ERA Conference on Cross Border Succession

The Academy of European Law (ERA) will host a conference on Planning Cross-Border Succession in Trier, Germany, on March 20 and 21, 2014.

Thursday, 20 March 2014

I. THE SUCCESSION REGULATION

Chair: Christian Hertel

09:15 Scope of application and international conventions that take precedence over the Regulation (Guillermo Palao Moreno)
09:45 Discussion
10:00 Which court is competent to decide cross-border succession cases? Which law is to be applied? (Jonathan Harris)
10:45 – 11:00 Discussion

Chair: Jonathan Harris

11:30 Effects of foreign decisions and authentic instruments in matters of succession

12:00 European Certificate of Succession: conditions for issue of certificate and effects (Christian Hertel)
12:30 – 12:45 Discussion

II. CROSS-BORDER INHERITANCE TAX ISSUES

Chair: Patrick Delas

14:00 Inheritance taxation in the context of EU law (Nathalie Weber-Frisch)

- National inheritance laws in comparative perspective
- CJEU case law on the impact of free movement on inheritance

14:45 Discussion
15:00 Possible measures to avoid double taxation in cross-border successions (Niamh Carmody)
15:30 Discussion

15:45 WORKSHOP (with tea & coffee)
Drafting testamentary dispositions in the light of the Succession Regulation and diverging tax regimes (Patrick Delas & Richard Frimston)
16:45 – 17:30 Results of the workshop and discussion

Friday, 21 March 2014
III. INTERPLAY WITH OTHER AREAS OF LAW
Chair: Richard Frimston

09:15 The impact of matrimonial property on succession law (Patrick Wautelet)
09:45 Discussion

10:00 Company law, trusts and succession disputes (Paul Matthews)
10:30 – 10:45 Discussion

11:15 Proof of succession in land registration proceedings (Kurt Lechner)
11:45 Discussion

Chair: Kurt Lechner
12:00 Inheritance of (holiday) houses and bank accounts abroad: national reports

- Markus Artz
- Guillermo Palao Moreno
- Paul Matthews
- Patrick Wautelet

13:15 Lunch and end of the conference

The ECJ and ECHR Judgments on Povse and Human Rights – a

Legislative Perspective

by Dorothea van Iterson

Dorothea van Iterson is a former Counsellor of legislation, ministry of Justice of the Netherlands[1]

In the contributions published last month on this topic, the blame for what is felt to be the unsatisfactory operation of article 11 Brussels II bis is put on the parties who negotiated the relevant provisions of the Regulation. For those who are unfamiliar with the history of the Regulation and wish to participate in the debate about a possible recast of Brussels II bis, it may be helpful to recall how these provisions came into being[2].

The articles of Brussels II bis relating to the return of a child who has been wrongfully abducted reflect a political compromise which was reached with great difficulty after discussions of 2 ½ years in the Council working party dealing with the topic. This explains some of the ambiguities in the text. The main elements of the compromise were the following:

1) The 1980 Hague Child Abduction Convention, to which all Member States of the EU are parties, was preserved in relationships between Member States. Consequently, the courts of the Member State of the child's refuge continues to have jurisdiction in respect of requests for the return of an abducted child. The procedures under the 1980 Hague Convention seek to ensure a speedy voluntary return of the child. If a voluntary return cannot be secured, the courts of that State are required to hand down an order restoring the *status quo ante****[3]****.* There are very limited grounds for refusing the child's return. Return orders under the Convention are no judgments on the merits of custody. No decision on the merits may be taken by the courts of the child's State of refuge until it has been determined that the child is not to be returned under the Convention (article 16). As long as such determination has not been made, the courts of the child's habitual residence at the time of the removal are competent to deal with the merits of the custody issue. The conditions for the passage of jurisdiction as to the merits to the courts of the Member State of refuge are specified in article 10 of the Regulation.

2) Article 11, paras 2 to 5, Brussels II bis were agreed upon as a complement

to the Hague system. They reflect policy guidelines developed over the years. These paragraphs were intended for the courts of the Member State of refuge of the child, not for the courts of the Member State of the child's habitual residence prior to the removal.

3) Article 11, paras 6 to 8, as included in the compromise, specifically address the situation in which the courts of the Member State of refuge have handed down a non-return order based on article 13 of the Convention. The three paragraphs were accepted as a package. Paragraph 7 cannot be isolated from paragraphs 6 and 8. The competent court in the Member State of the child's habitual residence prior to the removal has to be informed of any non-return order given in the Member State of refuge. This court can then examine the merits of custody. The Council compromise did not purport to provide for immediate "automatic" enforceability abroad of a *provisional* return order handed down by those courts. "Any subsequent judgment which requires the return of the child", as referred to in paragraph 8, was to be understood as "any decision on the merits of custody which requires the return of the child"[4]."Custody" comprises the elements stated in article 2, point 11, sub b, which corresponds to article 5 of the Hague Convention. It includes, among other rights and duties, the right to determine the child's residence.

4) Abolition of exequatur was accepted by way of an experiment for a very narrow category of judgments. According to the Council compromise, exequatur was to be abolished only for judgments *on the merits of custody* entailing the return of the child handed down following the procedural steps described in article 11, paras 6 and 7. It was considered that the issue of the child's residence should be finally resolved as part (or as a sequel) of the other custody arrangements and that the judgment on custody should put an end to the proceedings between the parents on the child's place of residence following the abduction. Successive provisional changes of residence were considered to be contrary to the child's interests.

5) Abolishing exequatur in this context means that once a certificate has been issued in accordance with article 42 Brussels II bis, the judgment is enforceable by operation of law in another Member State. No recourse can be had in the Member State of refuge to the grounds of non-recognition (and enforceability) stated in article 23. The tests mentioned in article 23 are carried out by a judge of the court which has handed down the judgment and who is asked to issue the

certificate (article 42, second paragraph). The issuance of a certificate is therefore unlikely to be refused. The Aguirre/Pelz ruling of the ECJ has shown that questions may then arise about the statements made in the certificate.

