The CJEU settles the issue of characterising the surviving spouse's share of the estate in the context of the Succession Regulation

It has not been yet noted on this blog that the CJEU has recently settled a classic problem of characterisation that has plagued German courts and academics for decades (CJEU, 1 March 2018 – C-558/16, *Mahnkopf*, ECLI:EU:C:2018:138). The German statutory regime of matrimonial property is a community of accrued gains, i.e. that each spouse keeps its own property, but gains that have been made during the marriage are equalised when the marriage ends, i.e. by a divorce or by the death of one spouse. According to § 1371(1) of the German Civil Code (*Bürgerliches Gesetzbuch – BGB*), the equalisation of the accrued gains shall be effected by increasing the surviving spouse's share of the estate on intestacy by one quarter of the estate if the property regime is ended by the death of a spouse; it is irrelevant in this regard whether the spouses have made accrued gains in the individual case. How is this claim to be characterized?

In the course of the German discussion, all solutions had been on the table: some have advocated to classify the issue as a part of succession law only, others have argued for characterising the issue as belonging to the field of matrimonial property law, and a minority opinion has developed a so-called "double characterisation", i.e accepting the spouse's share in the estate only if both the applicable succession and matrimonial property law would countenance such a solution. In 2015, the German Federal Court of Justice (*Bundesgerichtshof – BGH*), ruling on former autonomous choice of law rules, had settled the issue in favour of applying the German conflicts rules on matrimonial property, mainly arguing that § 1371(1) BGB determines what is left to the estate after the gains accrued during the marriage have been equalised (BGHZ 205, 289). The Court argued that, for practical reasons, the means that the provision deploys to allocate the gains are found in succession law, but its function is to deal with the dissolution of a marriage because of the death of one of the spouses. If frictions

arose between the law applicable to matrimonial property and the rules governing succession – e.g. a widow receiving nothing although the succession law and the matrimonial property regime would grant her a share if applied in isolation –, such problems would have to be solved by the technique of adaptation.

In light of the Europeanisation of private international law, however, it had become doubtful whether this approach would remain valid within the context of the Succession Regulation (Regulation (EU) No. 650/2012). A pertinent question was referred to the CJEU by the Kammergericht (Higher Regional Court Berlin). Following the conclusions by AG Szpunar, the CJEU now has decided the case in diametrical opposition to the earlier judgment of the BGH, by adopting a purely succession-oriented characterisation. The CJEU argues that "Paragraph 1371(1) of the BGB concerns not the division of assets between spouses but the issue of the rights of the surviving spouse in relation to assets already counted as part of the estate. Accordingly, that provision does not appear to have as its main purpose the allocation of assets or liquidation of the matrimonial property regime, but rather determination of the size of the share of the estate to be allocated to the surviving spouse as against the other heirs. Such a provision therefore principally concerns succession to the estate of the deceased spouse and not the matrimonial property regime. Consequently, a rule of national law such as that at issue in the main proceedings relates to the matter of succession for the purposes of Regulation No 650/2012" (para. 40). The main reason, however, is to ensure that the European Certificate of Succession remains workable in practice by giving a true and comprehensive picture of the surviving spouse's share in the estate, no matter whether domestic law achieves this result by inheritance law alone or rather by a combination of matrimonial property and succession law (see in particular paras. 42 et seq.). It remains to be seen how much scope this approach will leave to an application of the European Matrimonial Property Regulation (Regulation (EU) No. 2016/1103), which also covers the liquidation of the matrimonial property regime as a result of the death of one of the spouses. Whereas the law applicable to matrimonial property is, in principle, stabilised at the first common habitual domicile of the spouses, the applicable succession law is changed much more easily – it suffices that the deceased spouse had acquired a new habitual residence before his or her death. Thus, an extension of the Succession Regulation to the detriment of the Matrimonial Property Regulation may disappoint legitimate expectations of the surviving spouse concerning the allocation of accrued gains. The CJEU, however, does not seem to worry too much

about this aspect, which was not problematic in the case at hand (para. 41). Future cases may be more enlightening in this regard.

