Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1/2017: Abstracts

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

H.-P. Mansel/K. Thorn/R. Wagner: **European conflict of laws 2016: Brexit ante portas!**
The article provides an overview of developments in Brussels in the field of judicial cooperation in civil and commercial matters from December 2015 until November 2016. It summarizes current projects and new instruments that are presently making their way through the EU legislative process. It also refers to the laws enacted at the national level in Germany as a result of new European instruments. Furthermore, the authors look at areas of law where the EU has made use of its external competence. They discuss both important decisions and pending cases before the ECJ as well as important decisions from German courts pertaining to the subject matter of the article. In addition, the article also looks at current projects and the latest developments at the Hague Conference of Private International Law.

P. Mankowski: **Modern Types of Migration in Private International Law**
Migration has become a ubiquitous phenomenon in modern times. Modern immigration law has developed a plethora of possible reactions and has established many different types of migrants. Private international law has to respond to these developments. The decisive watershed is as to whether a migrant has acquired refugee status under the Geneva Refugees Conventions. If so, domicile substitutes for nationality. A mere petition for asylum does not trigger this. But subsidiary protection as an equivalent status introduced by EU asylum law must be placed on equal footing. Where habitual residence is at stake, it does matter whether a residence has been acquired legally or illegally under the auspices of immigration law. Yet for judging whether a habitual residence exists, the extension of permits might be a factor.

C. Mäsch/B. Gausing/M. Peters: **Pseudo-foreign Ltd., PLC and LLP: Limited in**

liability or rather in longevity? – The Brexit's impact on English corporations having their central administration in Germany

On 23rd of June 2016, the people of the United Kingdom voted in a referendum against the UK staying in the European Union. If, as can be expected, the withdrawal negotiations under Art. 50 of the EU Treaty will not address the issue of pseudo-English corporations operating in the remaining Member States of the EU, the Brexit will have severe consequences for companies incorporated under English law (e.g. a Ltd., PLC or LLP) having their central administrative seat in Germany. No longer protected by the freedom of establishment within the EU (Art. 49, 54 TFEU) these legal entities will be under German PIL and the so-called Sitztheorie subjected to domestic German company law. They will thus be considered simple partnership companies (German GbR or OHG), losing from one day to the next i.a. their limited liability status – an unexpected and unjustified windfall profit for creditors, a severe blow for the company shareholders. In this paper it will be argued that the outcome can and indeed should be rectified by resorting to the legal rationale of Art. 7 para 2 EGBGB (Introductory Act to the German Civil Code). This provision preserves the legal capacity of a natural person irrespectively of whether a change in the applicable law stipulates otherwise. Extending that concept to legal entities will create a "grace period" with a fixed duration of three years during which the English law continues to apply to a "German" Ltd., PLC or LLP, giving the shareholders time to decide whether to transform or re-establish their company.

L. Rademacher: **Codification of the Private International Law of Agency – On the Draft Bill Submitted by the Federal Ministry of Justice**

Based on a resolution adopted by the German Council for Private International Law, the German Federal Ministry of Justice and Consumer Protection has submitted a bill to amend the Introductory Act to the German Civil Code (EGBGB) in the to date uncodified area of agency in private international law. This paper provides an overview of the proposed Art. 8 EGBGB and identifies questions of interpretation as well as remaining gaps. The draft provision applies to agents who were authorized by the principal, i.e. neither to statutory agents nor to representatives under company law. The proposal strengthens party autonomy by allowing a choice of law. Absent a choice of law, the applicable law is determined by objective criteria depending on the type of agent. The respective connecting factors, such as the agent's or principal's habitual residence, require perceptibility for the third party. If these requirements are not met, the applicable

law residually is determined by the identifiable place of the agent's acts or by the principal's habitual residence. For the most part, the proposal can be characterized as a restatement of previous case law and academic writing.

H. Roth: **Rule and exceptions regarding the review of the European Order of Payment in exceptional cases according to art.20 par. 2 of Reg. (EC) 1896/2006**

According to Art. 20 para. 2 of Reg. (EC) 1896/2006, the European Order of Payment can be reviewed in exceptional cases. This additional legal remedy is only applicable in exceptional cases such as collusion or other malicious use of process. It is not sufficient that the defendant would have been able to detect misrepresentations by the claimant.

M. Pika/M.-P. Weller: **Private Divorces and European Private International Law**

Whilst substantive German family law requires a divorce to be declared in court, the instant case addresses the effect of a private divorce previously undertaken in Latakia (Arabic Republic of Syria) under Syrian law. Although, from a German perspective, the Syrian Sharia Court's holding has been merely declaratory, the European Court of Justice considered its effect before German courts to be a matter of recognition. Accordingly, it rejected the admissibility of the questions referred to the Court concerning the Rome III Regulation. This ruling indicates the unexpected albeit preferable *obiter dictum* that the Brussels II bis Regulation applies on declaratory decisions concerning private divorces issued by Member States' authorities. Subsequently, the Higher Regional Court Munich initiated a further, almost identical preliminary ruling concerning the Rome III Regulation. However, the key difference is that it now considered the Regulation to be adopted into national law.

A. Spickhoff: **Fraudulent Inducements to Contract in the System of Jurisdiction – Classification of (contractual or legal) basis of claims and accessory jurisdiction**

Manipulation of mileage and concealment of accidental damage belong to the classics of car law and indicate a fraud. But is it possible to qualify a fraudulent misrepresentation in this context as a question of tort with the meaning of art. 7 no. 2 Brussels I Regulation (recast)? German courts deny that with respect to decisions of the European Court of Justice. The author criticizes this rejection.

