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.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (3/2013)

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

- ***Christopher Selke***: "Die Anknüpfung der rechtsgeschäftlichen Vertragsübernahme" – the English abstract reads as follows:

> *More than fifty years after Konrad Zweigert's essay on the applicable law to the assignment of contracts, some issues are still unsettled. The following article gives an overview of previous comments and focuses on the scope of application. It further emphasizes the crucial question, how to determine the applicable law in the case of a cross-border assignment of a contract. In this connection, the role of the principle of party autonomy shall be challenged more carefully than it has been in the past – which does not inevitably mean that it has to be completely dismissed. There just has to exist a subsidiary objective international private law rule in the case that the parties' choice of law leads to difficulties. Therefore, this article concludes with a proposal for such a rule.*

- ***Wulf-Henning Roth:*** "Jurisdiction and Applicable Law in Cross-Border

Defamation and Breach of Personality Rights”

The article discusses the judgment of 25 October 2011, C-509/09 and C-161/10, eDate Advertising, in which the European Court of Justice clarifies two important issues of European private international law concerning cross-border injunctions and damages claims with regard to defamation and breach of personality rights on the internet. The first issue concerns the interpretation of Article 5 no. 3 of the Brussels I Regulation 44/2001/EC which establishes a special concurrent jurisdiction of the courts of the Member States in matters of tort liability. According to the Court, an applicant may bring an action before the court where the publisher is domiciled or before the courts of all Member States where the internet information is accessible, however restricted to the infringement of the personality rights in the relevant territory (“mosaic principle”). Alternatively, the applicant may also bring an action for an injunction or for all damages, incurred worldwide, before the court where he or she has his or her centre of interests. As for the applicable law concerning tort liability, the Court clarifies the intensely discussed meaning of Article 3 (1) and (2) of the e-commerce Directive 2000/31/EC. The Court holds that both provisions do not contain conflict of law rules. Rather, Article 3 (1) contains an obligation of the Member State where the internet provider has its seat of business to ensure that the internet provider complies with the national provisions applicable in that Member State. And Article 3 (2) allows that the Member States where the internet information is accessed may apply their own substantive law applicable to the infringement of personality rights, but not in such a way that the interstate provision of internet services is restricted.

- ***Karl-Nikolaus Peifer:*** *“*International Jurisdiction and Applicable Law in Trademark Infringment Cases”

The German Federal Court had to deal with questions of international jurisdiction and applicable law in a trademark infringement case based upon the broadcasting of an Italian game show which was available in Germany. The Court found that German courts had jurisdiction upon the case and might apply national trademark law because trademark interests were affected in Germany. The result is arguable. However, it demonstrates that even codified rules in IP-Law leave substantial insecurities with regard to international harmony as long as IP-laws have territorial reach only.

- ***Oliver L. Knöfel***: "The European Evidence Regulation: First Resort or Last?"

In Continental Europe, treaties and other devices of judicial assistance in the obtaining of evidence abroad have traditionally been understood as tools to prevent intrusions into another State's authority and territory. Today, there are diverging views as to whether or not the relevant legal instruments designed for civil and commercial matters, such as the Hague Evidence Convention and the European Evidence Regulation (Council Regulation [EC] No 1206/2001), have the quality of being exclusive, that is, the effect of barring any other means of gathering evidence abroad. The article reviews a judgment of the European Court of Justice (First Chamber) of 6 September 2012 (C-170/11), dealing with the mandatory or non-mandatory character of the European Evidence Regulation. The question at stake is whether a judge in a Member State must have recourse to the Regulation on each occasion that she wishes to take evidence that is situated in another Member State. The ECJ declared a Member State's court free to summon a witness resident in another Member State to appear before it in accordance with the lex fori processus, that is, without recourse to the Evidence Regulation. The author analyses the relevant comity issues, explores the decision's background in international law and in international procedural law, and discusses its consequences for the relationship to Third States, as well as for the traditional concept of judicial sovereignty.