The CJEU on the scope of the Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested claims.

On 14 December 2017 the CJEU has ruled on the scope of the Regulation (EC) No 805/2004 European Enforcement Order for uncontested claims – Case C-66/17.

As stated by the CJEU, 'Article 4(1) and Article 7 of Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims must be interpreted as meaning that an enforceable decision on the amount of costs related to court proceedings, contained in a judgment which does not relate to an uncontested claim, cannot be certified as a European Enforcement Order.'

In the meantime, given the definition of an uncontested claim, a EEO can be issued only in relation to a condemnatory decision, not in relation to a declaratory one.

Facts and main proceedings

Mr and Mrs Chudas had brought a declaratory action before a Polish court of first instance to establish whether they had acquired the right of ownership over a motor vehicle. The DA Deutsche Allgemeine Versicherung Aktiengesellschaft (Germany) was summoned to appear in the proceedings as defendant, but did not appear.

The court delivered a default judgment, in which it held that Mr and Mrs Chuda?

had acquired the right of ownership over the motor vehicle and ordered DA Deutsche Allgemeine Versicherung Aktiengesellschaft to pay the costs of the proceedings. Mr and Mrs Chudas then initiated the procedure in order to have to the costs of the proceedings certified as a European Enforcement Order.

The District court had doubts as to whether the type of decision felt within the substantive scope of the Regulation No 805/2004 and referred following question to the Court of Justice for a preliminary ruling.

Question for a preliminary ruling

[24] 'Should Article 4(1) of Regulation … No 805/2004 …, read in conjunction with Article 7 of that regulation, be interpreted as meaning that a European Enforcement Order certificate may be issued in respect of a decision concerning reimbursement of the costs of proceedings contained in a judgment in which a court has established the existence of a right?'

Main considerations

According to the CJEU,

…

[31] Article 4(1) of that regulation defines a 'judgment' as encompassing any judgment given by a court or tribunal of a Member State, including 'the determination of costs or expenses by an officer of the court'. Second, an enforceable decision on the amount of costs related to the court proceedings amounts, in principle, to a 'claim' within the meaning of the definition of that term provided by Article 4(2) of the regulation.

[32] However, as has been noted in paragraph 29 of the present judgment, under the specific provisions governing costs related to court proceedings laid down in Article 7 of Regulation No 805/2004, a decision on the amount of such costs cannot be certified as a European Enforcement Order independently of a judgment on an uncontested claim. In so far as the decision on those costs is intrinsically linked to the outcome of the principal action, which alone justifies the certification of a judgment as a European Enforcement Order, the definitions laid down in Article 4 of that regulation cannot affect the applicability of the regulation.

On the application of Art. 19.2 Service Regulation

In a recent ruling, the Supreme Court of Greece dismissed a cassation against an appellate decision, confirming the findings of the first instance ruling, which issued a default judgment against an Italian company, following the return of a non-service certificate by an Italian bailiff. The interesting part of the judgment is related to the application of Art. 19.2 Service Regulation. The questions raised are twofold:

First, the extent of efforts to be made by the Receiving Authority, before deciding to return the document to the Transmitting Authority.

Second, the presumption of the Greek Supreme Court that failure of the defendant to notify his change of abode, allows a court to continue with the proceedings, even when the change occurred before lis pendens.

More information can be found here.

First CJEU Ruling on the Succession Regulation. Case C-218/16

The first ruling on Regulation (EU) No 650/2012 was rendered on Thursday 12. These are the facts of the case as summarized by the Court:

Ms Kubicka, a Polish national resident in Frankfurt an der Oder (Germany), is married to a German national. Two children, who are still minors, were born from

that marriage. The spouses are joint owners, each with a 50% share, of land in Frankfurt an der Oder on which their family home is built. In order to make her will, Aleksandra Kubicka approached a notary practising in Slubice (Poland).

