

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 für 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.

The Instrumentalisation of PIL (article on SSRN)

Veerle Van Den Eeckhout (Leiden University and University of Antwerp) has published a short, updated version of “The Instrumentalisation of Private International Law: Quo Vadis?” on ssrn ([click here](#)).

The abstract reads as follows:

“Private International Law is known as a very abstract, legal-technical and inaccessible discipline. Yet it is striking that PIL issues are conspicuously often interwoven with a number of heated, topical socio-legal debates, see for example the debate on transnational corporate social responsibility, the debate on posting of employees from Eastern to Western Europe, the debate on residency and social-security entitlements of foreigners based on family relationships. Both where it concerns situations governed by European PIL rules and national PIL rules, the question arises what position PIL should take in the forces at play and to what extent PIL can or should still adopt a *neutral* position.”

The author would also like to share her ppt presentation on “Choice and Regulatory Competition - Rules on Choice of Law and Forum”, which will be shown as part of the programme of the Maastrich Conference “The Citizen in European Private Law: Norm-setting, Enforcement and Choice”, next Friday ([click here](#)).

Niedermaier on Arbitration and Arbitration Agreements Between

Parties of Unequal Bargaining Power

Tilman Niedermaier, LL.M. (University of Chicago) has authored a book on “Arbitration Agreements and Agreements on Arbitral Procedure Between Parties of Unequal Bargaining Power. A Comparison of German and U.S. Law With Consideration of Further Legal Systems.” (Original German title: “Schieds- und Schiedsverfahrensvereinbarungen in strukturellen Ungleichgewichtslagen. Ein deutsch-U.S.-amerikanischer Rechtsvergleich mit Schlaglichtern auf weitere Rechtsordnungen”).

The book is in German. The official English abstract reads as follows:

The German Arbitration Law of 1998 is particularly intended to meet the requirements of international commerce. One characteristic of international commercial disputes is a balance of power between the parties. However, structural imbalances between parties do occur not only in domestic and non-commercial disputes. In the recent years, issues raised by such imbalances in arbitration have received increasing attention in case law and legal scholarship in the United States.

Tilman Niedermaier compares the law in Germany and the United States. Taking into account recent developments in EU law, he assesses to what extent the interests of parties with unequal bargaining power in arbitration can be safeguarded under German law.

More information is available on the publishers website.

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 well 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.

ECJ Rules on Irreconcilable Judgments Given in the Same State of Origin

On 26 September 2013, the Court of Justice of the European Union ruled in *Salzgitter Mannesmann Handel GmbH v. SC Laminorul SA* (C-157/12) that Article 34(4) of the Brussels I Regulation does not apply to two irreconcilable judgments given by courts of the same of Member state of origin.

Laminorul, which is established in Romania, brought an action seeking payment for a delivery of steel products against Salzgitter, established in Germany, before the Tribunalul Braila (Braila Court of First Instance) (Romania). Salzgitter claimed that that action should have been brought against the actual party to the contract with Laminorul, Salzgitter Mannesmann Stahlhandel GmbH, rather than against Salzgitter. On that ground, the Tribunalul Braila dismissed the action brought by Laminorul by judgment of 31 January 2008 ('the first judgment'). That judgment became final.

Shortly thereafter, Laminorul initiated new proceedings against Salzgitter before the same court for the same cause of action. That application was, however, served on Salzgitter's former legal representative, whose authority to act for the company had been limited, according to Salzgitter, to the first proceedings. No one appeared on Salzgitter's behalf at the hearing on 6 March 2008 before the Tribunalul Braila which delivered a judgment by default against Salzgitter, requiring Salzgitter to pay EUR 188 330 to Laminorul ('the second judgment'). Salzgitter later on made a number of applications in Romania to review or set aside the second judgment. They were all dismissed.

In the mean time, Maminorul was seeking enforcement of the second judgment in Germany.

The ECJ ruled:

36 The interpretation of Article 34(4) of Regulation No 44/2001 according to which it also covers conflicts between two judgments given in one Member State is inconsistent with the principle of mutual trust referred to in paragraph 31 above. Such an interpretation would allow the court in the Member State in which recognition is sought to substitute its own assessment of that of the court in the Member State of origin.

37 Once the judgment has become final at the end of the proceedings in the Member State of origin, the non-enforcement of that judgment on the ground that it is irreconcilable with a judgment given in the same Member State amounts to reviewing the judgment sought to be enforced as to its substance which is, however, expressly excluded by Article 45(2) of Regulation No 44/2001.