- ***Gerald Mäsch:*** "The "Equitable Life" 2002 Scheme of Arrangement in the German Federal Court of Justice"

The German Federal Court of Justice's IVth Senate, in its decision of 15 February 2012, took the view that the High Court sanction of the English Insurance Company Equitable Life's 2002 voluntary solvent scheme of arrangement has no binding effect on a dissenting policy holder residing in Germany on the ground that art. 35 (1) and 12 of the Brussels I Regulation prevent its recognition. In this article, the author argues that, based on the European Court of Justice's ruling in "Group Josi Reinsurance", the Brussels I Regulation pro-visions on insurance contracts should instead be interpreted as not applying to collective procedures aiming at the financial redress of an insurance company where the individual policy holder's inferior knowledge of

insurance issues is irrelevant. The same interpretation applies – mutatis mutandis – for the consumer contract provisions (art. 35 (1), 15 Brussels I Regulation), whereas the position of the IVth Senate would make the restructuring of any English company by way of voluntary agreements under English law nearly impossible if a significant number of dissenting private investors from Germany is involved. The author calls upon German courts confronted with the issue of recognition of English solvent scheme of arrangements not to follow the IVth Senate but rather to seek a preliminary ruling by the ECJ.

- ***Herbert Roth***: "Problems concerning the certification as a European Enforcement Order under the regulation (EC) No 805/2004"

The reviewed order of the German Federal Supreme Court (BGH) is dealing with the revocation of a German decision fixing costs of an interim prohibition procedure, which was certified as an European Enforcement Order by German authorities. Both the result as well as the legal reasoning must be criticized for the excessive requirements concerning the information on legal remedies and the wrongfully denied cure of non-compliance with minimum standards. On the other hand the order of the local Augsburg trial court (Amtsgericht) is rightfully based on prevailing opinion of scholars and courts demanding only the formal service of the foreign judgement to the debtor in accordance with § 750 German Civil Procedure Code as a prerequisite of the execution of an European Enforcement Order. By contrast the formal service of the certification as an European Enforcement Order itself is no mandatory requirement of the later execution.

- ***Kurt Siehr:*** "Foreign Certificate of Succession for Estate in Germany?"

A Turkish citizen passed away in Turkey. The deceased had a bank account with a German bank in Munich. The plaintiff, a son adopted by the deceased, presented to the bank a Turkish certificate of succession and asked for payment of the account. The certificate of succession mentioned the plaintiff as the only heir. The defendant bank declined to pay and asked for a German certificate of succession (§ 2369 BGB) which may be granted for that part of the estate which is located in Germany. The County Court of Munich gave judgment for the

plaintiff. The Turkish certificate of succession has to be recognized under § 17 of the German-Turkish Succession Treaty of 1929 and the defendant is not allowed under principles of good faith to insist on the presentation of a German certificate of succession by the plaintiff.

The County Court decision has to be criticized. Certificates of succession in continental European law are quite different. The most advanced certificate is the German one which also served as a model for the European certificate of succession as adopted by the European Union in Articles 62 et seq. of the Succession Regulation of 2012. The Turkish certificate, as the Swiss one (as the model for the Turkish Civil Code), are not very well regulated and many questions are left open and have not yet been settled by the courts of these countries. Open is still the question whether a debtor of the estate can validly pay his debt to the person mentioned as heir in the Turkish certificate. This is different according to German law. The German certificate is issued by the probate court after diligent examination of the facts and, if issued, guaranties that the debtor may validly pay his debt to the person mentioned in the German certificate [§ 2367 BGB; similar Article 69 (3) Succession Regulation]. If it is not established without any doubt that a foreign certificate of succession has the same effect of a German one, the debtor in Germany of any claim of the estate of a foreigner may insist that a German limited certificate of succession (§ 2369 BGB) be presented by the collecting heir.

- ***Götz Schulze/Henry Stieglmeier***: "The State's Right to succeed in shares of the inheritance – Qualification, Subrogation and ordre public"

The State's Right to succeed to shares of the inheritance asserted by the KG in the context of Russo-German relations has already been the subject of comment by Dörner (see: IPRax 2012, 235–238). As an additional point of analysis, in question here is the qualification of an undivided joint-inheritance of co-heirs (Miterbgemeinschaft) of an estate. It is our opinion that the portion of the estate subject to co-inheritance should share the conflict-of-law judgement applied to the whole estate. In the case of sale, this also applies to the subrogation of revenues accruing on the estate. Otherwise, the choice-of-law decision depends upon chance factors such as the number of heirs or the date of alienation of the estate. The portion of the estate subject to co-inheritance is therefore to be considered immovable property, which in the case of the KG

would have led to a partial renvoi to German law. Furthermore, the KG's judgement leads to the strange outcome that the USSR's legal successor can exercise a State's Right to succeed that it would not enjoy in either of the present-day jurisdictions. A nephew's subjective right of inheritance, as that of an heir of the third order, is eliminated by an intertemporal referral to an earlier and then already controversial legal situation in the USSR. Ordre public can be set against an entrenchment of outdated judgements and ensure application of laws governing relatives' inheritance rights in line with all the legal jurisdictions involved at the time of judgement.