K. Siehr: **In the Labyrinth of European Private International Law. Recognition and Enforcement of a Foreign Decision on Parental Responsibility without Appointment of a Guardian of the Child Abroad**

A Hungarian woman and a German man got married. In 2010 a child was born. Two years later the marriage broke down and divorce proceedings were instituted by the wife in Hungary. The couple signed an agreement according to which the child should live with the mother and the father had visitation rights until the final divorce decree had been handed down and the right of custody had to be determined by the court. The father wrongfully retained the child in Germany after having exercised his visitation rights. The mother turned to a court in Hungary which, by provisional measures, decided that rights of custody should be exclusively exercised by the mother and the father had to return the child to Hungary. German courts of three instances recognized and enforced the Hungarian decree to return the child according to Art. 23 and 31 (2) Brussels IIbis-Regulation. The *Bundesgerichtshof* (BGH) as the final instance decided that the Hungarian court had jurisdiction under Art. 8–14 Brussels IIbis-Regulation and did not apply national remedies under Art. 20 Brussels IIbis-Regulation. In German law, the hearing of the child was neither necessary nor possible and therefore the Hungarian return order did not violate German public policy under Art. 23 (a) or (b) Brussels IIbis-Regulation.

H. Dörner: **Better too late than never – The classification of § 1371 Sect. 1 German Civil Code as relating to matrimonial property in German and European Private International Law**

After more than 40 years of discussion the German Federal Supreme Court finally (and rightly so) has classified § 1371 Sect. 1 of the German Civil Code as relating to matrimonial property. However, the judgment came too late as the European Succession Regulation No 650/2012 OJ 2012 L 201/07 started to apply on 17 August 2015 thus reopening the question of classification in a new context. The author argues that a matrimonial property classification of § 1371 Sect. 1 German Civil Code under European rules is still appropriate. He discusses two problems of assimilation resulting from such a classification considering how the instrument of assimilation has to be handled after the regulation came into force. Furthermore, he points out that a matrimonial property classification creates a set of new problems which have to be solved in the near future (e.g. documentation of the surviving spouse’s share in the European Certificate of Succession, application of different matrimonial property regimes depending of

the Member state in question).

H. Buxbaum: **RICO's Extraterritorial Application: RJR Nabisco, Inc. v. European Community**

In 2000, the European Community filed a lawsuit against RJR Nabisco (RJR) in U.S. federal court, alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). After more than fifteen years and a number of intermediate judicial decisions, the litigation came to its likely close in 2016 with the U.S. Supreme Court's ruling in *RJR Nabisco, Inc.* v. *European Community*. The Court held that RICO's private cause of action does not extend to claims based on injuries suffered outside the United States, denying the European Community any recovery. The case was the third in recent years in which the Supreme Court applied the "presumption against extraterritoriality," a tool of statutory interpretation, to determine the geographic reach of a U.S. federal law. Together, these opinions have effected a shift in the Court's jurisprudence toward more expansive application of the presumption – a shift whose effect is to constrain quite significantly the application of U.S. regulatory law in cross-border cases. The Court's opinion in RJR proceeds in two parts. The first addresses the geographic scope of RICO's substantive provisions, analyzing whether the statute's prohibition of certain forms of conduct applies to acts occurring outside the United States. The second addresses the private cause of action created by the statute, asking whether it permits a plaintiff to recover compensation for injury suffered outside the United States. After beginning with a brief overview of the lawsuit, this essay discusses each of these parts in turn.

T. Lutzi: **Special Jurisdiction in Matters Relating to Individual Contracts of Employment and Tort for Cases of Unlawful Enticement of Customers**

A claim brought against two former employees, who had allegedly misappropriated customer data of the claimant, and against a competitor, who had allegedly used said data to entice some of the claimant's customers, provided the Austrian *Oberster Gerichtshof* with an opportunity to interpret the rules on special jurisdiction for matters relating to individual contracts of employment in Art. 18–21 of the Brussels I Regulation (Art. 20–23 of the recast) and for matters relating to tort in Art. 5 No. 3 of the Brussels I Regulation (Art. 7 (2) of the recast). Regarding the former, the court defined the scope of Art. 18–21 by applying the formula developed by the European Court of Justice in *Brogsitter* concerning the distinction between Art. 5 No. 1 and 3 (Art. 7 (1) and (2) of the

recast); regarding the latter, the court allowed the claim to be brought at the claimant's seat as this was the place where their capacity to do business was impaired. Both decisions should be welcomed.

The international protection of vulnerable adults: recent developments from Brussels and The Hague

On 10 November 2016, the French MEP Joëlle Bergeron submitted to the Committee on Legal Affairs of the European Parliament a draft report regarding the protection of vulnerable adults.

The draft report comes with a set of recommendations to the European Commission. Under the draft, the European Parliament, among other things, 'deplores the fact that the Commission has failed to act on Parliament's call that it should submit … a report setting out details of the problems encountered and the best practices noted in connection with the application of the Hague Convention [of 13 January 2000 on the international protection of adults], and 'calls on the Commission to submit … before 31 March 2018, pursuant to Article 81(2) of the Treaty on the Functioning of the European Union, a proposal for a regulation designed to improve cooperation among the Member States and the automatic recognition and enforcement of decisions on the protection of vulnerable adults and mandates in anticipation of incapacity'.

A document annexed to the report lists the 'principles and aims' of the proposal that the Parliament expects to receive from the Commission.