Ms Kubicka wishes to include in her will a legacy 'by vindication', which is allowed by Polish law, in favour of her husband, concerning her share of ownership of the jointly-owned immovable property in Frankfurt an der Oder. She wishes to leave the remainder of the assets that comprise her estate in accordance with the statutory order of inheritance, whereby her husband and children would inherit it in equal shares.

She expressly ruled out recourse to an ordinary legacy (legacy 'by damnation'), as provided for by Article 968 of the Civil Code, since such a legacy would entail difficulties in relation to the representation of her minor children, who will inherit, as well as additional costs.

On 4 November 2015, the notary's assistant refused to draw up a will containing the legacy 'by vindication' stipulated by Aleksandra Kubicka on the ground that creation of a will containing such a legacy is contrary to German legislation and case-law relating to rights *in rem* and land registration, which must be taken into consideration under Article 1(2)(k) and (l) and Article 31 of Regulation No 650/2012 and that, as a result, such an act is unlawful.

The notary's assistant stated that, in Germany, a legatee may be entered in the land register only by means of a notarial instrument containing an agreement between the heirs and the legatee to transfer ownership of the immovable property. Foreign legacies 'by vindication' will, by means of 'adaptation', be considered to be legacies 'by damnation' in Germany, under Article 31 of Regulation No 650/2012. This interpretation is clear from the explanatory memorandum of the German law which amended national law in accordance with the provisions of Regulation No 650/2012 (Internationales Erbrechtsverfahrensgesetz (Law on international succession proceedings), of 29 June 2015, BGBl. I p. 1042).

On 16 November 2015, Aleksandra Kubicka submitted to the notary an appeal pursuant to Article 83 of the Law on notaries against the decision refusing to draw up a will containing such a legacy 'by vindication'. She claimed that the provisions of Regulation No 650/2012 should be interpreted independently and, in

essence, that none of those provisions justify restricting the provisions of succession law by depriving a legacy 'by vindication' of material effects.

Since her appeal to the notary was not upheld, Aleksandra Kubicka brought an appeal before the Sad Okregowy w Gorzowie Wielkopolskim (Regional Court, Gorzów Wielkopolski, Poland).

The referring court considers that, pursuant to Article 23(2)(b) and (e) and Article 68(m) of Regulation No 650/2012, legacies 'by vindication' fall within the scope of succession law. However, it is uncertain to what extent the law in force in the place where the asset to which the legacy relates is located can limit the material effects of a legacy 'by vindication' as provided for in the succession law that was chosen.

Given that, under Article 1(2)(k) of Regulation No 650/2012, the 'nature of rights *in rem*' is excluded from the scope of the regulation, legacies 'by vindication', as provided for by succession law, cannot create for an asset rights which are not recognised by the *lex rei sitae* of the asset to which the legacy relates. However, it is necessary to determine whether that same provision also excludes from the scope of the regulation possible grounds for acquiring rights *in rem*. In that regard, the referring court considers that the acquisition of rights *in rem* by means of a legacy 'by vindication' is governed exclusively by succession law. Polish legal literature on the matter takes the same position, while the explanatory memorandum of the German draft law on international succession law and amending the provisions governing the certificate of succession and other provisions (Gesetzesentwurf der Bundesregierung, BT-Drs. 17/5451 of 4 March 2015) provides that it is not obligatory, in the context of Regulation No 650/2012, for German law to recognise a legacy 'by vindication' on the basis of a will drawn up according to the law of another Member State.

Referring to Article 1(2)(l) of Regulation No 650/2012, the referring court also wonders whether the law governing registers of rights in immoveable or moveable property may have an impact on the effect of a legacy under succession law. In that regard, it states that if the legacy is recognised as producing material effects in matters relating to succession, the law of the Member State in which such a register is kept would govern only the means by which the acquisition of an asset under succession law is proven and could not affect the acquisition itself.

