in June 2014 was going in this direction, defining kafalah as "custody or legal assistance of a child". However, in light of the delicate question of compatibility between the Italian legal system and kafalah, the Senate decided to meditate further on how to implement kafalah in Italian law. Therefore, all rules on the implementation of kafalah have been separated from ratification of the Hague Convention and have been included in a new bill.

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

Save the date: Conference European civil procedure Rotterdam and MPI 25-26 February 2016

On **25 and 26 February 2016** a conference on the theme "***From common rules to best practices in European Civil Procedure***" will be held at Erasmus University Rotterdam. The conference is organised jointly by Erasmus School of

Law in Rotterdam (Prof. Xandra Kramer, Alina Ontanu and Monique Hazelhorst) and the Max Planck Institute for European, International and Regulatory Procedural Law in Luxembourg (Prof. Burkhard Hess). The conference will bring together experts in the field of civil procedure and private international law from the European Union and beyond. It seeks to facilitate in-depth discussion and sharing of knowledge, practical experiences, and solutions, with the aim of reinforcing mutual trust and contributing to the further development of European civil procedure.

In the past fifteen years a considerable harmonisation of civil procedure has been achieved in the EU with the aim of furthering judicial cooperation. In recent years, the focus has shifted from minimum standards and harmonised rules to the actual implementation, application, and operationalisation of the rule. Important constituents in this discourse are the interaction between European civil procedure and national law, e-Justice, ADR, and best practices in civil procedure. The conference will focus on how to move beyond common rules and towards best practices that give body to mutual trust and judicial cooperation, which can in turn feed the further development of the European civil procedure framework from the bottom up.

The conference will host four panels:
Panel 1: The need for common standards of EU civil procedure and how to identify them: do we need harmonisation to achieve harmonious cooperation?
Panel 2: Procedural innovation and e-justice: how can innovative mechanisms for dispute resolution contribute to cooperation in the field of civil justice?
Panel 3: How can alternative mechanisms for dispute resolution contribute to judicial cooperation and what is needed to ensure effective access and enforcement in cross-border cases?
Panel 4: How can the best practices of legal professionals with judicial cooperation be operationalised to improve mutual trust?

Many distinguished specialists (academics, practitioners and policy makers) have confirmed their participation. All those interested in civil procedure, EU law and judicial cooperation are cordially invited to attend.

The program as well as a link for the registration will be posted on this website soon!

European Parliament: Legislative Resolution on the Amendment of the Small Claims Regulation

It has not yet been noted on this blog that the European Parliament, on 7 October 2015, adopted at first reading a legislative resolution on the proposal for a regulation amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure. The resolution as well as the position of the European Parliament can be downloaded here.

Further information is available here.

Thanks to Edina Márton for the tip-off.