In particular, following the suggestions illustrated in a study by the European Parliamentary Service, the regulation should, *inter alia*, 'grant any person who is given responsibility for protecting the person or the property of a vulnerable adult

the right to obtain within a reasonable period a certificate specifying his or her status and the powers which have been conferred on him or her', and 'foster the enforcement in the other Member States of protection measures taken by the authorities of a Member State, without a declaration establishing the enforceability of these measures being required'. The envisaged regulation should also 'introduce single mandate in anticipation of incapacity forms in order to facilitate the use of such mandates by the persons concerned, and the circulation, recognition and enforcement of mandates'.

In the meanwhile, on 15 December 2016, Latvia signed the Hague Convention of 2000 on the international protection of adults. According to the press release circulated by the Permanent Bureau of the Hague Conference on Private International Law, the Convention is anticipated to be ratified by Latvia in 2017.

A study of the European Parliament on the protection of vulnerable adults in cross-border situations

The European Parliamentary Research Service has published a study, authored by *Christian Salm*, to support a legislative initiative report on the protection of vulnerable adults to be prepared by the French MEP *Joëlle Bergeron*.
The purpose of the study is to provide an objective evaluation of the potential added value of taking legislative action at EU level in this field, in particular where a cross-border element is present.

The study builds on expert research carried out for the purpose by *Ian Curry-Sumner* of the Voorts Juridische Diensten (Dordrecht), on the one hand, and by *Pietro Franzina* of the University of Ferrara and *Joëlle Long* of the University of Turin, on the other. The research papers are annexed to the study.

The study argues that, together with the ratification of the Hague Convention of 13 January 2000 on the international protection of adults by all EU Member States, the adoption of certain EU legal measures would create a more reliable legal framework for the protection of vulnerable adults in cross-border situations than is currently the case. This would constitute an added value in itself, and would also contribute to reducing legal and emotional costs for vulnerable adults when facing issues in a cross-border situation.

The proposed measures, which could be adopted on the basis of Article 81 of the Treaty on the Functioning of the European Union, include: (i) enhancing cooperation and communication among authorities of EU Member States in this area; (ii) abolishing the requirement of exequatur for measures of protection taken in EU Member States; (iii) creating a European certificate of powers granted for the protection of an adult; (iv) enabling the adult, under appropriate safeguards, to choose in advance the EU Member States whose courts should be deemed to possess jurisdiction to take measures concerning his or her protection; (v) providing for the continuing jurisdiction of the courts of the EU Member State of the former habitual residence.

Conference: "Le successioni internazionali in Europa" (International Successions in Europe) – Rome, 13 October 2016

The Faculty of Law of the **University of Rome "La Sapienza"** will host a German-Italian-Spanish conference on **Thursday, 13th October 2016, on International Successions in Europe**. The conference has been convened for the **presentation of the volume "The EU Succession Regulation: a Commentary"**, edited by Alfonso-Luís Calvo Caravaca (University "Carlos III" of Madrid), Angelo Davì (University of Rome "La Sapienza") and Heinz-Peter Mansel

(University of Cologne), published by Cambridge University Press, 2016. The volume is the product of a research project on "The Europeanization of Private International Law of Successions" financed through the European Commission's Civil Justice Programme.

Here is the programme (available as .pdf):

Welcome addresses: *Prof. Enrico del Prato* (Director, Department of Legal Sciences, University "La Sapienza"); *Prof. Paolo Ridola* (Dean, Faculty of Law, University "La Sapienza"); *Prof. Angelo Davì* (University "La Sapienza").

First Session

Chair: *Prof. Ugo Villani* (University of Bari, President of SIDI-ISIL – Italian Society for International Law)

- *Prof. Javier Carrascosa González* (University of Murcia): La residenza abituale e la clausola di eccezione (Habitual Residence and Exception Clause);
- *Prof. Cristina Campiglio* (University of Pavia): La facoltà di scelta del diritto applicabile (Choice of the Applicable Law by the Testator);
- *Prof. Erik Jayme* (University of Heidelberg): Metodi classici e nuove norme di conflitto: il regolamento relativo alle successioni (Traditional Methods and New Conflict Rules: the EU Regulation Concerning Succession);
- *Prof. Claudio Consolo* (University "La Sapienza"): Il coordinamento tra le giurisdizioni (Coordination between Jurisdictions).

Second Session

Chair: *Prof. Sergio Maria Carbone* (University of Genova)

- *Prof. Peter Kindler* (University of Munich): I patti successori (Agreements as to Succession);
- Round Table: The European Certificate of Succession
  Introduction: *Prof. Claudio Consolo* (University "La Sapienza");
  Participants: *Dr. Ana Fernández Tresguerres* (Notary in Madrid); *Dr. Paolo Pasqualis* (Notary in Portogruaro); *Dr. Fabian Wall* (Notary in Ludwigshafen).

Concluding remarks: *Prof. Sergio Maria Carbone* (University of Genova).

(Many thanks to Prof. Fabrizio Marongiu Buonaiuti, University of Macerata, for the tip-off)

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2016: Abstracts

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

B. Hess: **The impacts of the Brexit on European private international and procedural law**
This article explores the consequences of the *Brexit* on European private international and procedural law. Although Article 50 TEU provides for a two year transitional period, the (adverse) consequences will affect the London judicial market immediately. Following this transitional period, the Brussels Ibis Regulation and all EU instruments in their area of law will no longer apply to the United Kingdom. A substitution by the Lugano Convention will be difficult, but the United Kingdom might ratify the Hague Choice of Court Convention and the (future) Hague Judgments Convention. In the course of the two-year period, parties should carefully consider whether choice of courts agreements in favour of London will lose their validity after *Brexit*. In international company law, United Kingdom companies operating on the Continent should verify whether their legal status will be recognized after the *Brexit*. In family matters, the legal status of EU (secondary) legislation should be respected even after the *Brexit*. All in all, European private international law will be affected by the cultural loss of the English law. And the same will apply vice versa to English law.

