Full Movement beyond Control and the Law – Research Project – 2016 – 2021

Prof. Jean-Sylvestre Bergé, of Lyon, is the leading researcher of the long-term, multidisciplinary and comparative (and certainly challenging!) project giving title to this post. A summary of the project, which is funded by the Institut Universitaire de France, is provided below. More information can be found here; for an ssrn publication explaining the project click here.

Summary of the Research Project

The purpose of the research is to bring into the law a new legal concept in order to deal with the phenomenon called « full movement beyond control ».

Movement : persons (individuals or legal entities), goods (tangible or intangible, and more widely, services and capital) move within territories and between different territories. This movement has reached unprecedented dimension in recent times (notably for migrant, data, waste, capital) : the speed, diversity and often significant volume of flow have reached levels as yet unparalleled. *Full* : the movement of persons, goods, services and capital has a « full » dimension in that it engages the attention and action of all the public and private operators (States, companies, citizens) at local, national or international level, who contribute to the phenomenon in whole or in part, voluntarily or involuntarily. *Beyond control* : movement has an « uncontrollable » dimension in the sense that in specific or short-term situations, like those of crisis, operators, and particularly those with responsibility for such movement, do not have full control over it.

This movement beyond control results in the creation of positive and negative, legal and illegal channels within a particular sphere, making it almost possible for the operators to work together to contain it. Full movement beyond control is experiencing a paradoxical surge. More often than not, its existence is denied by those who claim to have the power to control it. However, it is putting existing frontiers at risk while simultaneously creating new ones. It is often backed up by a public whose collective conscience is shaped by a hope that regaining control is still a possibility.

By employing a multidisciplinary (Social sciences – Sciences) and comparative (Europe, Brazil, Canada) approach, this research project seeks to identify a new legal concept capable of specific legal treatment and competent to take in hand the particular issues raised by the phenomenon and the legitimate expectations it may create.

New Study on the Evidentiary Effects of Authentic Instruments & Succession

The evidentiary effects of authentic acts in the Member States of the European Union, in the context of successions

This study was conducted in 25 EU Member States, under the coordination of the Centre for Private International Law at the University Aberdeen. It additionally includes input from the notariats of the CNUE. It sets out the typical domestic types of authentic instruments (and their usual evidentiary effects) arising in successions in the 22 Member States of origin (that allow their creation) and also deals with the ways in which they may interact with Art 59 of Regulation 650/2012 in each of the 25 Member States considered as Member States addressed. The authors looked at the meaning of 'acceptance' and the meaning of public policy in the context of Art 59 650/2012. They made various suggestions for improvements in best practice and for various legislative reforms of the Succession Regulation.

The **abstract** reads:

The EU Succession Regulation (Regulation 650/2012) allows for cross-border circulation of authentic instruments in a matter of succession. Authentic instruments are documents created by authorised authorities which benefit from certain evidential advantages. As this Regulation does not harmonise Member State substantive laws or procedures concerning succession the laws relating to

the domestic evidentiary effects of succession authentic instruments remain diverse. Article 59 of the Succession Regulation requires the Member States party to the Regulation to give succession authentic instruments the evidentiary effects they would enjoy in their Member State of origin. The only limits on this obligation being public policy or the irreconcilability of the authentic instrument with a court decision, court settlement or another authentic instrument. This study, which was commissioned by the Policy Department for Citizen's Rights and Constitutional Affairs of the European Parliament upon request of the Committee on Legal Affairs, provides an information resource for legal practitioners concerning the evidentiary effects of succession authentic instruments in the 25 Member States bound by the Succession Regulation. It also makes recommendations for best practice.

Full study available here (in English, but it is being translated into French and German).

The EU General Data Protection Regulation: a look at the provisions that deal specifically with cross-border situations

This post has been written by Martina Mantovani.

On 4 May 2016, Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation, or GDPR) was published on the Official Journal. It shall apply as of 25 May 2018.

Adopted on the basis of Article 16(2) TFEU, the Regulation is the core element of the Commission's Data protection reform package, which also includes a Directive for the protection of personal data with regard to the

processing by criminal law enforcement authorities.

The new measure aims at modernising the legislative framework for data protection, so as to allow both businesses and citizens to seize the opportunities of the Digital Single Market.

First and foremost, businesses will benefit from a simplified legal landscape, as the detailed and uniform provisions laid down by the GDPR, which are directly applicable throughout the EU, will overcome most of the difficulties experienced with the divergent national implementations of Directive 95/46/EC, and with the rather complex conflict-of-law provision which appeared in Article 4 of the Directive.

