M. E. Burge on Party Autonomy and Legal Culture

Mark Edwin Burge, Associate Professor of Law, Texas A&M University School of Law, has published a highly interesting article on the relationship between party autonomy and legal culture, providing new insights on the success (or failure) of legal transplants in choice of law: "Too Clever by Half: Reflections on Perception, Legitimacy, and Choice of Law Under Revised Article 1 of the Uniform Commercial Code", 6 *William & Mary Business Law Review* 357 (2015).

The abstract reads as follows:

"The overwhelmingly successful 2001 rewrite of Article 1 of the Uniform Commercial Code was accompanied by an overwhelming failure: proposed section 1-301 on contractual choice of law. As originally sent to the states, section 1-301 would have allowed non-consumer parties to a contract to select a governing law that bore no relation to their transaction. Proponents justifiably contended that such autonomy was consistent with emerging international norms and with the nature of contracts creating voluntary private obligations. Despite such arguments, the original version of section 1-301 was resoundingly rejected, gaining zero adoptions by the states before its withdrawal in 2008. This Article contends that this political failure within the simultaneous overall success of Revised Article 1 was due in significant part to proposed section 1-301 invoking a negative visceral reaction from its American audience. This reaction occurred not because of state or national parochialism, but because the concept of unbounded choice of law violated cultural symbols and myths about the nature of law. The American social and legal culture aspires to the ideal that 'no one is above the law' and the related ideal of maintaining 'a government of laws, and not of men.' Proposed section 1-301 transgressed those ideals by taking something labeled as 'law' and turning on its head the expected norm of general applicability. Future proponents of law reform arising from internationalization would do well to consider the role of symbolic ideals in their targeted jurisdictions. While proposed section 1-301 made much practical sense, it failed in part because it did not—to an American audience—make sense in theory."

The full article is available here.

Out Now: Basedow on “The Law of Open Societies – Private Ordering and Public Regulation in the Conflict of Laws”

Prof. Dr. Dr. h.c. mult. *Jürgen Basedow*, LL.M. (Harvard), Director of the Max Planck Institute for Comparative and International Private Law, Hamburg, has published a revised and updated version of the widely read and well-received lectures given by the author during the 2012 summer courses of the Hague Academy of International Law (on the first edition, see the post by *Gilles Cuniberti* here). This superbly written and well-researched book is a must-read for anyone interested in the paradigm shifts that private international law has undergone in recent decades. The abstract provided by the publisher reads as follows:

“This book endeavours to interpret the development of private international law in light of social change. Since the end of World War II the socio-economic reality of international relations has been characterised by a progressive move from closed to open societies. The dominant feature of our time is the opening of borders for individuals, goods, services, capital and data. It is reflected in the growing importance of ex ante planning – as compared with ex post adjudication – of cross-border relations between individuals and companies. What has ensued is a shift in the forces that shape international relations from states to private actors. The book focuses on various forms of private ordering for economic and societal relations, and its increasing significance, while also analysing the role of the remaining regulatory powers of the states involved. These changes stand out more distinctly by virtue of the comparative treatment of the law and the long-term perspective employed by the author.”

Further information is available on the publisher’s website here.

The Trust Re-visited – The Hague Convention 30 Years After

The Society of Trust and Estate Practitioners (STEP), in cooperation with the Swiss Association of Trust Companies (commonly abbreviated as SATC, not to be confused with an American TV sitcom), is organising an international conference in Lausanne (Switzerland) on recent experience and current trends under the Hague Convention on the Law Applicable to Trusts and on their Recognition of 1985. The event will take place on 3 November 2015; the conference language will be English.

According to the flyer, the conference "will consider how in thirty years since the conclusion of the Hague Trust Convention the trust has become more widely accepted and trust service providers have greater opportunities, in many countries, including Switzerland. The speakers will demonstrate how the trust is playing a full and positive role in the world of wealth management and fiduciary services in Switzerland, as well as cover recent international trust law developments and jurisprudence. The ambitious program features distinguished speakers from the judiciary, academia, the Swiss government, regulatory and the financial services world and promises to be an extraordinary conference."

The full programme and details on registration are available here.