R. Freitag: **Explicit and Implicit Limitations of the Scope of Application of Regulations Rome I and Rome II**

Almost ten years after the enactment of Regulation "Rome II" on the law applicable to non-contractual obligations and nine years after the publication in the Official Journal of Regulation "Rome I" on the law applicable to contractual obligations, the fundamental question of the material scope of application of the uniform private international law of the EU remains unanswered: Are the aforementioned regulations limited to contracts in the strict sense of voluntarily incurred obligations (governed by Regulation "Rome I") and to torts, unjust enrichment, *negotiorum gestio* and *culpa in contrahendo* (as defined in Regulation "Rome II") or are both regulations to be seen as an ensemble forming a comprehensive regime for the law of obligations (with the exception of the matters explicitly mentioned in art. 1 par. (2) of Regulation Rome I and Rome II respectively)? The answer is of practical importance for a significant number of institutions of national substantive law that are characterized by their hybrid nature positioning them between contracts and legal obligations which cannot be qualified as torts, unjust enrichment etc. The aim of the article is to show that despite the fact that an all-encompassing European regime of conflict of laws is highly desirable, the existing Regulations "Rome I" and "Rome II" remain eclectic. They do not allow for a uniform treatment of all relevant institutions of substantive law and namely their rules on mandatory provisions (art. 9 Regulation "Rome I", art. 16 Regulation "Rome II") cannot be activated to this end.

K. Thorn/C. Lasthaus: **The „CAS-Ruling" of the German Federal Court of Justice – Carte Blanche for Sports Arbitration?**

In its judgement, the German Federal Court of Justice (*BGH*) ruled on the legal validity of an arbitration agreement in favour of the Court of Arbitration for Sport (*CAS*) between an athlete and an international sports federation. Even though sports federations constitute a monopoly and as a result, athletes are not free to choose between arbitration and courts of law without losing their status as a professional, the agreement is legally effective according to the *BGH*, thus precluding the parties from settling their dispute before courts of law. In this legal review, the authors argue that – due to the athletes' lack of freedom – arbitration agreements in sport can only be considered effective if they lead to a court of arbitration constituting a minimum rule of law. With regards to the *CAS* and considering the influence of sports federations in the establishment of the *CAS*' list of arbitrators, they take the view that the *CAS* does not fulfil such minimum legal requirements. Furthermore, they criticise the fact that an arbitrator is not required to disclose previous appointments by one of the parties

involved in the current arbitration procedure. This way, the right to refuse an arbitrator suffers devaluation. Notwithstanding the fact that the international sporting system requires consistent interpretation and application of sporting rules by an international arbitration court in order to establish equal opportunities among the athletes, this must not be achieved at the expense of the athletes' constitutional rights. Due to the aforementioned legal deficits, the *BGH* should have ruled the agreement void.

C. Mayer: **Judicial determination of paternity with regard to embryos: characterization, private international law, substantive law**

The Higher Regional Court of Düsseldorf had to decide on a motion to determine the legal paternity of a sperm donor with regard to nine embryos, who are currently deep frozen and stored in a fertility clinic in California. The hasty recourse to the German law of decent by the court overlooks the preceding issue whether assessing, as of when the judicial determination of paternity is possible, is to be qualified as a question of procedure or substantive law and is, thus, to be solved according to the *lex fori* or *lex causae*. Furthermore, the court's considerations concerning the conflict-of-laws provisions, denying the analogous application of Art. 19 par. 1 s. 1 *EGBGB* (Introductory Act to the German Civil Code), are not convincing, the more so as it left the question unanswered which conflict-of-laws provision decides on the applicable law instead.

K. Siehr: **Criminal Responsibility of the Father for Abduction of his own Daughter**

A man of Syrian nationality and a woman married in Germany and had a daughter. The couple finally divorced and parental responsibility was given exclusively to the mother. In December 2006 the couple decided to visit the father's relatives in Syria in order to spend Christmas vacation with them, to detract the daughter from bad influences in Germany and to change the daughter's name. The daughter felt very uncomfortable in Syria, because she was not allowed to go to school and could not leave her relatives' home without being accompanied by some elderly person of her relatives. She wanted to go back to Germany, but was not allowed to do so by her father. Her mother tried to enable her to leave Syria with the help of the German embassy, but this could not be realized. The daughter was beaten by her father and the mother was prohibited to have contact with her daughter. After having reached majority age, the daughter managed to go back to Germany, where the mother indicted the father for

depriving a minor from the person having exclusive parental responsibility (§ 235 German Criminal Code). The County Court of Koblenz convicted the father of being guilty of dangerous bodily harm (§ 223a German Criminal Code) and of depriving a minor from her mother (§ 235 German Criminal Code). The Federal Court for Civil and Criminal Cases (*Bundesgerichtshof = BGH*) confirmed this decision and rejected the attorney general's and the accused's appeal against it. The Federal Court correctly decided that German criminal law applies, because the person, having exclusive parental responsibility, had her habitual residence in Germany, hence the result of deprivation was also felt in Germany. The Federal Court also correctly held that the private law question of parental responsibility has to be answered by German law, including German private international law.