6) "Enforceability by operation of law" means that the judgment is eligible for enforcement as if it had been given in the Member State where enforcement is sought (article 47 Brussels II bis). The judgment is not enforced "automatically", as the procedures for enforcement are governed by the law of the requested Member State. The enforcement laws of the EU Member States were left untouched by the Brussels II bis Regulation. Many of those laws make enforcement conditional on a court decision in the requested State. Enforcement may be stayed or stopped in exceptional cases where human rights are in issue. The radical interpretation given by the ECJ in the Povse and Aguirre/Pelz rulings leaves us with questions regarding the meaning of article 47 and the actual approach to be taken by enforcement bodies if they find that there is an immediate danger for the child. Is it realistic to require them to enforce "automatically" a provisional order which contradicts an order of the same type which has just been handed down by the courts of their own country?

7) The implication of the Council compromise was that a *provisional* return order handed down by the courts of the Member State of the child's habitual residence prior to the removal should be enforceable in the Member State of refuge *only* after the issuance of an exequatur in the latter State. The intention was that the checks provided for in article 23 should to be made in the exequatur proceedings.

8) The proceedings before the ECHR on Povse were about the judgment *on the merits of custody* which was finally handed down in Italy. See the ECHR judgment, point 69. The ECHR did not dwell on the provisional return order on which the ECJ answered a number of preliminary questions. Would the outcome of the ECHR proceedings have been the same if it had been asked to assess the provisional return order?

9) On the face of it, the ECJ's ruling that article 11, para 8, Brussels II bis applies to a provisional return order of the courts of the Member State of habitual residence prior to the removal, seeks to reinforce the return mechanism of the 1980 Hague Convention. In reality it brings the EU closer to an abandonment of the Hague system. This is a matter for regret. If, in the forthcoming revision of

Brussels II bis, exequatur were abolished in all matters relating to parental responsibility, the left-behind parent would resort to the courts of his own country immediately rather than seeking to obtain a return order in the State of refuge. It may be questioned whether such an approach would be conducive to balanced solutions which would, in the end, be accepted by the parties involved in an abduction case[5].

[1] The views expressed in this post are personal views of the author.

[2] For a detailed account see Peter McEleavy, The New Child Abduction Regime in the European Union, Journal of Private International Law, 2005, Vol.1, No.1.

[3] See the Explanatory Report by E. Perez-Vera, para 106, which states: "..the compulsory return of the child depends in terms of the Convention on a decision having been taken by the competent authorities of the requested State".

[4] Cf. the ECJ's correct statement in the Povse judgment that a "judgment on custody that does not entail the return of the child" in article 10 is to be understood as a final decision.

[5] See, on another regrettable development, Mr J.H.A. van Loon and S. De Dijcker, LL.M., The role of the International Court of Justice in the Development of Private International Law, Mededelingen van de Koninklijke Nederlandse Vereniging voor Internationaal Recht, No. 140, 2013, p. 109-110.

Latest issue Nederlands Internationaal Privaatrecht (2013/3)

The third issue of 2013 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht*, includes the usual overview of important

Dutch and European case law, as well as three articles on the following topics: The functioning of the European Small Claims Procedure in the Netherlands; the EU Regulation on Succession and Wills; and Child Protection Measures against the background of Article 8 ECHR.

X.E. Kramer & E.A. Ontanu, The functioning of the European Small Claims Procedure in the Netherlands: normative and empirical reflections, p. 319-328. The abstract reads:

The European small claims procedure was the first uniform adversarial procedure in the EU, introduced to increase the efficiency and to reduce the costs of cross-border small claims litigation in the Member States. The European Commission regards this procedure as an important potential contribution to access to justice in order to resolve small claims disputes. However, there are clear signs that this procedure is seldom used and the Commission seeks to improve its attractiveness. This paper focuses on the implementation and application of this European procedure in the Netherlands. Normative and empirical research has been conducted to assess how this procedure is embedded in the Dutch legal order and how it actually functions in practice and is perceived by the judiciary. The question is whether, from the Dutch perspective, this procedure meets the objectives of providing a simple, fast and low-cost alternative to existing national procedures, while respecting the right to a fair trial. The paper concludes with several recommendations for improvement.

P. Lokin, De Erfrechtverordening, p. 329-337. The English abstract reads:

This article focuses on (EU) Regulation No. 650/2012 dealing with the jurisdiction, applicable law, recognition and enforcement of decisions and the acceptance and enforcement of authentic instruments in matters of succession and the creation of a European Certificate of Succession. Is this Regulation, which shall be applicable to the succession of persons dying on or after 17 August 2015, a step forward for the Netherlands? In light of its application in the near future, the article gives a first introduction into the new rules and concentrates on some aspects of the Regulation which require more attention, such as the determination of one's last habitual residence and the transitional provisions when the deceased has made a choice for the applicable law prior to 17 August 2015.

R. Blauwhoff, Kinderbeschermingsmaatregelen in de Nederlandse IPR-rechtspraak in het licht van artikel 8 EVRM, p. 338-345. The English abstract reads:

Both private international law and human rights instruments may affect parental and children's rights in cross-border situations, yet reference to both types of instrument is seldom made in Dutch legal decisions regarding parental responsibilities. Accordingly, the aim of this article is foremost to explore the relationship between both types of instruments in cases other than child abduction cases on the basis of an analysis of (Dutch) case-law, since the entry into force of the 1996 Convention on the International Protection of Children (1st of May 2011) and under reference to developments in case-law of the European Court of Human Rights (ECtHR) with regard to Article 8 ECHR. It is ventured that courts should have greater regard for the human rights dimension underpinning private international law decisions, especially in cases where tension arises between the law of the state of the child's present and former habitual residence. At the same time, the classic focus of the ECtHR on the accountability of national states sometimes falls short of taking into account the progress made in the field of cross-border co-operation in the ambit of the 1996 Hague Convention, especially in the area of cross-border contact arrangements.