Request for preliminary ruling on Art. 5 No. 1 Brussels I Regulation

On 18 August 2015, the German Federal Supreme Court referred the following questions relating to the interpretation of Article 5 No. 1 of the Brussels I

Regulation to the CJEU (my translation):

> *1. Must Art. 5 No. 1 lit. a) of the Brussels I Regulation be interpreted as covering a claim for compensation under Art. 7 of the EU Air Passenger Regulation against an airline that is not the contracting partner of the passenger but operates the flight by way of a codeshare agreement with the passenger's contracting partner?*
>
> *2. If Art. 5 No. 1 Brussels I Regulation applies: In case of a flight connection consisting of several flights without any meaningful stay at the connecting airports, is the place of departure of the first flight the place of performance within the meaning of Art. 5 No. 1 lit. b) Brussels I Regulation, if the flights are operated by different airlines by way of a codeshare agreement and if the claim for compensation is directed against the airline that operates the – severely delayed – second flight?*

The facts of the underlying case are straightforward: The claimant booked a flight with Air France from Stuttgart to Helsinki via Paris. The flight from Paris to Helsinki was operated by Finnair by way of a codeshare agreement with Air France. The flight from Paris to Helsinki was delayed by three hours and twenty minutes. Therefore, the claimant sought compensation from Finnair under the EU Air Passenger Rights Regulation – and brought an action against Finnair in Stuttgart. The Court of First Instance (Amtsgericht) and the Regional Court (Landgericht) both rejected the claim for lack of jurisdiction. The Federal Supreme Court (Bundesgerichtshof), in contrast, wasn't so sure, and, therefore, referred the above questions to the CJEU.

The press release of the Federal Supreme Court is available here (in German).

European Succession Regulation

in Force

On 17 August 2015 the European Succession Regulation has entered into force. It provides for uniform rules on the applicable law as well as recognition and enforcement of decisions in matters of succession. It also creates a European Certificate of Succession that enables person to prove his or her status and rights as heir or his or her powers as administrator of the estate or executor of the will without further formalities.

More information is available on the European Commission's website.

Book on International Protection of Adults

A volumious book on the **International Protection of Adults**, edited by Richard Frimston, Alexander Ruck Keene, Claire van Overdijk and Adrian Ward, has just been published (Oxford University Press, 2015).

The blurb reads:

> *Increasing numbers of people have connections with one country, but live and work in another, frequently owning property or investments in several countries. People with lifelong or subsequently developed impairments of capacity move cross-border or have property or family interests or connections spread across different jurisdictions. This new work fills a gap in a specialist market for a detailed work advising lawyers on all the considerations in these situations.*
>
> *The book provides a clear, comprehensive, and unique overview of all relevant capacity and private international law issues, and the existing solutions in common law and civil law jurisdictions and under Hague Convention XXXV. It sets out the existing law of various important jurisdictions, including detailed*

chapters on the constituent parts of the UK, Ireland, Jersey, the Isle of Man and the Hague 35 states; and shorter chapters on 26 Non-Hague states and those within federal states, including coverage of the United States, several Australian and Canadian states, and a number of other Commonwealth jurisdictions. Containing a number of helpful case studies and flowcharts, the book draws upon the expertise of the editors in their respective fields, together with detailed contributions from expert practitioners and academics from each relevant jurisdiction.

Furhter information is available here.

First Application of ECJ's Ruling in C-352/13, CDC Hydrogen Peroxide, in Dutch Private Enforcement Proceedings

By Polina Pavlova, research fellow at the MPI Luxembourg.

July, 21st 2015 has marked another important step in the private enforcement of competition law in Europe. Only two months after the long awaited preliminary ruling in the case *CDC Hydrogen Peroxide* (C-352/13) was delivered on May, 21st, the Amsterdam Court of Appeal seems to be the first one to apply the new ECJ case law on jurisdiction in cartel damage cases. Its judgment (accessible here in Dutch and German) dealt with compensation claims against members of the sodium chlorate cartel and applied the recently established ECJ principles even before the referring court itself (the Dortmund District Court) could render a judgment on its jurisdiction.

Background of the case is the bundled enforcement of the claims of damaged

customers in the aftermath of the Decision of the EU Commission from June, 11th 2008 fining a number of undertakings for their participation in a sodium chlorate cartel operating EEA wide. Following this decision, Cartel Damage Claims, a special purpose vehicle based in Brussels, started buying off claims of the cartel victims and filed a suit against several cartel members before the District Court of Amsterdam. The latter accepted jurisdiction with a judgment from June, 4th 2014: a judgment which was subject to scrutiny and eventually confirmed by the Amsterdam Court of Appeal.