C.F. Nordmeier: **Acceptance and waiver of the succession and their avoidance according to the Introductory Act to the German Civil Code and to Regulation (EU) No. 650/2012**

In matters of succession, a *renvoi* that results in the scission of the estate causes particular problems. The present contribution discusses acceptance and waiver of the succession and their avoidance in a case involving German and Thai law. The law applicable to the formal validity of such declarations is determined by art. 11 of the Introductory Act to the German Civil Code. It covers the question whether the declaration must be made before an authority or a court if this is provided for by the *lex successionis* without prescribing a review as to its content. In case of the avoidance of the acceptance of the succession based on a mistake about its over-indebtedness, the ignorance of the scission of the estate may serve as a base for voidability. The second part of the present contribution deals with Regulation (EU) No. 650/2012. Art. 13 of the Regulation applies in the case of the scission of the estate even if only a part of the estate is located in a Member State and the declaration at hand does not concern this part. Avoidance and revocation of the declarations mentioned in art. 13 and art. 28 of the Regulation are covered by these norms.

W. Wurmnest: **The applicability of the German-Iranian Friendship and Settlement Treaty to inheritance disputes and the role of German public policy**

Based on a judgment of the District Court Hamburg-St. Georg, the article discusses the conditions under which the applicable law in succession matters has to be determined in accordance with the German-Iranian Friendship and

Settlement Treaty of 1929, which takes precedence over the German conflict rules and those of Regulation (EU) No. 650/2012. The article further elaborates on the scope of the German public policy threshold with regard to the application of Iranian succession law. It is argued that the disinheritance of an heir as a matter of law would be incompatible with German public policy if based on the heir either having a different religion than the testator or having the status of illegitimate child. However, these grounds will be upheld if the discrimination has been specifically approved by the testator.

C. Thole: **Discharge under foreign law and German transaction avoidance**
The judgment of the Federal Court of Justice deals with the question whether recognition of an automatic discharge obtained by the debtor in an English insolvency proceeding excludes a subsequent non-insolvency action based on German law on fraudulent transfers. The Court rightly negates this question, however, the court's reasoning is not completely convincing. In particular, the judgment entails a bunch of follow-up questions with respect to the interdependency between a foreign insolvency or restructuring proceeding and German fraudulent transfer law (outside of insolvency proceedings).

F. Ferrari/F. Rosenfeld: **Yukos revisited – A case comment on the set-aside decision in Yukos Universal Limited (Isle of Man) et al. v. Russia**
In a decision of 20/4/2016, the District Court of The Hague set aside six arbitral awards that had been rendered in the proceedings *Yukos Universal Limited (Isle of Man) et. al.* against *Russia*. The arbitral tribunal had ordered *Russia* to pay compensation for its breach of the Energy Charta Treaty. According to the District Court of The Hague, the arbitral tribunal had erroneously found that the Energy Charta Treaty was provisionally applicable. For this reason, the arbitral tribunal could not base its jurisdiction on the arbitration clause set forth in Art. 26 Energy Charta Treaty. The present case note examines the set-aside decision of the District Court of The Hague as well as its implications for ongoing enforcement proceedings. Various approaches towards the enforceability of annulled arbitral awards will be presented.

P. Mankowski: **Embargoes, Foreign Policy in PIL, Respecting Facts: Art. 9 (3) Rome I Regulation in Practice**
Internationally mandatory rules of third states are a much discussed topic. But only rarely they produce court cases. Amongst the cases, foreign embargoes provide for the highlights. The USA has graced the world with their shades. Yet

the *Cour d'appel de Paris* makes short shrift with the (then) US embargo against the Iran and simply invokes Art. 9 (3) of the Rome I Regulation – or rather the *conclusio a contrario* to be drawn from this rule – to such avail. It does not embark upon the intricacies of conflicting foreign policies but sticks with a technical and topical line of argument. Blocking statutes forming part of the law of the forum state explicitly adds the political dimension.

C. Thomale: **On the recognition of Ukranian surrogacy-based Certificates of Paternity in Italy**
The Italian Supreme Court denied recognition of a Ukrainian birth certificate stipulating intended parents of an alleged surrogacy arrangement as the legal parents of a newborn. The reasoning given by the Court covers fundamental questions regarding the notions of the public policy exception, the superior interest of the child as well as the relationship between surrogacy and adoption. The comment elaborates on those considerations and argues for adoption reform.

M. Zilinsky: **The new conflict of laws in the Netherlands: The introduction of Boek 10 BW**
On 1/1/2012, the 10th book of the Dutch Civil Code (Boek 10 (Internationaal Privaatrecht) Burgerlijk Wetboek) entered into force in the Netherlands. Herewith the Dutch Civil Code is supplemented by a new part by which the different Dutch Conflict of Laws Acts are replaced and are combined to form one legal instrument. The first aim of this legislative process was the consolidation of the Dutch Conflict of Laws. The second aim was the codification of certain developed in legal practice. This article is not a complete treatise on the Dutch Conflict of Laws. The article intends to give only a short explanation of the new part of the Civil Code.

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und Verfahrensrechts (IPRax) 4/2016: Abstracts

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

F. Eichel, **Private International Law Aspects of Arbitration Clauses in Favor of the Court of Arbitration for Sport**
The validity of arbitration clauses in favor of the Court of Arbitration for Sport (CAS) has been called into question by German courts in the long running proceedings of Claudia Pechstein against the International Skating Union. The courts held that the arbitration clause in the athletes' admission form was void. They referred to provisions in German Civil Law (s. 138 German Civil Code – BGB; s. 19 Act against Restraints of Competition – GWB) which are recognized as being internationally applicable so that the German courts could apply them even though the validity of the arbitration clause was governed by Swiss law. The article reflects the Private International Law aspects of these arbitration clauses illustrating that both the relevant law of International Civil Procedure as well as the choice of law provisions primarily serve the interests of commercial arbitration and thereby reinforce the structural imbalance existing between the sports association and the athlete when signing such arbitration clauses. Against this background, the article argues that the special circumstances of sport arbitration would allow the application of the German law of standard terms (s. 307 BGB) although it is, in principle, not considered to form part of the general ordre public-reservation in Private International Law.