Nevertheless, some coordination will still be required between the laws of the various Member States, since the new regime does not entirely rule out the relevance of national provisions. As stated in Recitals 8 and 10, the GDPR 'provides a margin of manoeuvre for Member States' to restrict or specify its rules. For example, Member States are allowed to specify or introduce further conditions for the processing depending, *inter alia*, on the nature of the data concerned (Recital 53 refers, in particular, to genetic, biometric, or health-related data).

Secondly, the new Regulation marks a significant extension of the extraterritorial application of EU data protection law, with the express intent of leveling the playing field between European businesses and non-EU established companies operatig in the Single Market. In delimiting the territorial scope of application of the new rules, Article 3 of the GDPR borrows on the case-law of the Court of Justice regarding Article 4 of Directive 96/45/EC. Pursuant to Article 3(1), the Regulation applies to any processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, 'regardless of whether the processing itself takes place within the Union or not' (along the lines of the *Google Spain* case).

Moreover, Article 3(2) refers to the targeting, by non-EU established controllers and processors, of individuals 'who are in the Union', for the purposes of offering goods or services to such subjects or monitoring their behaviours. This connecting factor, further specified by Recital 23 in keeping with the findings of the Court of Justice in *Weltimmo,* is somehow more specific than the former

'equipment/means' criteria set out by the Directive (cfr. Opinion 8/2010 of the Working Party on the Protection of Individuals with regard to the processing of personal data, on applicable law).

One of the key innovations brought along by the GDPR is the so-called one-stop-shop mechanism. The idea, in essence, is that where a data controller or processor processes information relating to individuals in more than one Member State, a supervisory authority in one EU Member State should be in charge of controlling the controller's or processor's activities, with the assistance and oversight of the corresponding authorities of the other Member States concerned (Article 52). It remains to be seen whether the watered down version which in the end found its way into the final text of the Regulation will effectively deliver the cutting of red tape promised to businesses.

The other goal of the GDPR is to provide individuals with a stronger control on their personal data, so as to restore consumers' trust in the digital economy. To this end, the new legislative framework updates some of the basic principles set out by Directive 95/46/EC — which are believed to 'remain sound' (Recital 9) — and devises some new ones, in order to further buttress the position of data subjects with respect to their own data.

The power of individuals to access and control their personal data is strengthened, *inter alia,* by the introduction of a 'right to be forgotten' (Article 17) and a right to data portability, aimed at facilitating the transmission of personal data between service providers (Article 20). The data subject additionally acquires a right to be notified, 'without undue delay' of any personal data breach which may result in 'a high risk to [his or her] rights and freedoms' (Article 33).

The effective protection of natural persons in relation to the processing of personal data also depends on the availability of adequate remedies in case of infringement. The Regulation acknowledges that the infringement of the rules on the processing of personal data may result in physical, material or non-material damage, 'of varying likelihood or severity' (Recital 75). The two-track system has been maintained, whereby the data subject is entitled to lodge a complaint against the data controller or processor either with the competente courts (Article 79) or with the competent supervisory authority (Article 77). Furthermore, pursuant to Article 78, any legally binding decision of a supervisory authority

concerning the position of a data subject — or the lack of thereof — may be appealed before the courts of the Member State where the supervisory authority is established.

The GDPR additionally sets forth an embryonic procedural regime for proceedings in connection with the alleged infringement of data protection legislation.

In the first place, it introduces two unprecedented special rules of jurisdiction, the application of which should not be prejudiced, as stated in Recital 147, by 'general jurisdiction rules such as those of Regulation (EU) No 1215/2012', ie, the Brussels I*a* Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (by the way, the primacy of the GDPR over Brussels I*a* could equally be asserted under Article 67 of the latter Regulation). Article 79 of the GDPR provides that the data subject who considers that his or her rights under the Regulation have been infringed, may choose to bring proceedings before the courts of the Member State where the controller or processor has an establishment or, alternatively, before the courts of the Member State where the data subject himself or herself resides, unless the controller is a public authority of a Member State acting in the exercise of its public powers. Article 82(6) clarifies that the courts of the same Member State have jurisdiction over actions for compensation of the damage suffered as a result of the said infringements.