As a result, the referring court considers that the interpretation of Article 31 of Regulation No 650/2012 also depends on whether or not the Member State in which the asset to which the legacy relates is located has the authority to question the material effect of that legacy, which arises under the succession law that has been chosen.

In those circumstances the Sad Okregowy w Gorzowie Wielkopolskim (Regional Court, Gorzów Wielkopolski, Poland) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

> 'Must Article 1(2)(k) and (l), and Article 31 of Regulation (EU) [No 650/2012] be interpreted as permitting refusal to recognise the material effects of a legacy 'by vindication' (*legatum per vindicationem*), as provided for by succession law, if that legacy concerns the right of ownership of immovable property located in a Member State the law of which does not provide for legacies having direct material effect?'

The CJEU answer is:

Article 1(2)(k) and (l) and Article 31 of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession must be interpreted as precluding refusal, by an authority of a Member State, to recognise the material effects of a legacy 'by vindication', provided for by the law governing succession chosen by the testator in accordance with Article 22(1) of that regulation, where that refusal is based on the ground that the legacy concerns the right of ownership of immovable property located in that Member State, whose law does not provide for legacies with direct material effect when succession takes place.

Conclusions were written by Advocate General Y. Bot and delivered on May 17, 2017; C. Toader acted as Rapporteur.

First and Second Issues of 2017's Rivista di diritto internazionale privato e processuale

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

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

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

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

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

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

Under Italian substantive law agreements as to succession are not admitted. The same is true, inter alia, for French and Spanish law. The idea behind this rule is deeply rooted in the dignity of the de cuius. The freedom to dispose of property

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

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

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

With Law No 76/2016 two new types of pair bonds were regulated: civil unions between same-sex persons and cohabitation. As for transnational civil unions, the Law merely introduced two provisions delegating to the Government the

amendment of Law No 218/1995 on Private International Law. The change is laid down in Legislative Decree 19 January 2017 No 7 which, however, has not solved all the problems. The discipline of civil unions established abroad is partial, being limited to unions between Italian citizens who reside in Italy. Some doubt remains moreover in regulating the access of foreigners to civil union in Italy as well as in identifying the law applicable to the constitution of the union, its effects and its dissolution; finally, totally unresolved – due to the limitations of the delegation – remains the question of the effect in Italy of civil unions established abroad between persons of opposite sex. With regard to same-sex marriages celebrated abroad the fate of Italian couples is eventually clarified but that of mixed couples remains uncertain; in addition, no information is provided as to the effects of marriages between foreigners.

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

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

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

dispute the effects of ECS.

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

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

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

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

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

- *Lidia Sandrini*, Researcher at the University of Milan, **'Nuove prospettive per una più efficace cooperazione giudiziaria in materia civile: il regolamento (UE) n. 655/2014'** ('New Perspectives for a More Effective Judicial Cooperation in Civil Matters: Regulation (EU) No 655/2014'; in Italian).

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

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

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

international law and by examining its functioning aspects. In his conclusions, the Author underlines some critical aspects of such exception clause as well as some limits to its application.

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

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

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

HCCH discussion paper on the operation of Article 15 of the 1980 Hague Child Abduction Convention

The Permanent Bureau of the Hague Conference on Private International Law (HCCH) has just issued a discussion paper on the operation of Article 15 of the 1980 Hague Child Abduction Convention for the attention of the *Special Commission meeting of October 2017 on the practical operation of the 1980 Child Abduction Convention and of the 1996 Child Protection Convention*.