Th. Pfeiffer, **Ruhestandsmigration und EU-Erbrechtsverordnung**
From a German perspective, the most significant change that was brought about by the EU Succession Regulation is the transition from referring to the deceased's nationality as the general connecting factor to the deceased's habitual residence. This transition reflects an analysis of interests which is primarily based on cases of migrant professionals or workers and their families. However, there is also a large group of migrants already retired at the time of their migration (e.g. the large group of German pensioners on the Spanish island of Mallorca). Their situation is different from migrant workers insofar as their migration occurs at a moment when the most significant decisions in their lives have been made

already; as a consequence, migration at that age, usually, does not include following generations. Moreover, it is not unlikely that, in many cases, migrating pensioners, when planning for their estates, will not consider the laws of their new habitual residence. Based on this analysis, this article asks how the EU Succession Regulation addresses these particularities of migrating pensioners. In particular, it is discussed under which circumstances the laws of their home state (based on their nationality) may remain applicable. In this context, the article considers: (1) provisions which do not refer to the moment of deceased's death but to an earlier event, (2) the need for an appropriate definition of habitual residence, (3) the escape clause in Art. 21 (2) of the Regulation, (4) a choice of law by the deceased and (5) waivers of succession. The article concludes that the Regulation is open for applying the laws of the deceased's nationality to a certain extent but that this law must not be applied automatically if the principle of referring to the deceased's habitual residence is taken seriously.

A. Brand, **Damages Claims and Torpedo Actions – The Principle of Priority of Art. 29 para 1 Brussels I-Regulation with a particular focus on Cartel Damages Claims.**

Forum shopping by way of „Torpedo actions" is an unwanted means of a tortfeasor to secure the jurisdiction of their home country rather than having to defend themselves before the courts at the seat of the injured plaintiff. This has gained particular relevance in proceedings concerning cartel-damages claims. The race hunt to the court could and should be avoided by strictly applying the principles of procedural efficiency and fair trial and the requirement of a justified interest for an action for (negative) declaration. As under domestic law, the principle of priority as laid down in art. 29 para. 1 of the Brussels I-Regulation cannot be applied to torpedo actions in case of tort.

W.-H. Roth, **Jurisdictional issues of competition damages claims**

In its CDC-judgment the Court of Justice for the first time had the chance to rule on several issues of jurisdiction concerning cartel-inflicted damages. Claimant was an undertaking specifically set up for the purpose of pursuing such damage claims that had been transferred to her by potential cartel victims. The Court deals with jurisdiction over multiple defendants (Art. 6 No. 1 Regulation EC 44/2001), the scope of tort jurisdiction (Art. 5 No. 3), based on the place where the event giving rise to the damage occurred and on the place where the damage occurred, and with the interpretation of jurisdiction clauses (Art. 23) potentially

covering cartel-inflicted damage claims. The results reached and the arguments advanced by the Court, taken all in all, deserve applause. Given that the judgment deals with a setting of a follow-on action (with a binding decision by the EU-Commission) it will have to be clarified whether the main results of the judgment can also be applied in stand-alone actions.

R. Hüßtege, **A tree must be bent while it is young**
The Federal Constitutional Court of Germany reprimands that the district court in an adoption procedure did not use all sources of knowledge in accordance to the Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters and to the European Judicial Network, in order to determine whether an effective Romanian adoption exists. Due to this omission fundamental rights of the complainant were injured in the adoption case concerning the recognition of the Romanian decision. This case shows that instruments, like the mentioned regulation and the European Judicial Network in commercial and civil matters are not well known to courts. There is an urgent need for training of judges.

C. F. Nordmeier, **Lis pendens under art. 16 Brussels IIa and Art. 32 Brussels Ia when proceedings are stayed**
The case at hand deals with the decisive moment for lis pendens according to art. 16 (1) (a) Brussels IIa (equivalent to art. 32 (1) (a) Brussels Ia) if proceedings are stayed before service in order to reach an amicable arrangement. The provision contains an own obligation of the applicant. Whether a delay of service restrains lis pendens depends on the breach of this obligation being imputable to the applicant. Intention or negligence should not serve as a basis to impute the breach. The present contribution analyses different types of delay and its imputability: stay of proceedings to reach an amicable arrangement, deficiencies of the documents submitted for service and mistakes of the court while effecting service. For the continuance of lis pendens the author argues that a stay or an interruption of proceedings does not abolish the effects of lis pendens.

B. Heiderhoff, **Perpetuatio fori in custody proceedings**
Even if parents, as in the case at hand, have joint parental responsibility with the exception of the right to determine the child’s place of residence, the parent who has the sole right to determine the child’s place of residence may lawfully move abroad with the child. The other parent has to accept the complications in exercising parental responsibility. If the child is relocating its habitual residence

to a state that is not a member state of the EU, but a signatory state to the Hague 1996 Children's Convention, the Convention must be applied. This is clearly stated in Art. 61 Brussels II-Regulation. Unlike Art. 8 Brussels II-Regulation, the 1996 Children's Convention does not follow the principle of perpetuatio fori. In order to prevent a parent from taking a child abroad during ongoing court proceedings, the courts should regularly consider an injunction by which the right to determine residence of the child is limited to Germany. This applies particularly when both parents have joint responsibility and merely the isolated right to determine the child's place of residence is assigned to one parent. If one parent has sole custody at the beginning of the procedure, the interests must be weighed differently. The right to move abroad with the child during the proceedings should, in general, only be excluded if there is a rather serious chance for the affected parent to lose sole custody.