- ***Arkadiusz Wudarski/Michael Stürner***: "Unconstitutional EU Secondary Legislation?"

For the first time the Polish Constitutional Court had to decide whether it is competent to hear a complaint based on the alleged unconstitutionality of a provision of European secondary legislation. The claimant had contested as unconstitutional the procedure of exequatur in which a Polish court had declared enforceable a Belgian judgment in ex parte proceedings pursuant to Article 41 Brussels I Regulation. The Constitutional Court admitted the request in principle, but held that in the present case there was no violation of the relevant provisions of the Polish Constitution. The article explores whether there are other examples where EU secondary legislation in the field of international civil procedure might conflict with national constitutional law.

- ***Brigitta Lurger:*** "The Austrian choice of law rules in cases of surrogate motherhood abroad – the best interest of the child between recognition, European human rights and the Autrian pro-hibition of surrogate motherhood"

In the first decision reviewed in this article the Austrian Constitutional Court (VfGH) held that a child born by a surrogate mother in Georgia/USA after the implantation of the ovum and sperm (embryo) of the intentional parents, an Austro-Italian couple living in Vienna, was the legal child of the intentional parents and not of the surrogate mother. The same result was achieved by the second VfGH decision reviewed here, in the case of a surrogate motherhood in the Ukraine. The intentional and genetic parents of the twins born by the Ukrainian surrogate mother were Austrians living in Austria.

This outcome is surprising, considering the Austrian legal provisions which forbid surrogate motherhood and determine that the legal mother is always the woman who gives birth to the child. In the first decision, the reasoning of the court focusses on the supposedly limited competence/scope of the Austrian rules which could not apply to "foreign" artificial procreation cases, the internationally mandatory character of the laws of Georgia and on the best interest of the child. In the second case, the court recognizes the Ukrainian birth certificate of the twins which was purportedly based on Ukrainian family law and argues that the application of Austrian substantive law to this case would violate Art. 8 ECHR and the principle of protection of the best interest of the child. In both cases, the Austrian Constitutional Court unjustifiedly avoids addressing the issue of non-conformity of the Austrian substantive rules on motherhood with Art. 8 ECHR.

The article tries to show that the result achieved by both decisions is correct, albeit the reasoning is flawed in many respects. It analyzes the conflict of laws problems arising in cases of Austrian intentional parents causing foreign surrogate motherhood on a general basis, and discusses the implications of European primary law (Art. 21 TFEU) and European human rights (Art. 8 ECHR). Even though present Austrian choice of law rules lead in most cases to the application of the Austrian "birth-motherhood rule", the constitutional protection of private and family life by Art. 8 ECHR requires Austrian authorities to somehow "recognize" the legal family status acquired by a child and its intentional Austrian parents under the law of Georgia or the Ukraine where surrogate motherhood is legally permissible. The conformity of the birth-motherhood rule in domestic cases of surrogate motherhood (or in international cases where no "real" conflict of laws is present) with Art. 8 ECHR is questionable and should be re-viewed thoroughly by national courts and the ECHR.

- ***Yuko Nishitani:*** "International Jurisdiction of Japanese Courts in Civil and Commercial Matters"

This paper examines the 2011 reform of the Japanese Code of Civil Procedure (CCP), which introduced new provisions on international adjudicatory jurisdiction. After considering the salient features of major jurisdiction rules in the CCP, the author analyzes the regulation of international parallel litigations.

The relevant rules of the Brussels I Regulation (Recast) are taken into consideration from a comparative perspective. In conclusion, the author points out that the basic structure of Japanese jurisdiction rules is in line with that of the Brussels I Regulation (Recast), whereas some important jurisdictional grounds clearly deviate from the latter.

- ***Erik Jayme***: "Glückwünsche für Fritz Schwind – Der Schöpfer des österreichischen Internationalen Privatrechts wird 100 Jahre alt"
- ***Simon Laimer***: "Richterliche Eingriffe in den Vertrag/L'intervention du juge dans le contrat"

Excessive English Costs Orders and Greek Public Policy

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Two recent Court of Appeal rulings in Greece have demonstrated the significance of the public policy clause in international litigation and arbitration. Both judgments are dealing with the problem of recognition and enforcement of "excessive" costs awarded by English courts and arbitration panels. The issue has been brought several times before Greek courts within the last decade. What follows, is a brief presentation of the findings, and some concluding remarks of the author.