38 Such a possibility of review as to the substance would *de facto* constitute an additional means of redress against a judgment which has become final in the Member State of origin. In that regard, it is not disputed that, as the Advocate General has noted in point 31 of his Opinion, the grounds for non-enforcement provided for in Regulation No 44/2001 do not create additional remedies against national judgments which have become final.

39 Lastly, since the list of grounds for non-enforcement is exhaustive, as is apparent from the case-law referred to in paragraph 28 above, those grounds must be interpreted strictly and may not therefore be given, contrary to what Salzgitter and the German Government claim, an interpretation by analogy pursuant to which judgments given in the same Member State would also be covered.

Ruling:

Article 34(4) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as not covering irreconcilable judgments given by courts of the same Member State.

Sciences Po PILAGG Series, 2013-2014

The seminars on Private International Law as Global Governance (PILAGG) at the Law School of the Paris Institute of Political Science (*Sciences Po*) will be conducted this year according to a slightly different format, as they will be run in part with the LSE. 

This year's series will be beginning with an informal round-table in Paris on methodological shifts in the conflict of laws. This discussion is designed to link up with last year's reflections on the changing paradigms in (private international) legal thought.

Speakers will discuss proportionality, the impact of collective redress in individualist schemes of intelligibility, the renewal of characterization, the articulation of the conflict of laws and public policies on immigration, the access to justice paradigm, and how conceptualizing networks might be helpful in transnational settings. They were asked to focus specifically on the ways in which their area of expertise may (or not) bring methodological renewal. Participants will be Catherine Kessedjian, Samuel Lemaire, Toni Marzal, Hélène van Lith, Sabine Corneloup, Karine Parrot, Ferdinando Lenzi, Diego P. Fernández Arroyo and Horatia Muir Watt.

When: 17 October from 13:00 to 16:45.

Where: 13 rue de l'Université, 75007 Paris, salle de réunion Ecole de droit 4th floor.

The language for presentation and debate will be either French or English.

Next will be the first London session (November 19) on PIL and legal theory and then events on the political economy of the law of investment arbitration and on the interface of PIL and civil procedure.

Gay Marriage: France Blacklists 11 Nationalities (Updated)

In May 2013, France adopted a law allowing gay marriage.

The statute confirmed France' traditional choice of law rule according to which the law of the nationality of each spouse applies to the substantive validity of marriage (Civil Code, Art. 202-1, para. 1). However, in order to avoid confining the new legislation to couples of nationals originating from the 14 jurisdictions or so which allow gay marriage, the statute also adopted a new rule providing that same sex marriage would still be allowed when the national law or the law of the residence of one of the spouses only allowed it (Civil Code, Art. 202-1, para. 2). I have already reported how the French Constitutional Council miraculously found this provision to be constitutional.

So, is everybody welcome to come to Paris to marry a French national? Not quite. The French ministry of justice has issued guidelines instructing French mayors not to marry couples including a national coming from a list of 11 jurisdictions. The reason why is that France concluded a bilateral treaty with each of these jurisdictions providing for the application of the law of the nationality of each spouse. As treaties are superior to statutes in France, the administration has concluded that these treaties prevail over Art. 202-1, para. 2 of the Civil Code.

La règle introduite par l'article 202-1 alinéa 2 ne peut toutefois s'appliquer pour les ressortissants de pays avec lesquels la France est liée par des conventions bilatérales qui prévoient que la loi applicable aux conditions de fond du mariage est la loi personnelle.

Dans ce cas, en raison de la hiérarchie des normes, les conventions ayant une valeur supérieure à la loi, elles devront être appliquées dans le cas d'un mariage impliquant un ou deux ressortissant(s) des pays avec lesquels ces conventions ont été conclues. En l'état du droit et de la jurisprudence, la loi personnelle ne pourra être écartée pour les ressortissants de ces pays.

Most of these treaties, however, were concluded in the 1950s and 1960s. None of them contains any express provision on same sex marriage.

The blacklisted nationalities are:

- Algeria, Tunisia and Morocco,
- the five countries which formerly constituted Yugoslavia
- Laos, Cambodia
- Poland

A French prosecutor enforced the guidelines at the beginning of September and denied the right to marry to a Franco-Moroccan couple.

UPDATE:

The decision of the prosecutor was set aside today by a first instance court of Chambéry.