Article 81 of the GDPR deals with *lis pendens*. If proceedings concerning the same activities are already pending before a court in another Member State, any court other than the one first seised has the discretion (not the obligation) to stay its proceedings. The same court may also decide to decline jurisdiction in favour of the court first seized, provided that the latter court has jurisdiction over the proceedings in question and its law permits the consolidation of related proceedings.

Finally, the Regulation includes a provision concerning the recognition and enforcement of 'any judgment of a court or tribunal and any decision of an administrative authority of a third country requiring a controller or processor to transfer or disclose personal data'. Pursuant to Article 48, such judgments or decisions may be recognised or enforced solely on the basis of an international agreement, such as a mutual legal assistance treaty, in force between the requesting third country and the Union or a Member State..

This provision mirrors the stance recently taken by some Member States and their representatives in connection to an important cross-border dispute, where a similar question had arisen, which was in fact the object of different solutions on the two sides of the Atlantic.

In fact, in the light of the approach taken by US law enforcement authorities, search warrants seeking access to personal data stored in European data centres are regarded as a form of compelled disclosure, akin to a subpoena, requiring the recipient of the order to turn over information within its control, irrespective of the place in which data is effectively stored. What matters is the sheer existence of personal jurisdiction over the data controller, that is the ISP who receives the warrant, which would enable criminal prosecutors to unilaterally order seizure of the data stored abroad, without necessarily seeking cooperation thorough official channels such as Mutual Legal Assistance Treaties.

Article 48 of the Regulation (EU) 2016/679 may accordingly be read as the EU counter-reaction to these law enforcement claims.

German Federal Court of Justice (Bundesgerichtshof) requests ECJ to give a ruling on the validity of arbitration agreements in Bilateral Investment Treaties amongst Member States

Slovakia and the Netherlands concluded a BIT in 1992 which included an arbitration agreement for disputes between foreign investors and one of the contracting parties. Slovakia became a EU member state in 2004. Later, a health insurance company from the Netherlands that had operated on the Slovakian

market obtained an award from an arbitral court in Frankfurt, Germany, granting € 22 million damages against Slovakia.

Slovakia now argues before German state courts that by its accession to the EU its offer for concluding an arbitration agreement had become invalid because of its incompatibility with EU law. The Upper Regional Court (*Oberlandesgericht*) of Frankfurt, decision of 18 December 2014, docket no. 26 Sch 3/13, decided against Slovakia. By its appeal to the Federal Court of Justice (*Bundesgerichtshof*) Slovakia continues seeking the setting aside of the arbitral award for lack of jurisdiction of the arbitral tribunal. The *Bundesgerichtshof*, by its decision of 3 March 2016, docket no. I ZB 2/15, requested the Court of Justice of the European Union to give a ruling on the validity of arbitration agreements in BITs between Member States of the European Union, in particular in light of Articles 344, 267 and 18 I TFEU.

The *Bundesgerichtshof* expressed its view that there should be no conflict with Articles 344, 267. However, the Court poses the question whether there might be a discrimination against investors of other Member States unable to proceed under equivalent BIT proceedings. Even if this were the case, the Court further holds that the consequence of a dicrimination of this kind would not necessarily be the invalidity of the arbitration clause but rather the access of discriminated investors to the BIT dispute settlement mechanism.

For those who read German, the Court’s press release of today about its decision (full text is not yet available) can be found here:

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2016&Sort=3&nr=74606&pos=1&anz=82

The Max Planck Institute

Luxembourg is recruiting

The Max Planck Institute Luxembourg is currently recruiting new members for its team. Two types of positions are currently open:

1. Research Fellow in EU Procedural Law:

The Max Planck Institute Luxembourg would like to appoint highly qualified candidates for 2 open positions as Research Fellow (PhD candidate) for the Research Department of European and Comparative Procedural Law

Job description

The research fellow will conduct legal research (contribution to common research projects and own publications), particularly in the field of comparative civil procedural law (including European law and international arbitration).

Your tasks

The successful candidate will have the great opportunity to contribute to the development of the Department of European Comparative Procedural Law led by Prof. Burkhard Hess and, in parallel, work on her/his PhD project.

The Research Fellow is expected to write her/his PhD thesis and perform the major part of her/his PhD research work in the premises of the institute in Luxembourg, but also in close collaboration with her/his external supervisor and with the university or institution delivering her/his PhD diploma. A supervision of a PhD-thesis by Prof. Hess will also be possible.