I.a. In the first case, the Corfu CoA refused to grant enforceability to a costs order and a default costs certificate of the York County Court on the grounds that Greek courts wouldn't have imposed such an excessive amount as costs of the proceedings for a similar case in Greece. In particular, the court found that,

granting costs of more than £ 80,000 for a case, where the amount in dispute was £ 17,000, contravenes Greek public policy perceptions. Thus, the amount of £ 45,000 + 38,251.47 was considered as manifestly disproportionate and excessive for the case at hand. Consequently, the CoA granted exequatur for the remaining sums, and refused recognition for the above costs, which could not be tolerated by a court of law in Greece.

I.b. In the second case, the Piraeus CoA recognized an English arbitral award despite allegations made by the appellant, that the award's order for costs contravened public policy. In this case the amount in dispute was in the altitude of nearly $ 3 million, whereas the costs granted did not exceed £ 100,000. The court applied the same rule as in the previous case, and found that the costs were not disproportionate to the case at stake.

II. As already mentioned above, those decisions are the last part on a sequence of judgments since 2005. Free circulation of English judgments is generally guaranteed in Greece; the problem starts when English creditors seek to enforce the pertinent costs orders. For Greek legal views, it is sheer impossible that costs exceed the actual amount in dispute in the main proceedings. This was reason enough for the Supreme Court (Areios Pagos = AP) to establish the doctrine of public policy violation, on the occasion of an appeal against a judgment of the Athens CoA back in 2006 [AP 1829/2006, Private Law Chronicles 2007, p. 635 et seq.]. The Supreme Court held, that granting enforceability to similar orders would violate the principle of proportionality, which is embedded both in the Greek Constitution and the ECHR. At the same time, it emphasized that the excessive character of costs impedes access to Justice for Greek citizens, invoking again provisions from the Greek Constitution (Art. 20.1) and the Human Rights Convention (Art. 6.1). The reasoning of the Supreme Court is followed by later case law: In an earlier judgment of the Corfu CoA [Nr. 193/2007, Legal Tribunal 2009, p. 557 et seq.] the court reiterated the line of argumentation stated by the Supreme Court, and refused to grant exequatur (again) to an English order for costs. Two years later, the Larissa CoA [Nr. 484/2011, unreported], followed the opposite direction, based on the fact that costs were far lower than the amount in dispute.

In regards to foreign arbitral awards, mention needs to be made to two earlier Supreme Court judgments, both of which granted enforceability and at the same time rejected the opposite grounds for refusal on the basis of Art. V 2 b NYC. In

the first case [AP 1066/2007, unreported], the Supreme Court found no violation of public policy by recognizing an English award, which awarded costs equivalent to half of the subject matter. A later ruling [AP 2273/2009, Civil Law Review 2010, p. 1273 et seq.] reached the same result, by making reference to the previous exchange of bill of costs particulars, for which none of the parties expressed any complaints during the hearing of the case before the Panel.

In conclusion, it is obvious that Greek courts are showing reservation towards those foreign costs orders, which are perceived as excessive according to domestic legal standards. This stance is not unique, taking into account pertinent case law reported in France and Argentina [for the former, see Cour de Cassation 1re Chambre civil, 16.3.1999, Clunet 1999, p. 773; for the latter see Kronke / Nacimento / Otto / Port (ed.), Recognition and enforcement of foreign arbitral awards – A global commentary on the New York Convention (2010), p. 397, note 245]. The decisive element in the courts' view is the interrelation between the subject matter and the costs: If the latter is higher than the former, no expectations of recognition and enforcement should be nourished. If however the latter is lower than the former, public policy considerations do not usually prevail.

Final point: As evidenced by the case law above, it is clear that the Greek jurisprudence is applying the same criteria for foreign judgments and arbitral awards alike, irrespective of their country of origin. As far as the latter is concerned, no objections could or should be raised. However, making absolute no distinction between foreign judgments emanating from EU – Member States and non-Member States courts seems to defy the recent vivid discussion that predominated during the Brussels I recast preparation phase (2009-2012). Fact is, that public policy survived in the European context, and will continue playing a significant role in the new era (Regulation 1215/2012). Still, what is missing from Greek case law is an effort to somehow soften the intensity of public policy control in the EU landscape. Whatever the reason might be, a clear conclusion may be reached: Greek case law gives back to public policy a Raison d'être, demonstrating the importance of its existence, even when judicial cooperation and free circulation of judgments are the rules of the game.