Civil Justice in the EU – Growing and Teething?

This post has been jointly drafted by Gilles Cuniberti, Xandra Kramer, Thalia Kruger and Marta Requejo.

Civil Justice in the EU – Growing and Teething? Questions regarding implementation, practice and the outlook for future policy is the title of the conference held in Uppsala, Sweden, on Thursday and Friday last week, co-organised by the Swedish Network for European Legal Studies in collaboration with the Faculty of Law at Uppsala University and the Max Planck Institute

Luxembourg for International, European and Regulatory Procedural Law (see Prof. Cuniberti's announcement with the program here). This has been the first conference organized by the Max Planck Institute Luxembourg outside of the Grand Duchy.

After the formal opening of the conference by **Antonina Bakardjieva Engelberkt**, Stockholm University, Chairman of the Swedish Network for European Legal Studies, Prof. **Burkhard Hess**, Executive Director of the MPI Luxembourg, delivered the keynote address, centered on the current situation of a European procedural law which transgresses the mere coordination of the national procedural systems. In the European framework the national systems do not appear any longer to be self-contained and self-standing: in many respects, European law ingresses and transforms the adjudicative systems of the EU-Member States. Today, European lawmaking often triggers far-reaching reforms of the national systems (Consumer ADR being one example). In addition, the ECJ transforms the adjudicative systems of the Member States as more and more areas of private and procedural law are communitarised and are subjected to its (interpretative) competence. On the other hand, the national procedures in the European Judicial Area are still divergent with regard to their efficiency. In this respect, the case-law of the ECHR on the right of a party to get a judgment in reasonable period of time has not helped to assimilate the level of judicial protection in the Member States. Yet, the different efficiencies of the national systems entail a growing competition among the "judicial marketplaces" in Europe which is reinforced by the European procedural instruments on the coordination of these systems.

Against this background, Prof. Hess stressed the importance of the Commissioner for Justice. Since the entry into force of the Lisbon Treaty, the Commissioner for Justice implements a genuine lawmaking policy, not only with regard to cross-border litigation under Article 81 TFEU, but also with regard to the supervision of the national judicial systems. A new tool is the so-called judicial scoreboard aimed at the evaluation of the adjudicative systems of the EU-Member States. Although this scoreboard does not provide for substantial new information (the data are largely borrowed from the Council of Europe), the political ambition goes further: The Commission understands its mission in a comprehensive way covering all areas of dispute resolution, including the efficiency and the independence of the national court systems.

Prof. Hess went on to say the if the development of the European procedural law is regarded, not from the number of the instruments enacted so far, but from a systematic point of view, the balance would appear less successful. Until now, the law-making of the Union has been mainly sectorial and the choices of legislative activities have not been comprehensive, but rather incidental. At present, there is no master-plan, no roadmap; a comprehensive and systematic approach is lacking. This situation has been criticized by the legal literature and alternatives have been discussed and proposed. All in all, a more systematic approach with a better coordination of the EU-instruments at the horizontal and the vertical level is needed. And it is the task of procedural science to discuss the different regulatory options with regard of their feasibility and efficiency in order to improve and to systemize European law-making in this field. Thus, the Director of the MPI Luxembourg announced that regulatory approaches of the European law of civil procedural are going to become a major research area of the Institute.

The first panel, which was chaired by **Marie Linton** (University of Uppsala), carried the title ***Avoiding Torpedoes and Forum Shopping***. The four speakers focused on two topics. First, **Trevor Hartley** (London School of Economics) and **Gilles Cuniberti** (University of Luxembourg) explored whether the remedy established by the Recast of the Regulation to reinforce choice of court agreements would indeed eliminate torpedoes, whether Italian or not. While agreeing that the new remedy would probably be satisfactory in simple cases, the speakers debated whether problems might still arise in case of conflicting or complex clauses. Then, **Erik Tiberg** (Government offices of Sweden) and **Michael Hellner** (University of Stockholm) discussed the consequences of the new rules of jurisdiction with respect to third states.

The second panel, addressing alternative dispute resolution, was composed of three speakers. In his speech **Jim Davies**, University of Northampton, provided a broad historical background of the recently adopted Directive on ADR for consumers (Directive 3013/11/EU), starting from the 1998 and 2001 European Commission's Recommendations and moving on to the Commission's Proposal and the Directive's final text. Thereafter, **Antonina Bakardjieva Engelbrekt**, Stockholm University, tackled the new rules on ADR with a view to assessing how these new provisions provide a further step toward network governance in EU consumer protection policy, especially highlighting the role of consumer organizations. Finally, **Cristina M. Mariottini**, Max Planck Institute

Luxembourg, addressed two ADR systems concerning disputes over top level domains, and namely ICANN's New gTLD program and dispute resolution system and EURid's ADR system for disputes concerning the ".eu" domain, with a view to assessing whether and to what extent the protection of consumers has been kept into consideration within these systems.

The third panel, entitled *Simplified procedures and debt collection – much ado about nothing?,* brought together four speakers. **Mikael Berglund** (Swedish Enforcement Authority) noticed that the European enforcement order and the European order for payment procedure are not frequently used in Sweden; on the European small claims procedure there are no reported cases at all. He explained that creditors do not find it worth the time and money because there is no reliable information on the debtor's assets in other Member States; also, that they have problems finding the competent enforcement authority. He presented several practical ideas to cure the enforcement 'Achilles' heel' of EU law. **Carla Crifó,** of the University of Leicester, provided information and several – limitedly available – data on the implementation and enforcement of the European order for payment procedure and the small claims procedure in England and Wales. This shows that little use is made of these European procedures. In this context, Ms Crifò stressed the problem of the use of English in European instruments which does not necessarily correspond to the legal terminology used in the United Kingdom. English courts and practitioners are usually not well-acquainted with these procedures. Against the background of the current "euroscepticism" in England, this situation is not likely to improve. **Xandra Kramer,** of the Erasmus University (Rotterdam)**,** addressed the potential of the uniform European procedures in view of their scope and limitation to cross-border cases. She presented data on the use and appreciation of these procedures in the Netherlands acquired in empirical research and gave recommendations for improvement. Though particularly the use of the European small claims procedures is disappointing up to date, she stressed that one should not be too pessimistic since the European procedures are very new compared to national procedure and the building of a well-functioning European procedural order will take time and efforts. **Cristian Oro Martinez**, from the MPI Luxembourg, reviewed some of the aspects of the Regulation on the European Small Claims Procedure which, besides the general lack of awareness of the instrument, may account for its relatively small success. These issues include, among others, problems such as the territorial scope of application of the Regulation (narrow definition of cross-border cases), the