Article 15 of the Child Abduction Convention reads as follows: "The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the

authorities of the State of the habitual residence of the child **a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention**, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination." (our emphasis)

The paper proposes the following summary of possible measures to improve the application of Article 15:

- "Encouraging the availability of Article 15 decisions or determinations in all Contracting States;
- Encouraging clarification and improvement of internal Article 15 implementation with a view to making the procedures expeditious and effective;
- Enhancing the Country Profile under the 1980 Convention in relation to Article 15;
- Drafting of an Information Document on Article 15, which would also encourage:
    1. discretion in the use of the Article 15 mechanism and the use of alternatives;
    2. the systematic use of Article 8(3)(f) and Article 14, and the use of direct judicial communications and the IHNJ, where appropriate;

- Drafting of an Article 15 Model Request Form;
- Improving Central Authority practice in:
    1. facilitating the obtaining of decisions or determinations from competent authorities;
    2. encouraging more systematic inclusion of Article 8(3)(f) certificates / affidavits in applications, where deemed necessary;

- Encouraging improved quality of the decisions or determinations (under Art. 15) and certificates or affidavits (under Art. 8(3)(f)) (*e.g.*, through an Information Document and / or Model Request Form);
- Encouraging greater international consistency in a number of identified areas, if feasible (*e.g.*, certain trends / approaches could be described in an Information Document drafted with the assistance of a Working Group; use of a questionnaire to Contracting States to collect additional

information).”

Preliminary and Information Documents of the meeting are available at https://www.hcch.net/en/publications-and-studies/details4/?pid=6545&dtid=57. A draft agenda, as well as other Preliminary Documents including statistical information, will be uploaded in due course.

Please note that the meeting above-mentioned is open only to delegates or experts designated by the Members of the Hague Conference, invited non-Member States and International Organisations that have been granted observer status.

Implementation of Art. 56 Brussels IIa in Greece

Following the formation of a specialized law drafting committee nearly 4 years ago, the implementation Act on cross border placement of children in accordance with Art. 56 Brussels IIa has been published in the Official State Gazette on June 23, 2017. The ‘Act’ constitutes part of a law, dealing with a number of issues irrelevant to the subject matter in question. The pertinent provisions are Articles 33-46 Law 4478/2017.

Art. 33 establishes the competent Central Authority, which is the Department for International Judicial Cooperation in Civil and Criminal Cases, attached to the Hellenic MoJ. Art. 34 lists the necessary documents to be submitted to the Greek Central Authority. Art. 35-37 state the requirements and the procedure for the placement of a child to an institution or a foster family in Greece. Advance payment for covering the essential needs of the child, and the duty of foreign Authorities to inform the respective Greek Central Authority in case of changes regarding the child’s status, are covered under Art. 38 & 39 respectively.

Art. 40 regulates the reverse situation, i.e. the placement of a Greek minor to an institution or a foster family within an EU Member State. A prior consent of the

competent foreign State Authority is imperative, pursuant to Art. 41. The necessary documents are listed under Art. 42, whereas the procedure to be followed is explained in Art. 43. The modus operandi regarding the transmission of the judgment to the foreign Authority is clarified in Art. 44. A duty of the Prosecution Office for minors to request information on the status of the child at least every six months is established under Art. 45. Finally, Art. 46 covers aspects of transitional nature.

Prima facie it should be stated that the implementing provisions are welcome. In a country where not a single domestic tool has been enacted in the field of judicial cooperation in civil matters since the Brussels Convention era, this move allows us to hope for further initiatives by the government. However, swiftness is the key word in the matter at stake, and I wouldn't be sure whether the procedure enacted would fully serve the cause.

Beyond that, there are some other hot topics related to the Brussels IIa Regulation and its implementation in Greece, the first and foremost being the rules and procedures for issuing the certificates referred to in Art. 39, 41 & 42 [Annexes I-IV of the Regulation]. Bearing in mind that the latter forms almost part of the court's daily routine (at least in major first instance courts of the country), priority should have been given to an implementing act providing guidance on this issue, in stead of opting to elaborate on a matter with seemingly minimal practical implications.

Last but not least, it should be reminded that a relevant study has been released last year, commissioned by the Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee of the European Parliament, which may be retrieved here.