Regulation Nº 650/2012: Some Open Issues

The new Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession was published in the OJEU on 27 July 2012 and will apply on a general basis "*to the succession of persons who die on or after 17 August 2015*". The need for an instrument at Community level has been emphasized in order to solve the difficulties due to the treatment of the different international succession aspects by means of the respective national rules of Private International Law.

Nowadays, before the general application of the rules contained in the new EU Regulation, in the specific area of the determination of international jurisdiction in matters of succession problems such as positive and negative conflicts of jurisdiction, lack of legal certainty, contradictory answers to situations of international *lis pendens* and the following obstacles of recognition and enforcement of decisions arise. An interesting question is if the new Regulation will totally or only partially solve this situation.

One of the most delicate issues in this field is that the new legal instrument foresees the problematic term "court" when it refers to the competent authority to deal with an international succession case, establishing an important limitation on the total unification of this aspect at European level, due to the fact that the determination of the competent non-judicial authorities and legal professionals in matters of succession, such as notaries, will be still possible under some circumstances by means of the national legislations of the Member States. This situation will probably entail some compatibility problems.

The new EU Regulation 650/2012 provides different common rules for the allocation of international jurisdiction, starting from the premise of the unity of forum with some exceptions. As it has already been pointed out by the legal literature, this part of the EU instrument causes considerable problems of interpretation, and it does not regrettably incorporate certain aspects which were

underlined in the previous legislative proposals. The choice of the last habitual residence of the deceased as a general criterion seems to be reasonable, although in some cases it may be difficult to identify it. Besides, party autonomy plays an important role in this chapter of the Regulation; in this sense, the different mechanisms of choice of the competent authority are formulated in a very complex way that will also probably imply practical problems. Besides, the new instrument in matters of succession allows an exceptional possibility of remission of jurisdiction between authorities of Member States. The wording of this aspect in the final text also presents some significant difficulties relating to the operation and the effects of this flexibility mechanism.

Moreover, the new Regulation on Succession and Wills contains a rule on subsidiary or residual jurisdiction, giving an answer for cases where the deceased's last habitual residence is not located in a Member State. In this context, it is important to know if this rule will certainly allow identifying a real link between the specific case and the Community territory. Regulation 650/2012 also provides for jurisdiction based on *forum necessitatis*, an interesting option which had been supported in legal literature and which tries to avoid a loss of effective legal protection.

Besides, the new EU legal instrument incorporates some rules in order to establish a partial declaration of acceptance, waiver or limitation of liability and to adopt provisional measures. The treatment of *lis pendens* and related actions is also foreseen. Among other questions, providing further details on these rules would have been appropriate, such as time-limits or exceptions to the solution based on the chronological order of the bringing of the claims in the case of *lis pendens*.

All the aforementioned aspects are examined in a new book entitled *La autoridad competente en materia de sucesiones internacionales: el nuevo Reglamento de la UE* (Prólogo de *Alegría Borrás*), Marcial Pons, 2013 (translated into English, it would be "The competent authority in international succession matters: the new EU Regulation (Prologue by *Alegría Borrás*)"), written by Maria Álvarez Torné, a Postdoctoral Researcher in Private International Law of the University of Barcelona. This work analyzes the different criteria on international jurisdiction in the new Regulation on Succession and Wills, describing the interesting previous decision-making process and also including a brief chapter dealing with the rules on applicable law, recognition and enforcement of decisions, acceptance and

enforcement of authentic instruments and the European Certificate on Succession. Facing the new scenario, this book essentially aims to answer to the question of the advantages and missed opportunities in the way of allocation of international jurisdiction contained in the EU Regulation, taking into account that this aspect will condition the following treatment of a succession case with cross-border elements. It is necessary to use the time prior to the application of the EU Regulation to prepare for the application of all its rules, and in this sense opening up forums of debate to discuss about the numerous interpretation difficulties has an increasingly importance.

Vacancies at the University of Freiburg

At the Department of Law of the **Albert-Ludwigs-University Freiburg im Breisgau** (Germany), **four vacancies** have to be filled at the future chair for **civil law, particularly conflict of laws and comparative law (designated chairholder: Prof. Dr. Jan von Hein)**, from April 1st, 2013 with

legal research assistants (salary scale E 13 TV-L, personnel quota 50%)

limited for 2 years.

