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

Dr. Apostolos Anthimos is attorney at law at the Thessaloniki Bar, Greece. He holds a Ph.D. in International Civil Litigation and is a visiting lecturer at the International Hellenic University.

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.

EU Regulation on Succession and Wills Published in the Official

Journal

The EU regulation on succession (see our most recent post here) has been published in the Official Journal of the European Union n. L 201 of 27 July 2012. The official reference is the following: **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** (OJ n. L 201, p. 107 ff.).

Pursuant to its Art. 84(2), **the regulation shall apply from 17 August 2015, to the succession of persons who die on or after the same date** (see Art. 83(1)). Denmark, Ireland and the United Kingdom did not take part in the adoption of the instrument and are not bound by it.

Our friend *Federico Garau*, over at Conflictus Legum, provides an excellent summary of the main principles underlying this new piece of EU PIL legislation. A rich list of references on the regulation and its legislative history is pointed out by *Pietro Franzina*, at the Aldricus blog.

Regulation on the Mutual Recognition of Protection Measures in Civil Matters

In June 2011 the European Council adopted a Resolution entitled “Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings”, immediately published (OJ *C* 187, June 2011, 28th). I might of course be mistaken, but it seems to me that both the Resolution and its immediate consequences in the civil realm have gone largely unnoticed . Let’s fill (if only a bit) the gap.

The document starts reminding that in the Stockholm programme "An open and secure Europe serving the citizen", the European Council had stressed the importance to provide special support and legal protection to those who are most vulnerable, such as persons subjected to repeated violence in close relationships, victims of gender-based violence, or persons who fall victim to other types of crimes in a Member State of which they are not nationals or residents. In the same vein, responding to the Stockholm programme, the European Commission has proposed a package of measures on victims of crime including a Regulation on the mutual recognition of protection measures in civil matters [Com(2011) 276 *final*, May 2011, 18]. The Regulation intends to help preventing harm and violence and ensure that victims who benefit from a protection measure taken in one Member State are provided with the same level of protection in other Member States, should they move or travel there; and that protection be awarded without the victim having to go through additional procedures. In order to ensure a quick, cheap and efficient mechanism of circulation of protection measures in the European Union, the *rationale* of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ('Brussels II-bis'), and in particular Articles 41 and 42 (therefore automatic recognition and the abolition on intermediate procedures such as exequatur) thereof, has been followed.

The fact that the proposal follows the *rationale* of existing EU instruments on judicial cooperation in civil and commercial matters implies that many provisions are similar or equal to the correspondent articles in the mentioned legislation. This is not a problem in itself; it might be, nevertheless, as certain protection measures are already covered by the Brussels I and Brussels II-bis Regulations. It is therefore important to clarify the articulation of the proposal with these regulations. According to the Commission, as the new Regulation establishes special rules in relation to protection measures, following a general principal of law it shall supersede the general rules set out by Brussels I. As for the Regulation Brussels II-bis, the aim of which is to centralise all proceedings relating to a given divorce or legal separation the situation is different: the proposal must not jeopardise rules governing jurisdiction and the recognition of judgments contained in the Brussels II-bis Regulation by offering the possibility to seize the jurisdiction of another Member State as regards the protection measures taken in the context of the ongoing proceedings. For this reasons, all

protection measures entering into the scope of Brussels II-bis shall continue to be governed by this instrument. Examples of measures that do not fall under the application of Brussels II-bis are protection measures which would concern a couple which has not been married, same sex partners or neighbours.

The proposal provides for a speedy and efficient mechanism to ensure that the Member State to which the person at risk moves will recognise the protection measure issued by the Member State of origin without any intermediate formalities. A standardised certificate issued by the competent authority of this Member State, either ex-officio or on request of the protected person, will contain all information relevant for the recognition. The beneficiary of the measure will contact the competent authorities in the second Member State and provide them with the certificate. The competent authorities of the second Member State will notify the person causing the risk about the geographical extension of the foreign protection measure, the sanctions applicable in case of its violation and, where applicable, ensure its enforcement.

ERA Conference on Cross-Border Successions

On 22 and 23 November 2012 the Academy of European Law (ERA) will host a bilingual (English/German) conference in Trier on the new regulation on cross-border successions. The conference is set up for practitioners (lawyers, notaries, ministry officials) and academics. Key topics are:

- Scope of the instrument
- Jurisdiction and applicable law
- Recognition and enforcement of decisions
- Authentic documents in matters of succession
- Creation of a European Certificate of Succession

The official inivitation reads as follows:

On 7 June 2012, the Regulation aimed at simplifying the settlement of international successions was adopted by the EU's Justice Council. This new Regulation will ease the legal burden when a family member with property in another EU country passes away.

Under the Regulation, there will be a single criterion for determining both the jurisdiction and the law applicable to a cross-border succession: the deceased's habitual place of residence. People living abroad will, however, be able to opt for the law of their country of nationality to apply to the entirety of their succession. The Regulation will also permit citizens to plan their succession in advance in more legal certainty. This new instrument paves the way for the European Certificate of Succession which will allow people to prove that they are heirs or administrators without further formalities throughout the EU.

The conference will provide an in-depth discussion of the most topical issues regarding successions and wills in a European context.

More information is available at the ERA's website.

JHA Council (7-8 June 2012): EU Regulation on Successions and Wills Adopted – General Approach on Brussels I Recast – CESL

The Justice and Home Affairs (JHA) Council of the EU, currently holding its meeting in Luxembourg (7-8 June), **adopted today the successions regulation** (Regulation on jurisdiction, applicable law, recognition and enforcement of decisions, acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European certificate of succession): see the Council's note and RAPID press release. The final text can be found in doc. no.

PE-CONS 14/12.

Denmark, Ireland and the United Kingdom do not participate in the regulation, pursuant to the special position they hold in respect of the Area of Freedom, Security and Justice, **while Malta voted against the adoption**, expressing concerns on the uncertainty that the new rules will create in the legal regime of international successions, vis-à-vis current Maltese law (see the Maltese statement in the Addendum to Council's doc. no. 10569/1/12).

As pointed out in a previous post, an agreement had been reached by the Council and the Parliament in order to adopt the new instrument at first reading: a history of the legislative procedure, along with the key documents, is available on the OEIL and Prelex websites. Once the regulation is published in the OJ, the whole set of Council's documents relating to the procedure, currently not available, will be disclosed. An interesting reading on the legislative history can also be found on the IPEX website, which gathers the opinions of national parliaments of the Member States on draft EU legislation.

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Two other PIL items are set on the agenda of the JHA meeting on Friday 8 June. **The Council is expected to approve a general approach on the Brussels I recast** (see the state of play in Council's doc. no 10609/12 and the draft text set out in doc. no 10609/12 ADD 1), **and to hold a debate on the orientation and the method** to handle the further negotiations on the proposal for regulation **on a Common European Sales Law** (CESL). As regards the latter, here's an excerpt from the background note of the meeting:

> *The first discussions on the [CESL] proposal have made it clear that this file entails divergences among member states. Several member states had therefore requested that a political debate at the level of the Council takes place before proceeding further with technical discussions.*
>
> *To this end, the Presidency submits a discussion paper to the Council (10611/12) proposing that ministers address questions related to the legal basis and the need for the proposal, its scope (focus on sales contracts concluded on-line) and whether to start work on model contract terms and conditions.*