Your profile

The applicants are required to have obtained at least a Master degree in Law with outstanding results and to have a deep knowledge of domestic procedural and European procedural law. According to the academic grades already received, candidates must rank within the top 10 %.

The successful candidates should demonstrate a great interest and curiosity for fundamental research and have a high potential to develop excellence in academic research. Proficiency in English is compulsory (in written and oral);

further language skills (in French and German notably) are of advantage.

Our offer

The MPI Luxembourg will offer scientific guidance, a fully-equipped office and an access to its noteworthy library to foster legal research activities. You will be free to write your thesis in English or in any other language which suits you, as long as you are able to communicate on its content in English.

The MPI Luxembourg offers outstanding conditions to undertake fundamental legal research, and a very conducive work climate in an international team, while being in depth knowledge exchange and support among other research fellows.

Salary and social benefits are provided according to the Luxembourgish legal requirements. Positions are full-time but may be considered as part-time as well.

Joining us

If you are interested in joining our Institute, please apply online and follow our usual application process.

Documents required

A detailed CV incl. list of publications; copies of academic records; a PhD project description of no more than 1-2 pages with the name of the foreseen PhD supervisor and the name of the institution awarding the PhD certificate; the name and contact details of two referees.

2. Research Fellow (PhD candidate) in EU Family Law

For a period of thirty-six months, the Research Fellow will conduct legal research and cooperate at the Max Planck Institute Luxembourg (research Department of European and Comparative Procedural Law) within the Project 'Planning the future of cross-border families: a path through coordination – "EUFam's" (JUST/2014/JCOO/AG/CIVI 4000007729)' which aims (i) at assessing the effectiveness of the functioning 'in concreto' of the EU Regulations in family matters, as well as the 2007 Hague Protocol and the 2007 Hague Recovery Convention; and (ii) at identifying the paths that lead to further improvement of such effectiveness.

Your tasks

The successful candidate will benefit from the opportunity to partake in the development of the Department of Procedural Law led by Prof. Dr. Dr. h.c. Burkhard Hess by becoming an active and integrated part of the Project team.

The Research Fellow is expected to assist in the achievement of the objectives of the Project, namely by carrying out and developing legal research with a view to contributing to the drafting of the Project's Final Study and by participating in the presentation of the scientific outcomes of the Project.

Moreover, she/he will actively cooperate in the organization of meetings and of an international seminar, and will cooperate with the Project team in reporting on financial matters, in carrying out the research activities and in analysing potential interplays of research activities with cross-cultural issues. The project will be terminated with 14 months. The remaining time shall be (mainly) dedicated to the elaboration of the PhD.

Your profile

Applicants must have earned a degree in law and be PhD candidates working on a thesis on EU private international and procedural law in family matters. According to the academic grades already received, candidates must rank within the top 10 %.

The successful candidate shall demonstrate a strong interest and aptitude for legal research and have a high potential to develop excellence in academic research.

Her/His CV must portray a consolidated background in EU private international and procedural law in family matters: to this aim, prior publications in this field of the law shall be highly regarded in the selection process.

Full proficiency in English is compulsory (written and oral); further language skills are greatly valued.

Our offer

The MPI Luxembourg offers scientific guidance, a productive working environment within an international team of researchers, and the possibility to

develop connections and fruitful exchanges with academia, judges and practitioners from many EU Member States. Moreover, the Institute will provide a fully-equipped office and access to its renowned legal library.

Salary and social benefits are provided according to the Luxembourgish legal requirements. The position is full-time, for a period of thirty-six months.

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If you are interested in joining our Institute, please apply online and follow our usual application process.

Documents required

A detailed CV incl. list of publications; copy of academic records; a PhD project description of no more than 1-2 pages with the name of the PhD supervisor and the name of the institution awarding the PhD certificate; the name and contact details of two referees.

Note for all positions:

Full information and access to application platform: here.

Contact person is Diana Castellaneta: diana.castellaneta@mpi.lu

Deadline: 31 May 2016

A practical seminar in Munich on 10 and 11 June 2016 on the Brussels Ibis Regulation

On Friday 10 June (15h-18:30h) and Saturday 11 June (9:30h-13h) 2016, a seminar will take place in Munich, Germany (Rechtsanwaltskammer München,

Tal 33), devoted to Regulation (EU) no. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

The seminar will consist of a two-day training course for lawyers, who will be called to present, discuss and resolve practical cases falling within the scope of Regulation n. 1215/2012. The speakers will include Prof. Dr. Wolfgang Hau, Prof. Dr. Dennis Solomon, Dr. Andreas Köhler, and Dr. Claudia Mayer (all University of Passau). The language of the seminar is German.