limitation of the right to an oral hearing with regard to non-consumer cases, or the problems arising out of the interface between the Regulation and other EU instruments (especially the Brussels I Regulation), as well as domestic procedural law

Two other panels took place simultaneously after the coffee break, on Family Law and Collective Redress respectively. The first one was composed of three speakers. **Katharina Boele-Woelki,** of Utrecht University, discussed the issue of partial harmonisation, referring to the example of the Rome III Regulation. As today, only 16 of 28 Member States are participating in the Rome III framework. She indicated the different political reasons underlying Member States' choices whether to participate in the Regulation or not. She also showed that fragmented harmonisation is not only the result of enhanced cooperation, but also, in other instruments, of the particular status that some EU Member States (Denmark, Ireland and the UK) have with respect to civil justice. Thus, the application of enhanced cooperation in the Area of Freedom, Security and Justice is a matter of concern. Thereafter **Thalia Kruger,** of the University of Antwerp, discussed the element of choice in the Rome III Regulation, showing that a rule that looks clear at first sight has many underlying uncertainties. The debate raised the issue of how habitual residence can be ascertained as a preliminary matter for purposes of jurisdiction, without requiring too cumbersome an investigation by the judge (with a waste of time as a result).

The third speaker, **Björn Laukemann** of the Max Planck Institute in Luxembourg, addressed the issue of the new Succession Regulation and the European Certificate of Succession. The debate on the subject pointed out the problem of EU certificates that remain valid for only six months, while some national certificates, which will co-exist with the EU certificates, are eternally valid. Another question related to this co-existence is the issue of contradictory certificates (EU and national).

The second track of the fourth section addressed some issues relating to collective redress, especially in the light of the Commission's Recommendation of 11 June 2013. **Eva Storskrubb**, from Roschier, assessed the potential impact of the Recommendation highlighting that, although it is non-binding, its rather prescriptive formulation and the Commission's commitment to review its implementation by Member States may entail significant changes in the domestic regulation of collective actions. **Rebecca Money-Kyrle**, from the University of

Oxford, addressed some possible consequences of the Recommendations' approach to legal standing. She pointed out that the basic principles set out in the text may force to do away with existing domestic procedures which are efficient. Moreover, they fail to establish satisfactory rules as regards commonality criteria or cross-border cases. **Laura Ervo**, from Örebro University, provided several arguments to support an opt-out approach to collective redress, hence critically assessing the Commission's Recommendation in this respect. She drew from models provided by Scandinavian legislation, especially the Danish authority-driven system, to support the idea that only opt-out can guarantee access to justice for all damaged parties. Finally, **Stefaan Voet**, from Ghent University, dealt with different systems of funding of collective actions. He evaluated their compatibility with the principles laid down in the Recommendation on lawyers' remuneration and third-party funding, critically assessing the latter for being sometimes too strict.

Under the heading *The Quest for Mutual Recognition,* with Dean **Torbjörn Andersson** as chairman, the first panel of Friday morning discussed several issues related to mutual trust and mutual recognition. **Marie Linton**, from the Uppsala University, addressed the balance between efficiency and procedural human rights in civil justice, particularly in the field covered by the Brussels I Regulation and under the future Brussels I bis Regulation. **Marta Requejo Isidro**, MPI Luxembourg, presented the ECtHR decision of 18 June 2013, *Povse*, pointing out questions that remain open after it. As for the most important, i.e., its possible influence on the abolition of exequatur in civil and commercial matters, Prof. Requejo adopted a somewhat skeptical position on a wide reach of the ECtHR decision, both in the light of the features characterising the Brussels I bis Regulation (although it may still be disputable to what extent there is room for discretion at the requested State), and the reasoning of the Court itself. Finally, **Eva Storskrubb**, Senior Associate, Roschier (Stockholm), dealt with the evolution of mutual recognition as part of a regulatory strategy comparing its Internal Market historical context with the current civil justice context.

The conference ended with a presentation of Future Measures and Challenges by Mr. **Jacek Garstka**, Legislative Officer, DG Justice, European Commission, and **Signe Öhman**, Legal Counsellor, Permanent Representation of Sweden, Brussels. Announcements were made regarding the immediate release of several

Commission's Reports – among others, on the Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure; on Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), and on the Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000. Mr. Garstka also referred to future areas of concern for the Commission, such as justice as a means to enhance economic growth, the legal framework of insurance contracts, and the area of insurance law. Ms. Öhman recalled the forthcoming end of the Stockholm program, and ventured an opinion on the follow up. She also pointed out some topics on the Council agenda -data protection, the rights of citizens, judicial networking… This panel was chaired by **Prof. Antonina Bakardjieva-Engelbrekt**, Stockholm University, who pronounced the closing remarks.

Two academic events in Ferrara concerning the Succession Regulation

On 8 November 2013 the Department of Law of the University of Ferrara, in cooperation with the Council of Notaries of Ferrara, will host a workshop (in English) and a roundtable (in Italian) on issues relating to Regulation No 650/2012 on successions.

