New French Book on European Divorce Law

A commentary of European private international law instruments applicable in divorce proceedings was just published by the University of Burgundy (CREDIMI) under the supervision of Professor Sabine Corneloup.

> *There are approximately a million divorces in the European Union each year, of which 140 000 have an 'international' element. 13% of European couples are bi-national and the trend is increasing, due especially to the freedoms of movement. The European Union has adopted two regulations in the area of divorce which are meant to simplify the life of EU citizens: regulation n° 2201/2003 « Brussels II bis » and regulation n° 1259/2010 « Rome III ». The scope of application of these rules on private international law covers not only 'European spouses', but also Third States nationals if at least one of the spouses has his/her habitual residence within a Member State. As the national divorce laws of the Member States have not been harmonized, considerable differences are remaining not only regarding the substantial but also the procedural aspects of divorce. There is not even a consensus on the very concept of marriage, as shows the current debate on same-sex marriage. In such a context of major differences between the national divorce laws of the Member States, the EU regulations on Private international law have a fundamental role to play.*
>
> *The book is conceived as a commentary, article by article, of the regulations Brussels II bis and Rome III. It is written in French or in English, according to the authors. A comprehensive analysis of comparative law precedes the commentary itself, in order to provide practitioners with the necessary information to deal with an international divorce. The national divorce laws of six Member States are presented: Germany, Belgium, France, Spain, Italy and Portugal. The book concludes with transversal thoughts on the most important issues the European Divorce Law is currently facing.*

With the contributions of :

Alegría Borrás, Hubert Bosse-Platière, Maria Novella Bugetti, Christelle Chalas, Sabine Corneloup, Alain Devers, Christina Eberl-Borges, Marc Fallon, Aude

Fiorini, Estelle Gallant, Cristina González Beilfuss, Urs Peter Gruber, Petra Hammje, Rainer Hausmann, Natalie Joubert, Marco Jung, Paul Lagarde, Elena Lauroba Lacasa, François Leborgne, Yves-Henri Leleu, Luís de Lima Pinheiro, Eric Loquin, Alberto Malatesta, Françoise Monéger, Horatia Muir Watt, Valérie Parisot, Carlo Rimini, Thomas Simons, Miguel Teixeira de Sousa.

Table of contents

. Article 11, par Petra HAMMJE

. Articles 12-13, par Natalie JOUBERT

. Article 14-16, par Valérie PARISOT

. Articles 17 et 18 non commentés

. Article 19, par François LEBORGNE

. Articles 20 et 21 non commentés

QUATRIÈME PARTIE – RÉFLEXIONS TRANSVERSALES

. Réflexion sur la problématique de la double nationalité en matière de divorce, par Paul LAGARDE

. Bruxelles sans Rome : La réticence du Royaume-Uni face à l'harmonisation du droit européen du divorce, par Aude FIORINI

. La « conduite des conduites » et le droit international privé de la famille : réflexions sur la gouvernementalité à la lumière du règlement Rome III, par Horatia MUIR WATT

. La création d'un marché européen du divorce, par Éric LOQUIN

More information is available here.

ADR and ODR for (Cross-Border) Consumer Contracts

On 22 April 2013 Council of the European Union adopted a Directive on Alternative Dispute Resolution (ADR) and a Regulation on Online Dispute Resolution (ODR) for (cross-border) consumer contracts. Building on two proposals of the European Commission of November 2011 the two instruments

are meant to improve the cross-border enforcement of consumer rights. The official press release reads as follows (footnotes omitted):

> *The Council today adopted a directive on Alternative Dispute Resolution (ADR) and a regulation on Online Dispute Resolution (ODR) (PE-CO□S 79/12 and PE-CO□S 80/12). The new system, which is part of the "Single Market Act" package, will provide for simple, fast and low-cost out-of-court settlement procedures designed to resolve disputes between consumers and traders arising from the sales of goods and services. It will ensure the establishment of ADR schemes where none exist today. These will fill current gaps in coverage and ensure that consumers are able to take their disputes to an ADR. In addition, it establishes a common framework for ADR in the EU member states by setting out common minimum quality principles in order to ensure that all ADR entities are impartial, transparent and efficient. Existing national ADR schemes should be able to continue to operate within the new framework. The ADR system will be supplemented by an ODR mechanism involving the setting up of a European online dispute resolution platform (this will be an interactive website free of charge in all languages of the Union2).*
>
> *As a general rule, the outcome of an ADR procedure should be made available within a period of three months from the date on which the ADR entity has received the complaint file. ADR schemes, also known as "out-of-court mechanisms", already exist in many countries to help consumers involved in disputes which they have been unable to resolve directly with the trader. They have been developed differently across the EU and the status of the decisions adopted by these bodies differs greatly. The new directive will apply to domestic and cross-border disputes submitted by consumers against traders in almost all areas of commercial activity across the EU, including to online transactions, which is particularly important when consumers shop across borders. Member states will have two years to incorporate the new provisions into their national legislation.*