The participation is free of charge, but requires prior registration by sending an e-mail, no later than 25 May 2016, to the following address: *seminare@rak-m.de* and including "Wochenendseminar" in the object. The event is open up to a maximum of 30 participants.

For more information see here.

Conference: New Families – International Trends and Legal Recognition in Italy (Milan, 23 May 2016)

The **University of Milan** will host on **23 May 2016** a conference on "**New Families – International Trends and Legal Recognition in Italy**". The event will be structured in three parts: the first two sessions will look into changing family patterns in Europe and the US, respectively, while in the third one a round table will focus on legal recognition in Italy of new families.

Here's the programme (available as a .pdf file):

9.00 Welcoming addresses

- *Gianluca Vago* (Rector, University of Milan)

- *Maria Elisa D'Amico* (University of Milan)
- *Ilaria Viarengo* (University of Milan)

9.30: I Session – Changing family patterns: European Trends

- Chair: *Stefania Bariatti* (University of Milan)
- *Katharina Boele-Woelki* (Bucerius Law School, Hamburg): New families: fundamental issues
- *Angelika Fuchs* (ERA, Academy of European Law): Registered partnerships: crossing borders
- *Patrizia De Luca* (DG Justice, Civil Justice Policy Unit): The EU proposal on the property consequences of registered partnerships

11.15: II Session – Changing family patterns: USA Trends

- *Suzanne Goldberg* (Columbia University): Transforming Family Law in the United States: Multidimensional Advocacy and Social Change.
- *Yasmine Ergas* (Columbia University): From marriage to gender: pathways to equality

14.30: III Session – Round table on "New families: Legal Recognition in Italy"

- *Monica Cirinnà* (Italian Senate, Rapporteur of the proposed regulation of civil unions in Italy)
- *Ivan Scalfarotto* (Italian Chamber of Deputies, Vice-minister of economic development)
- *Annibale Marini* (President Emeritus of the Italian Constitutional Court)
- *Marilisa D'Amico* (University of Milan)
- *Ilaria Viarengo* (University of Milan)

17.30: Closing remarks

- *Stefania Bariatti* (University of Milan)

(Many thanks to Prof Ilaria Viarengo for the tip-off)

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2016: Abstracts

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

P. Huber, **The Hague Convention on Choice of Court Agreements**
The article presents the Hague Convention of 30 June 2015 on Choice of Court Agreements which entered into force on October 1st, 2015.

R. Schaub, **International Protection of Adults: Powers of Representation**
The article deals with the conflict of laws rules concerning the powers of representation granted by an adult to be exercised when the adult is no longer in a position to protect his or her interests. Especially the relevant rules of the Hague Convention on the international protection of adults are explained and analyzed, starting from the perspective of German courts or administrative authorities, with a special focus on the options of choosing the applicable law and making the necessary provisions with regard to the applicable law.

Th. Rauscher, **Ancillary Jurisdiction in Child Maintenance Cases**
In the judgment in comment the ECJ decided on conflicting ancillary jurisdiction concerning child maintenance. Ancillary jurisdiction under Article 3 of Regulation (EC) No 4/2009 should lie only in the courts exercising jurisdiction on parental responsibility (Article 3 (d)). The courts where a divorce case between the parents of the child was pending should not exercise ancillary jurisdiction under Article 3 (c) even if under the local law of the court such ancillary jurisdiction was given. As against this opinion, ancillary jurisdiction under Article 3 of said regulation should be determined only by reference to national rules of civil procedure as Article 3 (d) would not grant ancillary jurisdiction if not provided by national rules of civil procedure. Conflicting jurisdiction should be decided only under Articles 12, 13 and a court in one Member State should not be under an obligation to examine jurisdiction of other Member State's courts.