The workshop (the third, this year, in a series of workshops on topics in the area of private international law: see this post for previous seminars) will feature Anatol Dutta (Max-Planck-Institut fur ausländisches und internationales Privatrecht. Hamburg), as main speaker, and Antonio Leandro (University of Bari) as discussant, with Luigi Fumagalli (University of Milan) presenting some

concluding remarks. The topic of the workshop is “The European Certificate of Successions – A didactic play on the challenges to forge integrated private international law regimes”.

The roundtable will focus on the relevance of the new rules on cross-border successions to the planning of intergenerational passage in family businesses (“Passaggio generazionale nell’impresa e successione transfrontaliera – Problemi e prospettive alla luce del Regolamento (UE) n. 650/2012”). Speakers include Francesco Salerno (University of Ferrara), Paolo Pasqualis (Italian Council of Notaries), Fabrizio Vismara (University of Insubria) and Lorenzo Schiano di Pepe (University of Genova).

The roundtable will provide the opportunity to present a recently published collection of essays on Regulation No 650/2012 (see this post).

For more information: *pilworkshops@unife.it*.

Second Issue of 2013’s Rivista di diritto internazionale privato e processuale

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

The second issue of 2013 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released. It features three articles and two comments.

In her article *Nerina Boschiero,* Professor of International Law at the University of Milan, addresses the issue of “Corporate Responsibility in Transnational Human Rights Cases. The U.S. Supreme Court Decision in *Kiobel v. Royal Dutch Petroleum*” (in English).

With a decision based upon the consideration that all the significant conduct occurred outside the territory of the United States, in Kiobel the U.S. Supreme Court unanimously ruled that the presumption against extraterritoriality applies to claims under the Alien Tort Statute, and that nothing in the statute refutes that presumption. However, in its decision the Supreme Court did not directly address the issue whether a corporation can be a proper defendant in a lawsuit under the ATS. In this article, the Author begins by providing a substantial "pre-Kiobel" analysis of the business-human rights relationship. Furthermore, in addressing – with reference to the Kiobel case – the issues of corporate liability and extraterritorial jurisdiction over abuses committed abroad, the Author provides a detailed description of the governments' positions on universal civil jurisdiction, also providing a critical evaluation of the arguments put forth by the EU Member States on the extraterritorial application of ATS. As the Author illustrates, this decision is far more complex and problematic than it may appear: it in fact leaves a number of questions open on what exactly remains of the ATS, as well as various uncertainties due to the substantive differences between the majority opinion and the different concurring opinions, difficult to be reconciled and harmonized, especially from an European standpoint.

In his article *Andrea Bonomi*, Professor of Comparative Law and Private international Law at the University of Lausanne, provides an assessment of the new EU Regulation on succession matters in "Il regolamento europeo sulle successioni" (The EU Regulation in Matters of Successions; in Italian).

The European Regulation on Succession Matters, adopted on 4 July 2012, will be applicable from 17 August 2015 to the succession of persons who die on or after this date. The final text reflects in its main features the Commission proposal of 2010, albeit with several amendments. Among the most important novelties, we will mention the restructuring of the jurisdictional scheme, the introduction of an exception clause and of some specific provisions concerning wills and the formal validity of mortis causa provisions, as well as the admission of renvoi. Several useful clarifications have also been included, sometimes in the text of the Regulation and sometimes in the preamble, inter alia with respect to the definition of "court", the determination of the last habitual residence of the deceased, the "acceptance" of evidentiary effects of authentic instruments, and the purpose and effects of the European Certificate of

Succession. Overall, the Regulation is a very detailed and well-balanced instrument. In the majority of cases, the adoption of the habitual residence as the main criteria for the allocation of jurisdiction and the determination of the applicable law will allow national courts in the Member States to regulate the succession according to their domestic law. Derogations from this approach result in particular from the admission of party autonomy, and are mainly provided for estate planning purposes. The unification of the conflict of law rules in the Member States as well as the extension of the principle of mutual recognition to decisions and authentic instruments to succession law matters will also significantly contribute to legal certainty, and further estate planning. Last but not least, the European Certificate of Succession will greatly facilitate the transnational administration of estates by heirs and representatives. On the other hand, the main weaknesses of the new instruments concern the relationships with non-Member States, and with those Member States who are not subject to the Regulation (Denmark, Ireland, and the United Kingdom); potential conflicts with the courts of those States, due to the wide reach of the Regulation's jurisdictional rules, cannot be avoided through lis pendens and recognition mechanisms. It is therefore to be hoped that the efforts of harmonization in the area of international succession will continue under the auspices of the Hague Convention at a global level.

In her article *Francesca C. Villata*, Professor of International Law at the University of Milan, addresses the reorganisation of the Greek sovereign debt in "Remarks on the 2012 Greek Sovereign Debt Restructuring: Between Choice-Of-Law Agreements and New EU Rules on Derivative Instruments" (in English).

The paper analyses – from a choice-of-law perspective – the restructuring mechanism implemented for the Greek sovereign debt bonds in 2012. In this respect, on one hand, the role played by parties' autonomy in determining the law applicable both to contractual and to non-contractual matters is emphasised; on the other hand, an analysis of the relevant EU Regulations on CDSs and derivative instruments, as wells as of the Mi-FID II and MiFIR proposals is conducted mainly through the lens of unilateral mandatory rules following the lex mercatus approach. The paper concludes with an auspice for the adoption of uniform rules on the insolvency or pre-insolvency of states, providing for agreed-upon restructuring processes.

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

Olivia Lopes Pegna, Researcher of International Law at the University of Florence, "L'interesse superiore del minore nel regolamento n. 2201/2003" (The Superior Interest of the Child in Regulation No 2201/2003; in Italian).