Complaint against France for a

violation of several obligations arising from the Rome III and Brussels IIbis Regulations

On 19 April 2017, Professor Cyril Nourissat and the lawyers Alexandre Boiché, Delphine Eskenazi, Alice Meier-Bourdeau and Gregory Thuan filed a complaint with the European Commission against France for a violation of several obligations arising from the European Rome III and Brussels II*bis* Regulations, as a result of the divorce legislation reform entered into force on 1 January this year. The following summary has been kindly provided by Dr. Boiché.

"Indeed, since January the 1st, in the event of a global settlement between the spouses, the divorce agreement is no longer reviewed and approved in Court by a French judge. The agreement is merely recorded in a private contract, signed by the spouses and their respective lawyers. Such agreement is subsequently registered by a French *notaire*, which allows the divorce agreement to be an enforceable document under French law. From a judicial divorce, the French divorce, in the event of an agreement between the spouses, has become a purely administrative divorce. The judge only intervenes if a minor child requests to be heard.

The implications and consequences of this reform in an international environment were deliberately ignored by the French legislator, with a blatant disregard for the high proportion of divorce with an international component in France. The main violations arising from this reform are the following.

First of all, as there will be no control of the jurisdiction, anyone will be able to get a divorce by mutual consent in France, even though they have absolutely no connection with France whatsoever. For instance, a couple of German spouses living in Spain will now be able to use this new method of divorce, in breach of the provisions of the Brussels II*bis* Regulation. The new divorce legislation is also problematic in so far as it remains silent on the law applicable to the divorce.

Moreover, the Brussels II*bis* Regulation states that the judge, when he grants the divorce (and therefore rules on the visitation rights upon the children, or issues a support order, for instance) provides the spouses with certificates, that grant

direct enforceability to his decision in the other member states. Yet, the new divorce legislation only authorizes the notary to deliver the certificate granting enforceability to the dissolution of the marriage itself, but not the certificate related to the visitation rights, nor the support order. This omission is problematic insofar as it will force the spouses who seek to enforce their agreement in another member state to seize the local Courts.

Last but not least, article 24 of the Charter of Fundamental Rights of the European Union makes it imperative for the child's best interests to be taken into consideration above all else, and article 41 of the Brussels II*bis* Regulation provides that the child must be heard every time a decision is taken regarding his residency and/or visitation rights, unless a neutral third party deems it unnecessary. Yet, under the new legislation, it is only the parents of the child who are supposed to inform him that he can be heard, which hardly meets the European requirements. Moreover, article 12 of the Brussels II*bis* Regulation provides that, when a Court is seized whereas it isn't the Court of the child's habitual residence, it can only accept its jurisdiction if it matches the child's best interests. Once again, the absence of any judicial control will allow divorces to be granted in France about children who never lived there, without any consideration for their interests. This might be the main violation of the European legislation issued by this reform.

For all those reasons, the plaintiffs recommend that the Union invites France to undertake the necessary changes, in order for this new legislation to fit harmoniously in the European legal space. In particular, they suggest a mandatory reviewal by the judge in the presence of an international component, such as the foreign citizenship of one of the spouses, or a foreign habitual residence. They would also like this new divorce to be prohibited in the presence of a minor child, an opinion shared by the French 'Défenseur des Droits'"

The full text of the complaint (in French) is available here.

Conference Report – Property regimes of international couples and the law of succession

On the 9th and 10th of March 2017, the Academy of European Law (ERA) hosted the conference "Property regimes of international couples and the law of succession" in Trier, Germany. It gave an opportunity to more than 60 academics and practitioners of 24 different nationalities to discuss property aspects of marriage and registered partnerships at European level. The focus has been put on the two new additions to European family, i.e. the property regime Regulations (No 2016/1103 and 2016/1104) and their interplay with the already applicable Succession Regulation (No 650/2012).