The application in the appeal proceedings questioned the jurisdiction of the Dutch courts over a cartel member seated in Finland. The Amsterdam judges confirmed the decision of the lower court according to which, since one of the co-defendants in the first instance proceedings was seated in the Netherlands, jurisdiction can be based on ex-Article 6 (1) of the Brussels I Regulation. Transposing the reasoning of the ECJ in *CDC Hydrogen Peroxide* – issued in a parallel scenario – to the proceedings at hand, the Court of Appeal considered the EU jurisdictional rule on joint defendants applicable. The close connection between the claims in the sense of ex-Article 6 (1) and in particular the same situation of fact and law – a requirement well established in ECJ case law – was deemed fulfilled: Following *CDC Hydrogen Peroxide*, the national appellate court decided that the commitment of a continuous competition law infringement sanctioned by the Commission's Decision was sufficient to create an identical factual and legal background of the cartel damage claims. In addition, the court clarified that a company which has been held responsible for the cartel by the Commission can serve as an anchor defendant for the purposes of ex-Article 6 (1) even where the latter is a parent company of a cartel member and has not directly participated in the infringement.

Finally, the Amsterdam Court of Appeal (upholding the first instance decision) confirmed that the standard jurisdiction and arbitration clauses contained in the supply agreements between the cartel members and their customers do not apply to cartel damage claims. As far as the evoked jurisdiction agreements were concerned, the appellate court applied the reasoning of the ECJ in *CDC Hydrogen Peroxide* relating to the interpretation ex-Article 23 (para 70 f.). The disputes were qualified as deriving from a competition law infringement previously unknown to the customers and not from the multiple contractual relationships between suppliers and customers as such. They could thus not be covered by the

standard wording of a jurisdiction clause regulating the contractual relation of the parties. Regarding the arbitration agreements, the court saw no reason to deviate from the aforementioned interpretation.

The appeal of the Finish cartel member was thus dismissed.

It is interesting to note that in this judgment the national Court of Appeal merely confirms what the Amsterdam District Court had already decided in 2014, long before the ECJ rendered its *CDC Hydrogen Peroxide* ruling. Even though the lower court did not await the judgment of the ECJ, its result seems to fall completely in line with the now EU-wide binding principles formulated by the Luxembourg judges. This demonstrates that the ECJ case law now simply prescribes what private enforcement friendly jurisdictions were doing anyway.

What is perhaps more intriguing, is to observe where the national court went even one step further than the ECJ in completely transposing the considerations on the material scope of the choice-of-court clauses to the other type of dispute resolution clauses at issue, i.e. the arbitration agreements. This was motivated by the sole consideration that there are no reasons to judge differently in this regard. While this might be a welcome interpretation, the issue of the applicability and interpretation of arbitration clauses was left untouched by the ECJ ruling (see para 58, particularly evident in comparison to the Advocate General's opinion in the *CDC Hydrogen Peroxide* proceedings which dealt extensively with the issue, see there at para 118 ff.). Nevertheless, the equal treatment of the two types of (standard) dispute resolution clauses as regarding their scope seems to be common before Member State courts. This feature might prove to broaden the actual effect of the *CDC Hydrogen Peroxide* case law beyond its explicit scope (see e.g. the judgment of the District Court of Helsinki from of the July, 4th 2013, also concerning the Hydrogen Peroxide cartel). It remains to be seen how other jurisdictions will see the application of arbitration clauses in cartel damage cases.

The mentioned proceedings are only instances of a much broader landscape of private enforcement of cartel damage claims in the EU conducted to a great extent by special vehicles such as CDC. It seems that the Dutch jurisprudence might be, once again, setting an example on how international jurisdiction in competition law damage cases is to be dealt with by member state courts.

The ECJ on the notion of “ancillary matter” for the purposes of the rules on jurisdiction of the Maintenance Regulation

This post has been written by Ester di Napoli.

On 16 July 2015, the European Court of Justice (ECJ) rendered its judgment in the case of *A* v. *B* (C-184/14), clarifying the interpretation of Regulation No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (the Maintenance Regulation).

More specifically, the ruling regarded the interpretation of Article 3 of the Regulation. This provides, *inter alia*, that jurisdiction in matters of maintenance lies with “(c) the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties”, or with “(d) the court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties”.

The dispute in the main proceedings concerned the legal separation of two Italians and the custody of their children. These proceedings had been brought by

A (the husband) against B (the wife) before the District Court of Milan.

The Court of Milan asserted its jurisdiction in respect of legal separation relying on Article 3(1)(b) of Regulation No 2201/2003 (Brussels II*a*), but held that, pursuant to Article 8(1) of that Regulation, it lacked jurisdiction over parental responsibility, as the children were, at the material time, habitually resident in the UK. The Court of Milan further held that, according to Article 3(c) and (d) of the Maintenance Regulation, it had jurisdiction to decide on the issue of maintenance for the benefit of the wife, but not to decide on maintenance for the benefit of the children, since the latter request was not ancillary to proceedings over personal status, but to proceedings concerning parental responsibility.