> *The European Union is increasingly concerned with private international law instruments regarding, directly or indirectly, children. The UN Convention on the rights of the child (Art. 3) and the European Charter of Fundamental Rights (Art. 24) require that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests be a primary consideration. It is therefore mandatory for EU Institutions, and for national judges, to construe and apply EU legislative instruments in compliance with this principle. The present work concerns rules on jurisdiction and enforcement of foreign judgments that expressly refer to the best interests of the child in order to operate, and in particular the rules set in Regulation No 2201/2003 (Brussels II-bis) concerning decisions on parental responsibility. It tries to show how, and to what extent, "the best interests of the child" principle introduce flexibility, or even derogate, to the traditional private international law methods. The case-law of the European Court of Justice on the Brussels II-bis Regulation is examined, together with the main decisions of the Italian courts, in order to evaluate to what extent effectiveness to the aforementioned principle is guaranteed in the application of the Regulation's provisions. It is also suggested that the Regulation shall be construed in a way that permits, in some circumstances, the participation of the child to the proceedings for recognition and enforcement of foreign decisions.*

Nicolò Nisi (PhD candidate at the Bocconi University), "La giurisdizione in materia di responsabilità delle agenzie di rating alla luce del regolamento Bruxelles I" (Jurisdiction over the Liability of Rating Agencies under the Brussels I Regulation; in Italian).

> *A recent judgment delivered by the Italian Supreme Court decided upon the jurisdiction over damage claims brought by investors against rating agencies based in the U.S., allegedly liable for issuing inaccurate ratings capable of having a significant impact on their investment decisions. In this regard, the new Regulation (EU) No 462/2013 amending Regulation (EC) No 1060/2009 on*

credit rating agencies has introduced a new Article 35-bis specifically addressing the liability of rating agencies but it failed to provide some guidance with respect to private international law issues. The Italian Supreme Court declined its jurisdiction on the grounds of Article 5(3) of Regulation (EC) No 44/2001 ("Brussels I") and ruled that the "place where the harmful event occurred" is localized at the place of the initial damage, i.e. where the shares were first purchased at an excessive price, without any reference to the seat of the depositary bank, nor to the place where the rating is issued. This judgment turned out to be very interesting since it was the first Italian judgment to deal with jurisdiction issues relating to liability of rating agencies under the Brussels I Regulation and it provided for the opportunity to make a contribution to the discussion on the interpretation of Article 5(3) in case of financial torts and purely financial losses.

Indexes and archives of the RDIPP since its establishment (1965) are available on the website of the Department of Italian and Supranational Public Law of the University of Milan.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (5/2013)

Recently, the September/October issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

- ***Robert Magnus*:** "Choice of court agreements in succession law"

The EU Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (Succession Regulation), most recently adopted by the European Parliament and the Council of the European

Union introduces the possibility for parties of a probate dispute to conclude a jurisdiction agreement. This article compares the new rules on jurisdiction agreements with the current legal situation in Germany, where such agreements in succession matters have not been much in use. As the Succession Regulation is for several reasons rather unsatisfactory the article further discusses more convincing alternatives (e.g. prorogation by the deceased in testamentary dispositions, arbitration agreements).

- ***Maximilian Eßer***: "The adoption of more far-reaching formal requirements by the EU Member States under the Hague Protocol on the Law applicable to Maintenance Obligations"

Art. 15 of Regulation (EC) No 4/2009 refers to the Hague Protocol of 2007 for the determination of the law applicable to maintenance obligations. The Protocol was ratified by the EU as a "Regional Economic Integration Organisation". The formal requirements in Art. 7 (2) and Art. 8 (2) of the Protocol have to be considered as minimum standards. In order to protect the weaker party from a hasty and heedless choice of applicable law on maintenance obligations, the choice-of-law agreement should from this perspective be recorded in an authentic instrument. In his essay, Eßer illustrates that neither public international law nor European Union law prevent the EU Member States from adopting more farreaching formal requirements.

- ***Herbert Roth:*** "Der Einwand der Nichtzustellung des verfahrenseinleitenden Schriftstücks (Art. 34 Nr. 2, 54 EuGVVO) und die Anforderungen an Versäumnisurteile im Lichte des Art. 34 Nr. 1 EuGVVO" – the English abstract reads as follows:

The European Court of Justice has correctly decided, that the Court of the Member State in which enforcement is sought may lawfully review the effective delivery of the initial trial document even if the exact date of service is specified in the certificate referred in Article 54 of the COUNCIL REGULATION (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. The Court also held convincingly, that the recognition and therefore enforcement of a default judgement is normally not manifestly contrary to public policy in the sense of Article 34 No 1 of the Council Regulation 44/2001 despite the fact that the

default judgement itself does not provide any legal reasoning. Exceptions are necessary if the defendant had no effective remedy against the decision in the Member State of origin.

- ***Jörg Pirrung:*** "Procedural conditions for compulsory placement of a child at risk of suicide in a secure care institution in another EU Member State"

Judgment and View in case S.C. clarify important questions of judicial cooperation within the EU in child protection matters. According to the ECJ, a judgment ordering compulsory placement of a 17 year old child in a secure care institution in another Member State according to Article 56 of the Brussels IIa regulation N 2201/2003 must, before its enforcement there against the will of the child, be declared to be enforceable/registered in that State. Appeals brought against such a registration do not have suspensive effect. Further activity of the EU and/or national legislators should ensure, by developing concrete rules, that the decision of the court of the requested State on the application for such a declaration of enforceability shall be made with particular expedition. Though there may be differences of opinion as to certain aspects regarding the answer given by the ECJ in point 3 of the operative part of its decision, – one might have preferred the way via enforcement of a provisional protective measure taken, on the basis of the recognition of the decision of the State of origin, by the State requested, such as the English decision of 24 February 2012 – the outcome of the procedure confirms the general impression that the ECJ has developed an effective way of interpretation and application of the regulation. After the entry into force for 25 EU States of the Hague Convention of 19 October 1996 on the Protection of Children, courts in EU States should, as far as possible, try to apply the EU regulation in conformity with the principles of this international treaty.

