Commentary of the Succession Regulation

The first commentary of the European Regulation No 650/2012 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 has been published by Bruylant.

The book is conceived as a commentary, article by article, of the Regulation. It is written in French and, in its 940 pages, it provides a comprehensive analysis of comparative law as well as extensive explanations and examples in order to allow practitioners to address the issues of future international successions and family business succession planning.

With the contributions of :

Andrea Bonomi (Introduction ; Préambule ; article 1er, paragraphe 1er, paragraphe 2,
points a à g, j ; article 3, paragraphe 1er, points a à d ; articles 4-12 ;
article 14-18 ; articles 20-22 ; article 23, paragraphe 1er, paragraphe 2,
points a à d, h, i ; articles 24-27 ; articles 34-38 ; articles 74-75 ;
articles 77-82);

Ilaria Pretelli (Articles 39-58);

Patrick Wautelet (Article 2 ; article 3, paragraphe 1er, points e à i, paragraphe 2 ;
article 13 ; article 19 ; article 23, points e à g, j ; articles 28-33 ;
articles 59-73 ; article 76 ; articles 83-84).

More information available here.

Online Symposium: Abolition of Exequatur and Human Rights

In June, the European Court of Human Rights ruled in *Povse v. Austria* that the abolition of exequatur was compatible with the European Convention of Human Rights, and that the mechanism introduced by the Brussels IIa Regulation was not dysfunctional from the perspective of the Convention.

In December 2010, the Court of Justice of the European Union had also ruled in *Joseba Andoni Aguirre Zarraga v. Simone Pelz* that the allegation of violation of fundamental rights should not prevent the free circulation of judgments under the Brussels IIa Regulation.

For several years, European scholars debated whether the project of the European Commission to abolish exequatur and to suppress the public policy exception would comport with Member States ECHR obligations. Many thought that it would not. Member States eventually successfully resisted the project which was not adopted in the Brussels I Recast.

From this week-end onwards, *ConflictofLaws.net* will organize an online symposium on Abolition of Exequatur and Human Rights. Scholars from different jurisdictions will share their first reaction on the *Povse* judgment and on its consequence on the evolution of European civil procedure. Readers interested in participating may either contact directly the editors or use the comment section.

- Requejo on *Povse*
- Muir Watt on Abolition of Exequatur and Human Rights
- Arenas Garcia on *Povse*: Taking Direct Effect Seriously?
- Gascon on *Povse*: a Presumption of ECHR Compliance when Applying the European Civil Procedure Rules?
- van Iterson on *Povse*: a Legislative Perspective

Jurcys on Economic Analysis of Party Autonomy in Family Law

Paulius Jurcys (Kyushu University Graduate School of Law) has posted Party Autonomy in International Family Law: A Note from the Economic Perspective on SSRN.

This paper aims to contribute to the discussion concerning the scope of party autonomy in international family law. It is suggested to adopt a wider view and analyse the principle of party autonomy from the efficiency perspective. In particular, this short note questions the widely accepted assumption that agreements in family law are very similar, if not identical, to other forms of market transactions. In order to facilitate the debate, it is suggested to take into consideration that some forms of agreements perform signaling function and therefore should be treated differently from other forms of market transactions. It is argued that such a perspective could help identify the surplus value of the agreement. The paper concludes with some further thoughts about the implications of the signaling and surplus value to the discussion on party autonomy in international family law.

TDM 4 (2013) – Ten years of Transnational Dispute Management

TDM has published its special anniversary issue. According to the Editorial by Mark Kantor, and especially relevant to readers of this site, "the TDM community has not limited itself to investment treaty disputes. Instead, we have promoted discussion of international commercial arbitration, litigation over international issues in national courts, mediation of cross-border disputes,

administrative law in national and international tribunals, labor and environmental disputes, the overlap between human rights law and tribunals and investments, the overlap between WTO dispute resolution and investments, administrative law and international matters, treaty making and treaty unmaking, and so many other methods for transnational dispute management." With articles from leading authorities on timely topics of regional and substantive interest, the anniversary issue is no different.

Italian Book on the Succession Regulation

The Italian publisher Giuffrè has recently published *Il diritto internazionale privato europeo delle successioni mortis causa* [The EU Private International Law of Succession upon Death], edited by Pietro Franzina and Antonio Leandro, with a preface by Karen Vandekerckhove.

The book is a collection of essays, in Italian, covering a variety of issues in connection with Regulation No 650/2012 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.

In an introductory paper, Pietro Franzina (University of Ferrara) examines the reasons for unifying private international law rules in succession matters in Europe and the main policy options underlying the new instrument. Giacomo Biagioni (University of Cagliari) deals in his contribution with the scope of application of Regulation No 650/2012 and with the relationship entertained by the latter with other texts – international conventions and EU legislative acts – that may come into play in respect of cross-border successions.

Antonio Leandro (University of Bari) explores the rules laid down by the Regulation as regards jurisdiction in matters of succession. The provisions determining the law applicable to succession are examined from a general

perspective by Domenico Damascelli (University of Salento), while Bruno Barel (University of Padova) focuses on the conflict-of-laws issues raised by agreements as to succession.