The assistants are supposed to support the organizational and educational work of the future chairholder, to participate in research projects of the chair as well as to teach their own courses (students' exercise). Applicants are offered the opportunity to obtain a doctorate.

The applicants are expected to be interested in the chair's main areas of research. They should possess an above-average German First State Examination (at least "vollbefriedigend") or a foreign equivalent degree. In addition, a thorough knowledge of German civil law as well as conflict of laws, comparative law and/or

international procedural law is a necessity. Severely handicapped persons will be preferred provided that their qualification is equal.

Please send your application (Curriculum Vitae, certificates and, if available, further proofs of talent) to Prof. Dr. Jan von Hein, Institut für ausländisches und internationales Privatrecht, Abt. III, Peterhof, Niemensstr. 10, D-79098 Freiburg (Germany) no later than February 15th, 2013.

As the application documents will not be returned, we kindly request you to submit only unauthenticated copies. Alternatively, the documents may be sent as a pdf-file via e-mail to ipr3@jura.uni-freiburg.de.

Further information is available at the institutes website.

BIICL Event: The UK's Rejection of the New EU Regulation on International Successions

The EU has adopted a new Regulation on international successions (Regulation (EU) No 650/2012). In short, its main features are the following: It provides for court competence of the courts of the Member State in which the deceased had his habitual residence in the moment of death and declares the law of that Member State applicable to the succession as a whole. The Regulation also provides for a limited choice of the law of the deceased's nationality. In that event, an alignment of court competence and applicable law can be reached through specific mechanisms. The cross-border circulation of authentic instruments is simplified and a European Certificate of Succession newly introduced.

Although the UK is not taking part in the adoption of the Regulation, there are scenarios in which UK citizens moving abroad or possessing property abroad might be affected by the Regulation. This can give raise to a difficult interplay of

the Regulation with the private international law provisions in the UK.

Speakers from the continent and the UK will present the Regulation and its main advantages and shortcomings. They will then focus on the difficulties which arise in a cross border context involving UK citizens and discuss the need for law reform.

Participants:

Robert Bray, European Parliament
Professor Andrea Bonomi, University of Lausanne
Dr Anatol Dutta, Max Planck Institute for Comparative and International Private Law, Hamburg
Professor Jonathan Harris, King's College; Serle Court, London
Richard Frimston, Partner, Russell Cooke, London
Oliver Parker, Ministry of Justice, London
Representative of Notaries of Europe (CNEU), Brussels

Venue:

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

Date:

Thursday 8 November 2012, 14:00 to 18:30

C- 619/10: Art. 34 (1) and (2)

Brussels I Regulation

One of the first cases to be addressed by the ECJ after the holiday will be the so-called *Trade Agency*, concerning grounds for refusing recognition and the power of the enforcing court to determine whether the application initiating proceedings had been served on the defendant in default, when service is accompanied by a certificate as provided for by Article 54 of the regulation. Quoting AG Kokott, this are the items to be solved:

> "Article 34(2) permits the withholding of recognition or enforcement of a default judgment that has been pronounced against a defendant who was not served with the document which instituted the proceedings in sufficient time and in such a way as to enable him to arrange for his defence. Article 54 of the regulation provides for the issue by the State in which judgment was given ('State of origin') of a certificate showing the various underlying procedural data. This certificate has to be submitted together with the application for enforcement of a judgment. The information to be stated there also includes the date of service of the claim form. In light of this, the question in this case concerns the extent to which the court in the State where enforcement is sought should examine service of the claim form: Is it still entitled, despite the date of service being stated in the certificate, to examine whether the document instituting the proceedings was served or does the certificate have binding legal effect in this respect?
>
> The ground for withholding recognition under Article 34(2) does not apply if the defendant failed to commence proceedings in the State of origin to challenge the default judgment when it was possible for him to do so. This case provides the Court with an opportunity of further clarifying its case-law on the question of when it is incumbent upon the defendant to lodge an appeal in the State of origin. It is necessary to make clear whether the defendant is obliged to do so even if the decision pronounced against it was served on it for the first time in exequatur proceedings.
>
> Finally, the dispute in this case also relates to the public-policy clause in Article 34(1) of Regulation No 44/2001. The referring court would like to know in this connection whether it is compatible with the defendant's right to fair legal process embodied in Article 47 of the Charter of Fundamental Rights of

the European Union for the court of the State of origin to neither examine the substance of a claim before pronouncing judgment in default nor to give further reasons for the default judgment."

Judgment is expected next Thursday.