U. P. Gruber, **How to modify decisions on maintenance obligations**
In scholarly writing, proceedings to modify decisions on maintenance obligations have only attracted limited attention. However, these proceedings raise very intricate und unsolved problems of characterization. The Bundesgerichtshof, in a new decision, has tackled some of the questions while leaving others unanswered. In the author's opinion, the modification of decisions on maintenance obligations is governed by the Hague Protocol of 23 November 2007. The convention's predecessor, the Hague Convention of 2 October 1973, also covered the modification of decisions, and it can be presumed that the Hague Protocol, as far as its scope is concerned, follows the Hague Convention. The procedural framework of the proceedings to modify decisions on maintenance obligations, however, is governed by the lex fori, i.e. the law of the state in which the proceedings to modify the decision are brought. The Hague Protocol of 23 November 2007 is part of EU law. Therefore, it seems likely that the ECJ will be requested to decide on the issue. Whether or not the ECJ will support the application of the Hague Protocol seems impossible to predict.

K. Siehr, **Execution of Foreign Order to Return an Abducted Child**
A child was abducted by his mother from Germany to Poland and after one year re-abducted by his father to Germany. Instead of asking German courts for a return order under the EU Regulation No. 2201/2003 on Matrimonial Matters and Matters of Parental Responsibility the father turned to Polish courts and asked for a return order. Such an order was turned down because the child, in the

meantime, had been abducted by the father to Germany. The mother asked the Polish court for a return order and got it as an urgent order because of the habitual residence of the child in Poland. The mother asked German courts to recognize and enforce this Polish order to return the child to Poland. The Court of Appeals of Munich recognized and enforced the Polish return order. The Munich court did not recognize the return order neither under Art. 42 nor under Art. 28 et seq. Regulation 2201/2003 because relevant certificates were missing or some enforcement obstacles (hearing of the father in Poland) were given. The German court decided that the Polish return order should be recognized and enforced under the Hague Convention of 1996 on the Protection of Children without taking care of Art. 61 of the Regulation 2201/2003 which give precedence to the Regulation in this case. Jurisdiction of the Polish court is determined according to Art. 20 of the Regulation and Art. 11 of the Hague Convention of 1996 which granted only territorially limited jurisdiction to local courts in urgent matters. In this case, however, the child was not any more in Poland but in Germany. The German court is criticized because of not explaining properly the application of the Hague Convention of 1996 under Art. 61 of Regulation 2201/2003 and because of misinterpreting Art. 20 of the Regulation 2201/2203 and of Art. 11 Hague Convention by giving them universal jurisdiction.

D. Looschelders, **Problems of Characterization and Adaptation in German-Italian Successions**

German-Italian successions often raise difficult legal questions. In its decision, the Higher Regional Court of Duesseldorf firstly deals with the invalidity of joint wills under Italian law. The main part of the decision is concerned with problems of characterization and adaptation. In the present case, these problems arise due to the parallel applicability of Italian Succession Law and German Matrimonial Property Law. The author supports the decision in general. However, it is stated that the courts considerations with regard to the necessity of adaptation are not convincing in all respects. Finally, it is shown how the problems of the case were to be solved in accordance with the European Succession Regulation which was not yet applicable.

C. Mayer, **Ancillary matrimonial property regime and conflict of laws – characterization of claims arising from an undisclosed partnership between spouses.**

While it is generally agreed that the legal regime for undisclosed partnerships

follows the law applicable to contractual obligations, there is debate as regards undisclosed partnerships between spouses. Due to their special connection with the matrimonial property regime, it is argued that compensation claims arising from undisclosed partnerships between spouses are to be characterized as matrimonial. Along with the prevailing opinion, the German Federal Court of Justice now correctly supports a characterization as contractual. Given, however, the close relation to the matrimonial property regime, the court proposes an accessory connection: the partnership agreement is closest connected to the law governing matrimonial property. Subject to criticism is, however, the far-reaching willingness of the court to find an implied choice of law by the spouses.

M. Stöber, **Discharge of Residual Debt and Insolvency Avoidance Actions in Cross-Border Insolvencies with Main and Secondary Proceedings**

15 years after the adoption of the European Regulation on Insolvency Proceedings in the year 2000, it is still difficult to answer the question which national insolvency law applies to cross-border insolvency proceedings within the European Union. The case that – in addition to main insolvency proceedings in one member state – secondary insolvency proceedings have been opened in another member state of the European Union is of particular complexity. In two recent judgments, the German Supreme Court has decided on the impact the opening of secondary proceedings in another state has on a discharge of residual debt (judgement of 18 September 2014) and on insolvency avoidance actions respectively (judgement of 20 November 2014) granted by the national law applicable to the main proceedings opened in the first state.