Elena D'Alessandro (University of Torino) analyses in her paper the rules relating to the recognition, the enforceability and the enforcement of judgments and court settlements, whereas the contribution of Paolo Pasqualis (Italian Council of Notaries) is concerned with the movement of authentic instruments relating to succession matters across Europe. The newly instituted European Certificate of Succession is the object of a paper by Fabio Padovini (University of Trieste). Finally, Emanuele Calò (Italian Council of Notaries) provides an overview of the main features of the substantive regulation of succession upon death from a comparative perspective.

The table of contents of the book may be downloaded here.

Conference Announcement: What Law Governs International Commercial Contracts?

On October 18, 2013, Brooklyn Law School is hosting an important symposium on the question of what law governs international commercial contracts. A link to the event is here. Below is a short description of the symposium. This should be of great interest to private international lawyers and the international arbitration community.

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What Law Governs International Commercial Contracts? Divergent Doctrines and the New Hague Principles

Friday, October 18 9:15 am-3:15 pm

Brooklyn Law School Subotnick Center 250 Joralemon Street Brooklyn, New York

Co-Sponsors Dennis J. Block Center for the Study of International Business Law
Brooklyn Journal of International Law

About the Symposium With the continued dramatic growth of international commerce, a critical question has become even more important: What law governs the contracts behind the commerce? Key issues include:

- In much of the world, courts accept the choice of the parties to a contract as to what law will govern it – but this principle is not accepted everywhere. Even in nations where it is accepted, differences abound.
- Should the ability of parties to select the law governing their contract be approached differently in the increasingly prevalent world of international commercial arbitration?
- In many arbitral systems, parties may select not only the law of a sovereign state, but also "rules of law" emanating from non-state sources, such as "principles" promulgated by international organizations. Should courts show the same deference to the parties' choice of non-state law?

The Hague Principles on Choice of Law in International Contracts, prepared by the Hague Conference on Private International Law and now nearing completion, are expected to be quite influential, both in establishing the principle of party autonomy to select the law governing commercial contracts and in developing the principle and its limits.

This symposium addresses the important issues described above – from the perspectives of both current law and the "best practices" represented by the draft Hague Principles.

Nagy on the Draft Regulation on

Matrimonial Property

Csongor István Nagy (University of Szeged, Faculty of Law) has posted The European Commission's Draft Regulation on the Conflict of Laws of Matrimonial Property – Some Conceptual Questions on SSRN.

> *The paper analyses, in the context of the European Commission's Draft Regulation on the conflict of laws of matrimonial property and from a choice-of-law perspective, the property issues connected to the dissolution of the marriage, with special emphasis on matrimonial property. It examines the problems emerging from the differences between Member State laws in terms of thinking and conceptualization and analyses how these impact the application of the Draft Regulation.*

New Edition of Collier's Conflict of Laws

Pippa Rogerson (University of Cambridge) has published the fourth edition of her former colleague John Collier's manual on the Conflict of Laws.

> *This reworked version of Conflict of Laws introduces a new generation of students to the classic. It has been completely rewritten to reflect all the recent developments including the increased legislation and case law in the field. The author's teaching experience is reflected in her ability to provide students with a clear statement of rules which sets out a framework to the subject, before adding detail and critical analysis. Recognising that the procedural aspect of the subject challenges most students, the book explores conflict of laws in its practical context to ensure understanding. Teachers will appreciate the logical structure, which has been reworked to reflect teaching in the field today. Retaining the authority that was the hallmark of the previous edition, this contemporary and comprehensive textbook is essential reading.*

- *Clear and accessible updated version of the classic text on the subject*
- *Focuses on commercial law*
- *Substantially rewritten to reflect all case law and legislative developments*
- *Restructured to map contemporary courses*

UK Supreme Court Rules on Return of British Children

On 9 September 2013, the UK Supreme Court delivered its judgment In the matter of A (Children) (AP).

The Court issued the following press summary.

BACKGROUND TO THE APPEAL

The issue in this appeal is whether the High Court of England and Wales has jurisdiction to order the 'return' to this country of a small child who has never been present here on the basis that he is habitually resident here or that he has British nationality.

The child, called Haroon in the judgment, was born on 20 October 2010 in Pakistan. His father was born in England and his mother in Pakistan. They married in Pakistan in 1999 and lived in England from 2000. They have four children: two daughters, born in 2001 and 2002, and two sons, one born in 2005 and Haroon. The father and the first three children, who were born in England, have dual British and Pakistani nationality and the mother has indefinite leave to remain in the United Kingdom.

From 2006 the father began to spend a lot of time in Pakistan. The marriage was unhappy and in 2008 the mother moved into a refuge with her three children complaining of abuse. The mother arranged a three week trip to Pakistan in October 2009, in order to visit her father with the children. When she was there

she was put under pressure by her father, her husband and his family to reconcile with her husband and was forced to give up the children's passports. She strongly wished to return to England and telephoned the refuge asking for their help to return from February 2010, when she became pregnant with Haroon. Eventually in May 2011 her family helped her to return to England without the children and she began proceedings for their return in the High Court. On 20 June 2011 all four children were made wards of court and the father was ordered to return them forthwith.