I could not see the judgment, but the French press has reported that the Court would have ruled that the recent French statute has modified French international public policy, and that the applicable bilateral convention should thus be avoided as it discriminates against gay people.

This would be an innovative use of the public policy exception, to avoid the law of the forum, as discussed in comments by Mr Margonski and Mr Davis.

Conflict of Laws Across the Ditch

The Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement, signed on 24 July 2008, enters into force today. The provisions of the Agreement have been implemented by legislation in both jurisdictions (Trans-Tasman Proceedings Act 2010 (Cth), (NZ)), which also has effect from today.

Among other matters, this legislation lays down newly harmonised rules governing service of process as a basis of jurisdiction, stays of proceedings on appropriate forum grounds, a partial ban on anti-suit injunctions, proof of laws and the recognition and enforcement of judgments, ensuring that the civil justice systems in the two countries will, henceforth, be more closely integrated and aligned.

The Agreement and implementing legislation have already begun to influence the ways in which the courts of the party States approach litigation with a connection to the other party State. In *Robinson v Studorp Ltd* [2013] QSC 238, Jackson J of the Queensland Supreme Court examined the provisions of the Agreement and the Australian Act concerning court procedural co-operation and treated these as significant in deciding that the Queensland Court was not a “clearly inappropriate forum” for litigation between a New South Wales’ (former New Zealand’) resident and a New Zealand incorporated corporation relating to exposure to asbestos by the claimant while working with his New Zealand resident father in New Zealand. The asbestos products were manufactured by the defendant in New Zealand. True, the claimant had lived for a time in Queensland and had been diagnosed and treated for his disease within that state, but these connections seem comparatively unimportant.

This outcome is not wholly surprising given the way in which the Australian courts have applied their version of the common law *forum (non) conveniens* test in personal injury claims. If, however, the application had been determined under the new legislation, a different test (more favourable to the defendant) would have applied, requiring the court to ask whether a New Zealand court having jurisdiction is the “more appropriate court” to determine the matters in issue (s. 17(1); see also s. 19). In light of the spirit underlying the Agreement, the result seems topsy-turvy. It remains to be seen whether the entry into force of its provisions will effect a sea change in judicial attitudes on both sides of the Tasman Sea.

Riles on Regulatory Arbitrage

Annelise Riles (Cornell Law School) has posted *Managing Regulatory Arbitrage: A Conflict of Laws Approach* on SSRN.

Many of the core challenges facing national financial regulators stem from a classical puzzle of international law: how to manage conduct that is beyond national jurisdiction, or conduct that is potentially subject to multiple regulatory authorities, in a context in which markets are transnational and market participants arbitrage the differences between regulatory regimes to their own advantage. The dominant approach of the G20 to this challenge has been a model borrowed from public international law and institutions. After reviewing some of the limitations of this approach, the paper considers how tools in the private international lawyer's toolkit that might offer a very different, yet potentially more effective approach.

Coyle on Judgments Reciprocity

John Coyle (University of North Carolina School of Law) has posted *Rethinking Judgments Reciprocity* on SSRN.

Scholars have long debated the criteria that U.S. courts should use when deciding whether to recognize and enforce money judgments rendered by foreign courts. One of the proposed criteria — reciprocity — would require proof that the rendering court would enforce a U.S. judgment if the situation were reversed. Advocates of reciprocity claim that it is necessary to create incentives for foreign states to recognize and enforce U.S. judgments. Critics argue that a policy of judgments reciprocity is both costly to administer and highly unlikely to bring about any change in foreign state practice.

This Article makes two original contributions to this debate. First, it draws on historical examples of successful reciprocal legislation to construct an

analytical framework for determining the conditions under which such legislation is most likely to change foreign state behavior. These examples show that that a particular state's response to such legislation will in many cases be shaped by the reaction of interest groups within that state. Second, the Article seeks to evaluate how interest groups within specific foreign states — those that currently refuse to enforce U.S. judgments — would be likely to react to a new U.S. policy of judgments reciprocity. Drawing upon a hand-collected dataset of reported cases and federal complaints, it argues that judgment creditors in many of these states are likely to suffer few, if any, economic losses as a result of such a policy. In the absence of such losses, the Article concludes that a new U.S. policy of judgments reciprocity is unlikely to prompt foreign states to change their laws and, consequently, is unlikely to achieve its goal of making it easier to enforce U.S. judgments overseas.