A. Piekenbrock, **The application of Art. 13 EIR in practice**
As far as avoidance in insolvency proceedings is concerned, Art. 13 EIR provides

for an exception from the basic rule laid down in Art. 4 (2)(m) EIR. Generally, the law of the State of the opening of proceedings, the lex fori concursus, is also applicable to the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors. Yet, the defendant may, to his own protection, invoke that the applicable law of another Member State does not allow any means of challenging that act in the relevant case. In 2015, the ECJ had to deal with the interpretation of the aforementioned exception for the first time. In the German-Austrian Lutz-case the ECJ has held: Art. 13 EIR applies to a situation in which the proceeds realised from a right in rem are attributed to the defendant after the opening of insolvency proceedings; the defendant may invoke that the avoidance action is time barred; the lex causae also applies to the interruption of the limitation period. In the Finish-Dutch Nike-case the ECJ has held that Art. 13 EIR only applies if the defendant can prove that under the circumstances of the case the detrimental act cannot be challenged neither under the insolvency law nor under the general provisions and principles of the lex causae. The paper analyses the Court's rulings.

W. Hau, **Jurisdiction based on defendant's property located in Germany**
Under the traditional rules, German courts claim jurisdiction for actions against defendants who are domiciled outside the EU but own property in Germany (sec. 23 Code of Civil Procedure). In this context, a recent decision of the Higher Regional Court of Munich raises interesting questions: Is it required that the assets are located in Germany at the beginning and/or at the end of the proceedings? Is it relevant that the value of the property is out of proportion to the value in litigation? Must the defendant's property be undisputed? And can even future assets suffice?

G. Schulze, **You'll never walk alone? Infringement of EU law and the duty of using the legal remedies pursuant to Art. 34 N. 1 Reg. 44 / 2001**
The Dutch Hoge Raad in Diageo Brands BV v. Simiramida-04 EOOD has referred the question concerning the interpretation of public policy in Art. 34 N. 1 of the Brussels I-Regulation to the European Court of Justice for a Preliminary Ruling according to Art. 267 TFEU. The court confirms that EU law is also part of the national conception which determines the content of public policy. In such a case the limits will be controlled by the ECJ as well as the substantive content of public policy. The court states that an error in the application of EU trademark law does not suffice to justify a refusal of recognition. The ECJ remembers the fundamental

idea that individuals are required to use all the legal remedies made available by the law of the Member State of origin. That rule is all the more justified where the alleged breach of public policy stems, as in the main proceedings, from an alleged infringement of EU law. It should be noted that the ECJ does not answer the question under which specific circumstances it is too difficult or impossible to make use of the legal remedies in the Member State of origin. All that is left to Diageo is an action in damages against Bulgaria.

S. Mock, **Qualification of Insolvency-Based Instruments of Creditor Protection in Corporate Law**

In the last few years, the European Court of Justice (ECJ) changed the fundaments of European company law dramatically due to its interpretation of the Freedom of Establishment (Art. 49, 54 Treaty on the Functioning of the European Union). Since the Centros, Überseering and Inspire Art decisions of the ECJ European corporations enjoy a general mobility especially allowing them to transfer their real seat to another Member States without a change of the applicable corporate law. However, this shift from the real seat to the incorporation theory in the international corporate law of the Member States is not reflected by European insolvency law under which the applicable law is generally determined by the center of main interest (Art. 3 f. European Insolvency Regulation) and therefore often by the real seat of the corporation. This difference becomes especially relevant in the context of insolvency-based instruments of creditor protection in corporate law since these instruments cannot be completely allocated to corporate or to insolvency law. In its decision of December 10, 2015 (C-594/14) the ECJ had to deal with such an insolvency-based instrument of creditor protection in German corporate law and considered it as insolvency law according to Art. 4 European Insolvency Regulation. The following article analyses this decision and shows that the insolvency-based instruments of creditor protection in corporate law generally – in contrast to the decision of the ECJ – have to be considered as part of corporate and not of insolvency law.

M. Andrae, **Enforcement of a Polish maintenance obligation decision against a debtor who is living in Paraguay**

The Oberlandesgericht (Higher Regional Court) Nürnberg had to decide on the appeal of the debtor against the declaration of enforceability of two Polish maintenance obligation decisions. The following legal issues were to be discussed and are treated in this note. In which cases is a judgment that was given in a

Member State since 18 June 2011 subject to the declaration of enforceability under Chapter IV Section 2 of Regulation (EC) No 4/2009 of 18 December 2008 (EuUnterhVO)? Which evidentiary value does a report prepared by the court of origin using the form in Annex II EuUnterhVO have? Is the child a creditor in the process of enforcement if the decision for child maintenance has been issued in the parents' matrimonial proceedings? In what period should an appeal be lodged in accordance with Article 32 (5) Regulation (EC) No 4/2009 of 18 December 2008 if the party against whom enforcement is sought has its habitual residence in a third country? What is the correct interpretation of the rule in Article 24 (b) Regulation (EC) No 4/2009 of 18 December 2008 according to which there is not a ground for refusing recognition insofar as the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so.