The father challenged the jurisdiction of the court to make orders for the return of the children. The judge found that all four children were habitually resident in England and Wales as the mother had not agreed that the children should live in Pakistan. The older children had retained their habitual residence in England. Haroon had habitual residence because he was born to a mother who was being kept in Pakistan against her will. The Court of Appeal by a majority allowed the father's appeal in relation to Haroon only, on the ground that habitual residence was a question of fact (rather than deriving from the habitual residence of the parents) and required physical presence in the country.

JUDGMENT

The Supreme Court unanimously allows the mother's appeal and holds that the court had inherent jurisdiction to make the orders in this case on the basis of Haroon's British nationality. The case is however remitted to the judge to consider as a matter of urgency whether it is appropriate to exercise this exceptional jurisdiction. Lady Hale gives the main judgment, with which Lord Wilson, Lord Reed, and Lord Toulson agree. Lord Hughes gives an additional judgment explaining why he would have held that Haroon was habitually resident in the circumstances of this case.

REASONS FOR THE JUDGMENT

The orders exercising the court's wardship jurisdiction in this case did not fall within Part 1 of the Family Law Act 1986 ('the 1986 Act') [26-28]. They did relate to parental responsibility within the scope of Council Regulation (EC) No 2201/2003 (the Brussels II revised Regulation)('the Regulation') [29], which applied regardless of whether there was alternative jurisdiction in a non-member state [33]. The question was whether there was jurisdiction under article 8 of the

Regulation, which depended on where the child was habitually resident [34].

Habitual residence is a question of fact and not a legal concept such as domicile. It is desirable that the test for habitual residence be the same for the purposes of the 1986 Act, the Hague Child Abduction Convention and the Regulation, namely that adopted by the Court of Justice of the European Union ('CJEU')for the purposes of the Regulation [35-39]. The CJEU has ruled that habitual residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. This depends on numerous factors including the reasons for the family's stay in the country in question [54].

Four of the justices held that presence was a necessary precursor to residence. A child could not be integrated into the social environment of a place to which his primary carer had never taken him. Lord Hughes, by contrast, would have held that in these circumstances the child acquired the habitual residence of his mother. The CJEU had not had to consider a case with facts as stark as this, where the only reason that the child had been born in a particular place was because the mother had been deprived of her autonomy to choose where to give birth, and if it had been necessary to decide the appeal under the Regulation, the Supreme Court would have made a reference to it [58].

There was however another basis of jurisdiction which was open to the court to exercise in this case. By Article 14 of the Regulation, the common law rules as to the inherent jurisdiction of the High Court continue to apply if the child is not habitually resident in a Member State. The Crown retained the ancient power as parens patriae over those who owe it allegiance as British nationals. For most types of order this jurisdiction was removed by the 1986 Act but not for the order for return made in this case [60]. The judge below did not address herself to this basis of jurisdiction and whether it would be appropriate to exercise it. The case should be remitted to the High Court for it to be considered, in the light of the particular circumstances of this case [64-65]. If the court declined to exercise this jurisdiction, it would remain open to the mother to seek a reference to the CJEU on the issue of habitual residence [67].

Lord Hughes in an additional judgment did not accept that it was a minimum legal requirement of habitual residence that there had at some time been physical presence. This was tantamount to a rule when a purely factual enquiry was required. With a very young child the important environment was essentially a

family one. Haroon's family unit had its habitual residence in England. He therefore would have held that Haroon was habitually resident in England and Wales [93].

French Supreme Court follows ECJ judgment on jurisdiction clauses in Refcomp

Vincent Richard is a Research Fellow at the Max Planck Institute Luxembourg.

On September 11th, 2013, the French Supreme Court for private and criminal matters (*Cour de Cassation*) rendered its final decision in Refcomp SPA v. Axa Corporate solutions assurances (*in French*).

This case on the possible transmission of a jurisdiction clause in a succession of contracts transferring ownership gave rise to a preliminary ruling of the ECJ which was reported on this blog.

In its decision the ECJ ruled that a jurisdiction clause could not be relied against a sub-buyer unless it is established that he has actually consented to the clause under the conditions of article 23 Brussels I. According to the ECJ, the application of the French rule whereby a sub-buyer can bring a contractual action against the manufacturer and thus be bound by a jurisdiction clause, would have infringed the uniform application of the Brussels I regulation.

Unsurprisingly, the French Supreme Court acknowledged and complied with this decision by confirming the French courts' jurisdiction against *Refcomp SPA.* The court expressly mentions the ECJ ruling and then applies it in the present situation thus denying any effect to the jurisdiction clause against a sub-buyer (*Doumer SNC insured by Axa*) who has not agreed to it.

Refcomp will thus have to defend himself before French courts despite having

concluded a jurisdiction clause in favour of an Italian court when he sold his product to his Italian client (Climaveneta).