The case eventually reached the Italian Supreme Court, which decided to request the ECJ for a preliminary ruling. The Supreme Court asked whether, in circumstances such as those described above, a maintenance request pertaining to the child may be ruled on both by the court that has jurisdiction over legal separation or divorce, as a matter ancillary to the proceedings concerning the status of a person, within the meaning of Article 3(c) of that Regulation, and by the court that has jurisdiction to entertain the proceedings concerning parental responsibility, as a matter ancillary to those proceedings, within the meaning of Article 3(d) of that Regulation; *or* whether a decision on a similar matter can only be taken by the latter court.

Put otherwise, the issue was whether the heads of jurisdiction set out in Article 3(c) and (d) of the Maintenance Regulation must be understood to be mutually exclusive, or whether the conjunction "or" in the provision implies that the courts that have jurisdiction over legal separation and parental responsibility may be both validly seised of an application relating to maintenance in respect of children.

In its judgment, the ECJ begins by observing that the scope of the concept of "ancillary matter" cannot be left to the discretion of the courts of each Member State according to their national law. The meaning of this expression should rather be determined by reference to the wording of the relevant provisions, their context and goals.

The wording of Article 3(c) and (d) indicates that a distinction should be

made between proceedings concerning the *status* of a person and proceedings concerning parental responsibility. In the face of this wording, it cannot be unequivocally established "whether the alternative nature of those criteria means that the applications relating to child maintenance are ancillary only to one set of proceedings concerning parental responsibility, or whether those applications may be deemed ancillary also to proceedings concerning the status of a person".

As regards the context of the pertinent provisions, the ECJ notes that the above distinction echoes the distinction made by the Brussels II*a* Regulation between disputes concerning divorce, legal separation and marriage annulment, on the one hand, and disputes regarding the attribution, exercise, delegation, and restriction or termination of parental responsibility, on the other. The ECJ further notes in this connection, based on Recital 12 of the preamble of the latter Regulation, that the rules on jurisdiction relating to parental responsibility underlie a concern for the best interests of the child, and adds that "an application relating to maintenance in respect of minor children is … intrinsically linked to proceedings concerning matters of parental responsibility".

The ECJ concludes that "it is vital to take into account, in interpreting the rules on jurisdiction laid down by Article 3(c) and (d) of Regulation No 4/2009, the best interest of the child", and that the implementation of such Regulation "must occur in accordance to Article 24(2) of the Charter of Fundamental Rights of the European Union", according to which, in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

Finally, as regards the goals of the provisions at stake, the Court considers that the main objective of the Maintenance Regulation is to ensure, in this field, the proper administration of justice within the EU. This implies that the court to which jurisdiction is conferred to decide on parental responsibility should be the court that finds itself "in the best position to evaluate *in concreto* the issues involved in the application relating to child maintenance, to set the amount of that maintenance intended to contribute to the child's maintenance and education costs, by adapting it, according to (i) the type of custody (either jointly or sole) ordered, (ii) access rights and the duration of those rights and (iii) other factual elements relating to the exercise of parental responsibility brought before it".

In light of the above, the ECJ concludes that, when the court of a Member State is seised of proceedings concerning legal separation or divorce between the parents of a minor child, and the court of another Member State is seised of proceedings involving matters of parental responsibility over the same child, Article 3(c) and (d) of Regulation No 4/2009 must be interpreted as meaning that "an application relating to maintenance concerning that child is ancillary only to the proceedings concerning parental responsibility, with the meaning of Article 3(d) of that Regulation".

Dornis on the Local Data Theory in European Private International Law

Professor Dr. *Tim W. Dornis*, who teaches law at the Leuphana University (Lüneburg/Germany), has published a very interesting article on the application of the local data theory in European private international law in the Swiss Review of International and European Law (SZIER/RSDIE): *Tim W. Dornis*, Die Theorie der local data: dogmatische Bruchstelle im klassischen IPR, SZIER/RSDIE 25 (2015), p. 183. The author has kindly provided us with the following English summary:

"Quite often, the applicable law in international torts is not the law of the place where the tortfeasor acted. Indeed, both article 17 of Rome II and article 142 of the Swiss PIL provide for a consideration of "local rules of safety and conduct" instead of an application of the *lex causae*. Nevertheless, many questions around this so-called local-data doctrine remain unanswered—in particular, the distinction between rules that are "strictly territorial" and rules that are deemed to allow for more "flexibility" is problematic.