- ***Urs Peter Gruber:*** "Die perpetuatio fori im Spannungsfeld von EuEheVO und den Haager Kinderschutzabkommen" – the English abstract reads as follows:

In a case on the visiting rights of one parent to see the children in the custody of the other parent, the OLG Stuttgart was confronted with an intricate question of jurisdiction. Right after the commencement of the trial in Germany,

the child had moved from Germany to Turkey and had acquired a new habitual residence there. The court had to decide whether this change of habitual residence was of relevance for its jurisdiction.

Pursuant to the Brussels IIa Regulation, which adheres to the principle of "perpetuatio fori", such a change does not affect jurisdiction of the court seised. However pursuant to the Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, in such a case, jurisdiction shifts automatically to the state in which the new habitual residence of the child is located.

Therefore, the OLG Stuttgart had to decide whether jurisdiction was governed by the Brussels IIa Regulation or rather by the above mentioned convention on the protection of minors which both Germany and Turkey are parties of. The OLG Stuttgart held that when defining the exact scope of application of the Brussels IIa Regulation, one should consider the rights and obligations of member states arising from agreements with non-member states. Therefore, in the case at hand, the court held that the jurisdictional issue was not governed by the Brussels IIa Regulation; in order to ensure that Germany complied with its contractual duties in relation to Turkey, it applied the convention on the protection of minors. Consequently, it declined jurisdiction in favour of the competent Turkish courts.

- ***Fritz Sturm***: "Handschuhehe und Selbstbestimmung" – the English abstract reads as follows:

For centuries, the aristocracy used proxy marriages to anticipate the ceremony before the bride and the groom had met. Today proxy marriages are utilized for immigration purposes.

In many countries, such as Germany, Austria, Switzerland and the UK, this form of marriage is not permitted. Nevertheless, those countries recognize proxy marriages performed in a state where such marriages are permitted, if the representative has been given precise instructions. The US also apply the lex loci celebrationis, whereas French conflict of laws always requires the physical presence of the French spouse (Art. 146-1 C.civ.).

It is interesting to note that in cases where the representative did not receive

precise instructions, certain German judges refer to the ordre public. Indeed, the prevailing German doctrine refuses to view the question of the validity of a marriage solemnised by a representative with such unlimited power as a question of form, but sees it as a problem of substantive validity, and infers from the lack of the spouses' consent that such a marriage is null and void according to Art. 13 EGBGB.

However, as this paper shows, the prevailing doctrine has to be rejected in this respect. It goes astray as it does not reflect the fact that a marriage concluded through a representative authorized to independently choose the bride or groom himself may in fact later be approved by the spouse represented by him. This power of approval has to be qualified as a question of form and is therefore subject to the lex loci celebrationis.

An additional argument against this doctrine is that, if the representative has the aforementioned freedom of choice, Art. 13 EGBGB does not lead to a void marriage, but to a relationship which can only be dissolved by divorce.

- ***Carl Friedrich Nordmeier***: "Estates without a Claimant in Private International Law – Hidden Renvoi, § 29 Austrian PILC and Art. 33 EU Succession Regulation"

According to § 1936 German Civil Code, estates without a claimant are inherited by the State, whereas § 760 Austrian Civil Code provides a right to escheat for assets located in Austria. In addition, § 29 Austrian Code of Private International Law (PILC) determines the lex rei sitae as applicable, including the question if there are heirs. The same is true for laws that do not have a rule corresponding to § 29 PILC but contain hidden renvois. Art. 33 of the new European Succession Regulation (ESR) solves the problem of how to treat estates without a claimant in transborder cases only partially. It is recommended to apply the lex rei sitae in conflict cases not covered by the rule. Art. 33 ESR is applicable if only a part of the estate remains without claimant or if assets are located in third countries. Sufficient protection for creditors of the estate is granted as long as they are entitled to seek satisfaction of the assets which a State appropriates. Overall, § 29 PILC provides a better solution for dealing with estates without a claimant than Art. 33 ESR.

- ***Dieter Henrich:*** "Familienrechtliche Vorfragen für die Nebenklageberechtigung in einem Strafverfahren"
- ***Mathias Reimann***: "The End of Human Rights Litigation in US Courts? The Impact of Kiobel v. Royal Dutch Petroleum Co., 569 U.S. — (2013)"

For three decades, the Alien Tort Claims Act provided non-US citizens with a jurisdictional basis to bring (private) tort actions in US federal courts for violations of international human rights norms against alleged perpetrators, both foreign and domestic. Especially suits against multinational corporations for aiding and abetting human rights violations committed by governments in developing countries against the local population had become numerous and turned into a major irritant in boardrooms and government offices.

In a landmark decision announced in April of 2013, the US Supreme Court decided that the Alien Tort Claims Act does not apply extraterritorially. Since virtually all cases brought by aliens arose and arise from acts committed outside of the United States, at first glance it seems that the Court has rendered the lower courts' extensive 30-year jurisprudence under the statute all but moot. This is a major victory in particular for multinational corporate defendants as well as a major defeat for human rights protection in US courts.

Yet, it is far from clear whether the decision really amounts to a death sentence for tort-based human rights litigation in US courts. The split decision may leave room for some claims under the statute, e.g., if the acts were planned or knowingly tolerated by an American defendant on US soil. It also does not affect claims under the (more narrowly drafted) Torture Victim Protection Act of 1991, nor does it bar actions brought in the state courts under domestic (instead of international) law. Last, but not least, the decision cannot destroy the lasting legacy of the case law under the Alien Tort Claims Act which not only generated important decisions in international law but also increased the awareness of the human rights implications of foreign investment.

- ***Wolfgang Winter:*** "Einschränkung des extraterritorialen Anwendungsbereichs des Alien Tort Statute" – the English abstract reads as follows:

On April 17, 2013 the U.S. Supreme Court issued its decision in Kiobel et al. v.

Royal Dutch Petroleum et al. regarding the extraterritorial scope of the Alien Tort Statute, a provision dated 1789. The Court unanimously dismissed the complaint, filed by Nigerian citizens residing in the United States, alleging that the defendant non-U.S. companies aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria. The Court's majority applied the rule of presumption against extraterritoriality to claims under the Alien Tort Statute and found that this presumption was not rebutted by the text, history, or purpose of the Alien Tort Statute. The minority vote required a nexus to the United States which did not exist in the present case.