C. Kohler, **Claims for the payment of holiday allowances by a public fund for paid leave for workers: "civil and commercial" or "administrative" matters?**

By its ruling in BGE 141 III 28 the Swiss Federal Court refused to enforce in Switzerland an Austrian judgment according to which a Swiss company had to make payments to the Austrian fund for paid leave for workers in the construction industry that were due for workers posted to Austria by the defendant company. According to the Federal Court, the judgment is outside the scope of the Lugano-Convention as it has not been given in a "civil and commercial matter" as required by art. 1 thereof. The ways and means by which the Austrian fund claimed the payments constituted the exercise of public powers and differed from the legal relationship between the parties to an employment contract. The author

submits that the judgment of the Federal Court is not in line with the ECJ's case-law on art. 1 of the Brussels instruments. In order to assess whether a case is a "civil and commercial matter", one has to look not at the modalities for the enforcement but at the origin of the right which forms the subject matter of the proceedings. In the instant case the right to paid leave stems from the employment contract and is of a private law character. As the Federal Court sees no legal basis for the enforcement of the Austrian judgment outside the Lugano-Convention, its judgment leaves a gap in the judicial protection of posted workers' rights as between Austria and Switzerland contrary to the objective of Directive 96/71 which applies according to the bilateral agreements between Switzerland and the EU.

Summer Schools 2016, Greece

The Jean Monnet Center of Excellence and the UNESCO Chair at the Department of International and European Studies, University of Macedonia, Thessaloniki, Greece, is organising a Summer academy on European Studies and Protection of Human rights in Zagora, on Mount Pelion, Greece, consisting of two summer schools in English. The academic faculty in both summer schools are University professors and experts from all over Greece and the EU (Great Britain, Spain and Poland).

The first summer school is on **"Freedom, Security and Justice in the EU**". It will be held **from Friday July 8, afternoon until Monday, July 11, 2016, afternoon.** In particular, the summer school will last **25 hours.** The main areas of study will be:

- Institutional Structure and Development (EU institutions, Frontex, Eurojust, European Attorney) which will be analyzed by Prof. Chrysomallis,
- European Citizenship and the protection of fundamental rights in the Area of Freedom Security and Justice by D. Anagnostopoulou,
- Internal and External Security by Prof. F. Bellou,

- Immigration and asylum policies by Prof. V. Hatzopoulos and I. Papageorgiou,
- EU Private International Law by M. Gardenes – Santiago (Autonomous University of Barcelona),
- European criminal law (N. Vavoula, Queen Mary)

For further information in this summer school click here.

The second summer school will begin on **Thursday, July 14 afternoon and will end on Tuesday, July 19.** It will last **40 hours** with a focus on the **protection of human rights in Europe**:

- International human rights protection mechanisms (International Covenants and International Conventions), taught by f. Professor P. Naskou Perraki (University of Macedonia)
- European Convention on Human Rights by Dr. Dagmara Dajska, expert of the Council of Europe, who will discuss the right for fair trial and the right to asylum,
- Freedom of Expression by Prof. I. Papadopoulos (University of Macedonia),
- Protection of Personal Data by Prof. E. Alexandropoulou (University of Macedonia),
- EU Charter of Fundamental Rights by Prof. L. Papadopoulou (Aristotle University of Macedonia),
- Prohibition of discrimination by Prof. D. Anagnostopoulou (University of Macedonia),
- LGBT Rights by Prof. Alina Tryfonidoy (Reading University),
- Protection of minorities and cultural rights by Dr. Nikos Gaitenidis, Head of the Observatory on Constitutional Values of the Jean Monnet Centre of Excellence, and
- Workshop on intercultural skills by Prof. I. Papavasileiou (University of Macedonia)

For further information on this summer school click here.

A Certificate of attendance will be issued to all while a Certificate of Graduation will be awarded to all those passing a multiple choice examination.

For additional information and applications to any of the schools, please refer to

the links below or contact:

Assistant Professor Despina Anagnostopoulou, danag@uom.gr

or *Ms. Chrysothea Basia, chrybass@yahoo.com*

Job Opening: Research Fellow (Wissenschaftliche/r Mitarbeiter/in) in Private International Law / Transnational Commercial Law at the EBS Law School, Wiesbaden (Germany)

The EBS Law School in Wiesbaden, Germany, is looking for a highly skilled and motivated research fellow on a part-time basis (50%).

The position will entail research within the team of the Chair for Civil Law, Civil Procedure and Private International Law (Prof. Dr. Matthias Weller, Mag.rer.publ.) and within the EBS Research Center for Transnational Commercial Dispute Resolution (TCDR) on a number of new and ongoing projects focusing on Private International Law, Transnational Commercial Law and International Civil Litigation.

The position includes teaching and programme management for the “EBS Law Term” on Transnational Commercial Law, an intense academic programme in English from September to December each year for incoming international students from all over the world, mainly from the partner law faculties of the EBS

Law School. For further information on this programme: http://www.ebs.edu/lawterm.

Requirements:

- a university law degree (e.g. JD, preferably the German "Erste Juristische Prüfung")
- qualifications or at least substantial interest in Private International Law and Transnational Commercial Law
- excellent English language skills

The position is limited to two years but can be prolonged. The work location is Wiesbaden, a city close to Frankfurt, Germany. The work involves 19,75 hours per week (50%). The payment is subject to negotiations with the University, depending on the level of qualifications, but will not be lower than the average payment for research fellows (*Wissenschaftliche Mitarbeiter*) there. The faculty offers to obtain a doctoral degree on the basis of a thesis (*Dissertation*) if the faculty's requirements for admission are met.

How to Apply:

Please send your application with reference to **"ZRV_WiMi_Law Term"** via email to antonella.nolten@ebs.edu. The application should include a cover letter, a CV containing, if applicable, list of publications and/or teaching evaluations and electronic copies of all relevant certificates. Please do not hesitate to contact Antonella Nolten in case of further questions.

We are looking forward to hearing from you!

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.

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; 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

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.