An oft-enunciated illustration of the first category is a traffic accident between two German tourists in England. While the German *lex domicilii communis* may

be applied with respect to the liability of the tortfeasor, the English rule of driving on the left side of the street must provide for the standard of conduct. Of course, the tortfeasor cannot claim that he was acting in accordance with German traffic laws while driving his car in England. An example of the second, more flexible category can be found in rules on alcohol limits. These rules are supposed to be more adaptable insofar as parties from the same country are able to 'carry' their *lex communis* with them into a foreign jurisdiction.

If agreement exists—and it does—that considering local data serves lawmakers' concern for maintaining the local order, this differentiation is questionable. Don't alcohol limits also promote the safety of local traffic? A closer look at these and other problems reveals that the issue of local data lies at the heart of a debate confronting European choice of law in the Savignian tradition: the discussion on the interrelation between substantive justice and conflicts justice. As this article suggests, a more policy-oriented view allows for modest changes in the categorization of local rules of safety and conduct. This ultimately paves the way for consistent and practically workable results."

Second 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 second 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 her article *Costanza Honorati*, Professor at the University of Milano-Bicocca, examines the issue of child abduction under the Brussels IIa Regulation in "**La prassi italiana sul ritorno del minore sottratto ai sensi dell'art. 11 par. 8**

del regolamento Bruxelles II-bis" (Italian Practice on the Return of the Abducted Child Pursuant to Art. 11(8) of the Brussels IIa Regulation; in Italian).

> *The vast majority of return applications filed with the Italian Central Authority under the 1980 Hague Convention on the civil aspects of international child abduction concern children who are habitually resident in Italy and have been wrongfully removed to a foreign State (so-called "outgoing cases"). Therefore, it is not surprising that some of the foreign decisions refusing to return a child on the grounds of Article 13(1)b of the Convention were challenged before Italian courts with the special procedure provided under Article 11(8) of the Brussels IIa Regulation. Indeed, Italy stands out as one of the very few EU States that provide some case law on Article 11(8) of the Brussels IIa Regulation. However, it does come as a surprise that in most of these cases Italian courts, after a thorough analysis of the facts, including what was produced in the foreign proceedings, have confirmed the foreign non-return order and dismissed the request for return. In fact, only in a small number of cases the court has found the foreign decision to be ill-founded and has adopted a «trumping» return order. The present article aims at reviewing and analysing both groups of decisions, showing, on one side, how the time factor is often crucial and rightly kept into consideration by the court of habitual residence when deciding for non-return. On the other side, time is of the essence also in cases where the court of habitual residence orders for the children to be returned. When such order is not complied with or enforced in a very short time, it is here assumed that best interest of the child would call for a subsequent review of the decision rendered by the court of the place of the child's habitual residence.*

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

Elisabetta Bergamini, Associate Professor at the University of Udine, discusses status of children in a private international law perspective in "**Problemi di diritto internazionale privato collegati alla riforma dello status di figlio e questioni aperte**" (Questions of Private International Law Related to the Status of Children and Open Issues; in Italian).

> *This paper examines the Italian law reforming the status of children (Law No 219/2012), which finally abolished all discriminations between children born in and out of wedlock, and the consequences such abolishment entails at a private*

international law level. The first part of the paper analyses the reform, its principles and the problems related to the definition of the rules on the unity of the status of the child as "overriding mandatory provisions". The second part tackles some of the most relevant unsolved problems related to children status, such as the establishment of the parental link in case of medically assisted reproduction, the regime applicable to surrogate motherhood, and the legal vacuums affecting children of same-sex couples. In this regard, particular attention is paid to the Italian case-law, as well as its relationship with the ECtHR and the EU case-law, and to the possible solutions to the non-recognition of the personal status acquired in a foreign country.

Silvia Marino, Researcher at the University of Insubria, tackles choice-of-court agreements in parental responsibility matters in "**La portata della proroga del foro nelle controversie sulla responsabilità genitoriale**" (The Scope of Choice-of-Court Agreements in Disputes over Parental Responsibility; in Italian).

This article examines two recent judgments of the European Court of Justice concerning choice of forum in matters related to parental responsibility. These decisions offer the opportunity to reflect on the pre-conditions for the validity of the choice of forum clause, i.e. the agreement, the proximity, the interest of the child and the connection with another proceeding, and the relationships between different bases of jurisdiction (habitual residence and forum non conveniens). Analysing the peculiar facts of the cases and the clarifications provided by the ECJ, the article tackles those pre-conditions from a practical and concrete standpoint with a view to understanding when and how the different bases of jurisdiction can be used. Some final considerations are devoted to the concrete range of the choice of the parties.

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.