The decision has to be applauded. It continues a recent development of U.S. Supreme Court decisions, avoids friction with the sovereignty of other nations, provides legal certainty and is in line with the historical context of the Alien Tort Statute.

- ***Ulrich Spellenberg***: "Consequences of incapacity to the validity of contract and set-off"

The judgment of the Austrian Supreme Court could have been an opportunity for the Court to rule on two major questions of private international and procedural law which are much discussed in Germany and much less in Austria, namely what law to apply on the consequences of incapacity to contract and whether international jurisdiction is necessary to plead a set-off. Unfortunately the Court left the first one open, as it could, and did not even mention the second. Nevertheless, the judgment suggests remarks on these problems as well in Austrian as in German law.

- ***Leonid Shmatenko***: "Die Auslegung des anerkennungsrechtlichen ordre public in der Ukraine" – the English abstract reads as follows:

The rather undefined legal term of „public policy" leads to a great legal uncertainty in the Ukrainian jurisprudence and jeopardizes the recognition and enforcement of arbitral awards. By taking a clear position upon what falls under the public order and what not, the newest decision of the Ukrainian High Specialized Court on Civil and Criminal Cases is somewhat revolutionary. Even though it does still not provide a clear definition of the former, it provides a first glimpse of hope that someday Ukrainian courts may find one and thus,

guarantee legal certainty for the recognition and enforcement of foreign arbitral awards and lead to an arbitration friendly environment.

- ***Sebastian Krebber***: "The application of the posting-directive: Conflict of Laws, Fundamental Freedoms and Assignment of the Tasks among the Competent Courts"

The decision of the OGH deals with the application of the posting-directive in the country of reception and reveals how uncertain the handling of the directive still is, because it duplicates employment conditions: on the one hand, the employment conditions of the law applicable to the employment contract and, on the other hand, the employment conditions of the law of the country of reception. The article attempts to show that the relationship between the general legal theory of the law of fundamental freedoms and the posting directive developed in Laval, Rüffert and above all in Commission/Luxembourg makes it possible to view the posting directive as a legal instrument whose only task is to secure the application of the employment conditions of the country of reception as set out in Art. 3 of the directive. Thus, the subject of the proceedings of the court in the country of reception with jurisdiction under Art. 6 of the posting-directive is limited to the enforcement of Art. 3 of the directive. The issues of the law of fundamental freedoms, conflict of laws and substantial law raised by the duplication of employment conditions are to be dealt with by the courts of general jurisdiction of Art. 18 et seq. Brussel I regulation.

- ***Reinhold Geimer***: "The Registrability of a Real Estate Purchase Agreement Established by a German Notary with the Spanish Land Register – A Comment on Tribunal Supremo, 19/06/2012 – 489/2007"

The Spanish Supreme Court confirmed that registrations of ownership with the Spanish land register may be based on authentic instruments drawn up by German civil law notaries. In spite of some (misleading) comments on European law, the judgment heavily relies on specific provisions of Spanish law on the access of foreign instruments to the Spanish land register. According to the Spanish Supreme Court, any authentic instrument of foreign origin producing the same evidentiary effects as a Spanish authentic instrument can be registered with the land register. This result reflects current Spanish practice and is due to the effects of registration: registration in the Spanish land register

is not needed to establish ownership, but only entails bona-fide effects. This is why the Spanish Supreme Court decision has no effects on German practice where registration is needed to complete the transfer of ownership. As a result, German register law makes a distinction between evidentiary effects of authentic instruments and substantive law requirements they have to meet. This distinction does not contravene European law as solely the Member States are competent to determine the rules according to which ownership is transferred.

- ***Burkhard Hess***: "Das Kiobel-Urteil des US Supreme Court und die Zukunft der Human Rights Litigation – Tagung am MPI Luxemburg"
- ***Erik Jayme/Carl Zimmer:*** "Die Kodifikation lusophoner Privatrechte – Zum 100. Geburtstag von António Ferrer Correia"
- ***Deniz Deren/Lena Krause/Tobias Lutzi:*** "Symposium anlässlich der 100. Wiederkehr des Geburtstags von Gerhard Kegel und der 80. Wiederkehr des Geburtstags von Alexander Lüderitz vom 1.12.2012 in Köln"
- ***Jens Heinig***: "Die Wahl ausländischen Rechts im Familien- und Erbrecht"

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.

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.

South African Constitutional Court rules on taking of evidence

It is not every day that a Constitutional Court rules on a matter of evidence. The case *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others* concerned the taking of evidence in South Africa for a criminal investigation in Belgium. It was on a matter of common interest in South Africa and Belgium: diamonds. In the course of a criminal investigation in Belgium, the authorities issued a letter of request for evidence in South Africa. This concerned evidence that had to be produced by Brinks Southern Africa, established in South Africa. This company was not involved in the suspected criminal activities, but transported diamonds for Tulip from Angola and Congo to the United Arab Emirates. Tulip was the intermediary of Omega, the Belgian company who allegedly imported the diamonds under false certificates to conceal their real value and therefore the company's taxable profit. The documents that the Belgian authorities sought to be transferred concerned invoices by Brinks Southern Africa to Tulip.

The request was approved by the Minister of Justice and given to a magistrate to carry out. The magistrate issued a subpoena to an employee at Brinks. Before she could submit the documents, Tulip got wind of the request. After negotiations and a temporary interdict by the High Court for Brinks not to transfer the documents, Tulip approached the court for a review of the approving of the request. The issue then arose whether Tulip had standing under the Constitution or under common law to bring these proceedings.

Some of the issues in the case concern criminal procedure law, but the matter of standing is also of interest for civil cases, to my mind.

The judgment (issued on 13 June 2013) is available on the website of the Constitutional Court and on the Legalbrief site.