G. Hohloch, **Court Orders Refusing the Return of the Child Abducted in Spite of "Certificate of Wrongfulness" (Hague' Convention Articles 3, 12, 13, 15)**

The main object of the Hague Convention on the Civil Aspects of International Child Abduction is "to secure the prompt return of children wrongfully removed or retained in any Contracting State". Wrongfulness of removal or retention (Article 3 of the Convention) can be certified to the authorities in the sense of Articles 12 and 13 of the Convention by presentation of a "decision or other determination that the removal or retention was wrongful" ("certificate of wrongfulness") in accordance with Article 15 of the Convention. The Supreme Court of Austria now confirms the existence of such a "certificate of wrongfulness" in Austrian law. According to the new decision in Austria the "Central Authority" and not any court has the competence to make out such "certificates". The essay shows the consequences for cases of international abduction relating to Austria and also deals with the limited importance of such "certificates of wrongfulness" when – e.g. in the case of the Court of Hamburg – the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views (Article 13 subs. 2 of the Convention).

F. Wedemann, **Undisclosed partnerships (between spouses), allotments relating to marriage and family cooperation contracts in the conflict of laws**

The German Federal Court of Justice (BGH) has held that implicitly negotiated

undisclosed partnerships between spouses – a peculiarity of German law developed by the courts in order to mitigate unfair outcomes resulting from matrimonial property law – are to be characterised as a contractual matter for conflict of laws purposes. The author agrees in principle with this characterisation of undisclosed partnerships provided these are marked by the following two features: (1) nonparticipation of the partnership in legal relations, (2) absence of joint property. However, she argues that implicitly negotiated undisclosed partnerships between spouses should be characterised as a matter of international matrimonial property law. The same goes for two other peculiarities of German law: allotments relating to marriage as well as family cooperation contracts between spouses. Finally, the author deals with the characterisation of the three legal institutions – implicitly negotiated undisclosed partnerships, allotments relating to cohabitation and cooperation contracts – in cases of extra-marital cohabitation. The characterization depends on the handling of extra-marital cohabitation in international private law. If one accepts a special conflict rule for property matters of cohabitees, the three institutions should be governed by this rule. If one rejects such a rule and instead characterises the relations between cohabitees as a matter of international contract law, they are to be characterised as a contractual matter.

J. Samtleben, **A New Codification of Private International Law in Argentina**
A new "Civil and Commercial Code" containing a codification of private international law is in force in Argentina from 1 August 2015. The ambitious efforts, which persisted for a long time in Argentina, to create a distinct law for private international law have been replaced by the more practical attempt to regulate this area of law within the new Civil Code. This has substantial implications, as for instance the enforcement of foreign judgments is not regulated in the new codification. On the other hand, it contains not only provisions on the applicable law, but also on international jurisdiction. This topic is regulated in a general way in a separate chapter, but also in detail combined with the articles on the applicable law as concerns the individual fora. While the old Civil Code had only scattered provisions on conflict of laws, the new regulation is aimed at systematizing and modernizing this area of law within a cohesive text, considering the doctrine and jurisprudence in Argentina together with comparative law and international conventions.

The proposed draft text of the Hague Convention on the recognition and enforcement of foreign judgments

On 17 March 2016, the Council on General Affairs and Policy of the Hague Conference on Private International Law decided to set up a Special Commission to prepare a draft Convention on the recognition and enforcement of foreign judgments (the Hague Judgments Convention), while endorsing the recommendation of the Working Group on the Judgments Project that matters relating to direct jurisdiction should be put for consideration to the Experts' Group of the Judgments Project soon after the Special Commission has drawn up a draft Convention.

The Special Commission will meet in the Hague between 1 and 9 June 2016 to discuss the proposed draft text drawn up by the Working Group. The text may be found here, accompanied by an explanatory note prepared by the Permanent Bureau.

As stated in Article 1 of the proposed draft text, the Convention is meant to apply to the recognition and enforcement of judgments "relating to civil and commercial matters", at the exclusion of matters in the field of family law, the law of persons and successions. Insolvency, the carriage of passengers and goods, marine pollution, liability for nuclear damage and defamation are equally featured in the list of excluded matters.

Article 4(1) provides that a judgment given by a court of a Contracting State must be recognised and enforced in another Contracting State in accordance with the Convention. Recognition and enforcement may be refused only on the grounds specified in the Convention itself.