This post by ***Amandine Faucon***, research fellow at the MPI Luxembourg, provides an overview of the presentations and the discussions held at the Conference.

Setting the scene

Enhanced cooperation in family matters: genesis of the Regulations – María Vilar Badia (EU Commission) explained that the aim of the Regulations was to complete the existing European family law framework. In that perspective, two texts were proposed to the European legislator in 2011 but were rejected, after four years of negotiations, by Poland and Hungary. The main obstacle was the indirect recognition of same-sex couples. Given the lack of necessary unanimity, the Council suggested adopting the already negotiated texts through the enhanced cooperation process. This approach was supported and six months later, in June 2016, the instruments were adopted by eighteen Member States.

A comprehensive set of EU rules on international family estate law – Prof. Dieter Martiny acknowledged the broad scope of EU Regulations, now covering almost all aspects of family life. He briefly presented each of these instruments as well as their material scope. Furthermore, he discussed the interplay of the new Regulations with the already applicable ones, especially with regard to characterization matters, since one act can raise questions that have to be solved under different texts (e.g.: donation). He then presented the recurrent features of

all existing instruments, e.g. the existence of party autonomy, and pointed out some issues such as the lack of common general provisions.

New rules on matrimonial property regimes

Jurisdiction in case of death or divorce and in all other cases – Prof. Costanza Honorati illustrated the characterisation issue notably with the concept of marriage and registered partnership. Regarding jurisdiction, she stated that the new Regulations fulfil classical private International law objectives by aiming at concentrating jurisdiction, through a reference to the forum successionis and the forum divortii, and at favoring the application of the lex fori by making a detour by the applicable law, in case it is a chosen one. For the rest, habitual residence and nationality are the main criteria.

Applicable law, its scope and effects in respect of third parties and which choices can be made? – Dr. Ian Summer first explained the difficulty of knowing which Regulation to apply through the example of a relationship being considered as a marriage in a country and a registered partnership in a second. He then criticized the exclusion of pension rights which are a significant part of patrimonial disputes. As regard to applicable law, he explained the main features of the new Regulations: unity, universality and a hierarchy of connecting factor in the absence of a choice of law. The latter, being the privileged factor, was particularly detailed notably as regard to the different choice possible and the formal conditions to be fulfilled. The effects of the law applicable with respect to third party were also addressed.

Special rules for property consequences of registered partnerships – María Vilar Badia laid out the differences existing between the Regulation on matrimonial property regime (No 2016/1103) and the Regulation on the property consequences of registered partnerships (No 2016/1104). The overall objective of the legislator was to have very similar text so that both types of relationships are treated equally. The differences are therefore rare and consist of additional safeguards to protect registered partners, as this status does not exist in every participating State.

Crossover: property regimes and succession law

Workshop: Making the right choice – party autonomy in property & succession law

Within the workshop the following case has been set as working hypothesis: An Italian and an Austrian got married in Belgium where they lived for six months before moving to Germany. The wife bought a holiday apartment in Antibes and received a flat in Italy. After a while, they separated and the wife moved back to Italy. The participants addressed the relevant questions of property regime, divorce, succession and maintenance. The concept of habitual residence and the application of party autonomy as a tool to achieve some coherence were particularly examined. The participants concluded that there is no unique answer to the case and that the final outcome largely depends on the will of the parties involved. It is, therefore, fundamental for practitioners to carefully provide legal advises to their clients.

Equalization of accrued gains and pension rights adjustment – Peter Junggeburth discussed the characterization problem regarding pension rights and its impact on the increase in the share of the succession or divorce. The presentation was given from the point of view of German inheritance and matrimonial property law but contemplated the impact of the questions raised in cross-border situations.

Planning cross-border successions

Options for drafting a last will under the EU Succession Regulation: first experiences – Dr. Julie Francastel first considered the general rule – the law of the last habitual residence of the deceased – and raised the issue of determining the habitual residence. She used the case of a retired person living part-time in Mallorca and part-time in Germany as an example. In that situation, choosing the law applicable can be advisable. She stressed the impact of such a choice on jurisdiction and added that a choice should be considered even if a situation does not bear cross-border elements at first sight. The formal conditions of the choice and the issue of succession contracts (that do not exist in every Member States) were also addressed.

European Certificate of Succession and the division of the estate – Dr. Jan-Ger Knot presented the European Certificate of Succession (hereafter ECS) and its objectives. He stressed that its operation in practice remains very unclear and leads to many difficulties for practitioners. It was also recalled that depending on the Member State, the authorities issuing the ECS can be a Notary or a Court. He then described the effects of the ECS and the different means to challenge it. The

problem of conflicting ECS was also addressed and in this respect the European Network of Registers of Wills Association has been introduced as a possible solution.

Paying inheritance tax twice? – Prof. Alain Steichen first gave an overview of the main reasons leading to double taxation: the location of the deceased, heirs and assets in Member States having different taxation systems. Given the increasing mobility of citizens and purchases abroad, the problem is expanding but there are no possibilities to force Member States to avoid double taxation. He presented the Model for treaties on double taxation on inheritance from the OECD (1982) and the EU recommendation (2011) favoring the taxation at the residence of the heir but their impact is limited. A common rule to be followed by every State should be imposed to avoid the problem.

Hands-on experience: Planning cross-border successions with a view to third states and offshore jurisdictions

EU and Switzerland – Tobias Somary first indicated that internationality is becoming normality and therefore stressed the importance of estate planning. In that regard, the law applicable to matrimonial property regime should be carefully considered, as it can significantly impact the size of the estate and its distribution at the dissolution of the matrimonial regime. He then turned to the inheritance question and stressed that according to the Succession Regulation the law of a non-member State, such as Switzerland, can be applied to the inheritance. He, therefore, advised to plan the succession carefully and gave some examples as an illustration of the possible difficulties.

UK before & after BREXIT and off-shore jurisdictions – Alex Ruffel explained that the UK is not part of the Succession Regulation and therefore applies its own private International law. She presented the related English provisions and illustrated them with practical examples. She then stressed out the present uncertainty as to whether the UK should be considered as a third State with regard to the application of Article 34 of the Succession Regulation (renvoi). This problem will vanish post-Brexit and is the only before/after difference regarding successions. Concerning off-shore jurisdictions, she explained that although most have a common law system, creating a trust or a company is advisable to avoid further complications.

The concluding remarks were presented by Prof. Dieter Martiny who noted the willingness of the EU to ease the life of European citizens but stressed that many uncertainties remain and lay in the hands of the European Court of Justice.

Job Vacancy: PhD Position/Fellow at the University of Bonn, Germany

The Institute for Private International and Comparative Law, University of Bonn, Germany, is looking for one highly skilled and motivated PhD candidate and fellow (Wissenschaftliche/r Mitarbeiter/in) on a part-time basis (50%) as of 1 June 2017.

The successful candidate holds a first law degree (ideally the First German State Examination) and is interested in the international dimensions of private law, in particular private international law, European law and/or comparative law. A very good command of German and English is expected; good IT skills are required.

The fellow will be given the opportunity to conduct his/her PhD project (according to the Faculty's regulations). The position is paid according to the German public salary scale E-13 TV-L, 50% (about 1300 Euro net per month). The initial contract period is two to three years, with an option to be extended. Responsibilities include supporting the Institute's director, Professor Dr Matthias Lehmann, in his research and teaching as well as independent teaching obligations (2 hours per week during term time).

If you are interested in this position, please send your application (cover letter in German; CV; and relevant documents and certificates, notably university transcripts and a copy of law degree) to lehrstuhl.lehmann@jura.uni-bonn.de by April 10, 2017. The University of Bonn is an equal opportunity employer.

The job advert in full detail is accessible here.