As a rule, a judgment is eligible for recognition and enforcement if one of the

bases listed in Article 5 of the proposed draft text is met, ie, if jurisdiction was asserted in the country of origin in conformity with one of the grounds of jurisdiction contemplated by the Convention.

Suitable grounds include the habitual residence of the defendant (to be understood as meaning, pursuant to Article 3(2), the place where the defendant has its statutory seat, or under whose law it was incorporated, or where it has its central administration or principal place of business), and the defendant's consent to the jurisdiction of the seised court as expressed in the course of the proceedings.

According to the proposed draft text, a judgment is also eligible for recognition, *inter alia*: if it ruled on a *contractual obligation* "and was given in the State in which performance of that obligation took place or should take place under the parties' agreement or under the law applicable to the contract, unless the defendant's activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State"; if it ruled on a *non-contractual obligation* arising from personal injury or damage to tangible property, "and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred"; if the judgment ruled on an *infringement of a patent, trademark, design or other IP right* required to be deposited or registered, "and it was given by a court in the State in which the deposit or registration of the right concerned has taken place"; if the judgment ruled on the *validity or infringement of copyright or related rights* "and the right arose under the law of the State of origin".

By derogation from Article 5, the proposed draft text sets forth in Article 6 some exclusive bases for recognition and enforcement. In particular, a judgment that ruled on the *registration or validity of patents, trademarks, designs, or other similar rights required to be deposited or registered* "shall be recognised and enforced if and only if the State of origin is the State in which deposit or registration has been applied for, has taken place, or is deemed to have been applied for or to have taken place under the terms of an international or regional instrument", while a judgment that ruled on *rights in rem in immovable property or tenancies of immovable property* for a period of more than six months "shall be recognised and enforced if and only if the property is situated in the State of origin".

The grounds on which a judgment eligible for recognition and enforcement may nevertheless be denied recognition or enforcement in a Contracting State are enumerated in Article 7.

Specifically, recognition and enforcement may be denied if the document which instituted the proceedings was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence or "was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents"; if the judgment "was obtained by fraud in connection with a matter of procedure"; if recognition or enforcement would be manifestly incompatible with the public policy of the requested State"; if the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfills the conditions necessary for its recognition in the requested State.

Pursuant to Article 9 of the proposed draft text, recognition or enforcement may also be refused "if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered".

Article 11 lays down the list of documents to be produced by the party seeking recognition or applying for enforcement of a foreign judgment under the Convention, while Article 12 clarifies that the procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless the Convention provides otherwise.

Post Brexit: The Fate of

Commercial Dispute Resolution in London and on the Continent

A joint conference of the Max Planck Institute for Procedural Law (Luxembourg) and the British Institute for International and Comparative Law will be held on May 26th in London, within the framework of a series of BIICL events on the Brexit.

This particular seminar will look at the potential impact of a Brexit on cross-border commercial dispute resolution and on the role of London as a center for international litigation and arbitration. Speakers will address selected questions such as the legal framework for the transitional period; the validity of choice of court agreements and future frequency of choice of court agreements in favour of English courts; the different approaches in England and under the Brussels I Recast as to parallel proceedings; the cross-border circulation of titles; the Swiss position as to commercial dispute resolution between Member States and third States. A roundtable discussion will place a particular focus on London's future as a centre for commercial dispute resolution post Brexit.

Speakers:

- Burkhard Hess, Max Planck Institute Luxembourg
- Richard Fentiman, University of Cambridge
- Andrew Dickinson, University of Oxford
- Marta Requejo Isidro, Max Planck Institute Luxembourg/University of Santiago de Compostela
- Trevor Hartley, London School of Economics
- Alexander Layton QC, 20 Essex Street
- Tanja Domej, University of Zurich
- Thomas Pfeiffer, University of Heidelberg
- Paul Oberhammer, University of Vienna
- Adam Johnson, Herbert Smith Freehills
- Martin Howe QC, 8 New Square
- Karen Birch, Allen and Overy
- Diana Wallis, President of the European Law Institute and former Vice-President of the European Parliament

- Deba Das, Freshfields Bruckhaus Deringer LLP

Time: 15:30-19:00 (followed by a drinks reception)

Venue: British Institute of International and Comparative Law, Charles Clore House, 17 Russell Square, London WC1B 5JP

The program is available here; for registration click here.