Ringe on Regulatory Competition in Corporate Law in the European Union

Wolf-Georg Ringe, Professor of International Commercial Law at the Copenhagen Business School, has posted a paper on charter competition in European Union on SSRN ("Corporate Mobility in the European Union – A Flash in the Pan? – An Empirical Study on the Success of Lawmaking and Regulatory Competition"). The paper is available here. The official abstract reads as follows:

> *This paper discusses new data on regulatory competition in European company law and the impact of national law reforms, using the example of English company law forms being used by German start-ups. Since 1999, entrepreneurs have been allowed to select foreign legal forms to govern their affairs. The data show that English limited companies have been very popular with German entrepreneurs in the first years of the last decade, but also document a sharp decline from early 2006 onwards. This decline casts doubt over the claim that the German company law reform from November 2008 had 'successfully fought off' the use of foreign company forms. Moreover, by contrasting the German data with the corresponding developments in Austria, the paper further demonstrates that the latter jurisdiction sees a similar decline without having reformed its company law. Instead of exclusively relying on law reform as the causal reason for declining foreign incorporation numbers, the paper offers a number of alternative or complementary explanations for the striking developments. The findings are important for our understanding of (defensive) regulatory competition and successful lawmaking.*

Should Brussels I Have Been Applied in "Land Berlin"? Some Thoughts on the Judgment of the ECJ from April 11th, As. C- 645/11

Many thanks to Polina Pavlova for sharing her comments on this recent ECJ ruling, first in our (MPI) weekly Referentenrunde and now here. Paulina Pavlova is research fellow of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law.

On April 11th, the ECJ rendered what at first sight appears to be a non-controversial judgment on the scope of application of the Brussels I Regulation. Whether the decision in the case C-645/11, *Land Berlin v. Ellen Mirjam Sapir and Others* is indeed as consistent as it might seem, is, however, highly questionable.

Mr. Busse owned a plot of land in East Berlin. During the Third Reich he was persecuted under the NS regime and was forced to sell the land to a third party in 1938. Later on, the plot was expropriated by the German Democratic Republic and became part of a larger, State-owned, parcel of land. After the German reunification, the ownership of this land transferred to the Land Berlin and the Federal Republic of Germany.

In 1990, the *Vermögensgesetz* (Law on Property) provided for the possibility that such expropriated land be returned to the original owner. Ten successors of Mr. Busse domiciled in four different States then applied for a return of the land which once belonged to Mr. Busse. However, in 1997, fulfilling this request became impossible since the Land Berlin and the Federal Republic of Germany sold the whole parcel to an investor. This was allowed by the *Investitionsvorranggesetz* – a Law on priority for investments in the case of claims for return under the Law on Property. As compensation, the successors were entitled to receive the corresponding proceeds of the sale or the market value of the property.

The competent authority ordered the Land Berlin to pay the respective share of the proceeds to Mr. Busse's successors. However, the Land Berlin unintentionally transferred the entire amount of the sell price to their lawyer instead of paying only the amount corresponding to the share of Mr. Busse in the big parcel of land. The Land Berlin then brought an action before the *Landgericht Berlin* against the successors of Mr. Busse and their lawyer in order to recover the overpayment. The claim was based on unjust enrichment against the successors and on tort against the lawyer.

As far as the merits are concerned, the defendants claim to be entitled to the whole amount they received alleging that the parcel had been sold under value anyway. More important for us is whether the *Landgericht Berlin* has jurisdiction over the defendants who are not domiciled in Germany but in the UK, Spain and Israel. This question concerns the application of the Brussels I Regulation and more specifically its Article 6 (1). The case went through all instances and finally to the *Bundesgerichtshof* which referred three questions to the ECJ on: (1) the notion of "civil matters" in the sense of Article 1 of the Brussels I Regulation, (2) the criteria of a close connection as required in Article 6 (1) and (3) the applicability of the latter provision to defendants not domiciled in a Member State. With regard to the specific case the ECJ basically gave a "Yes-Yes-No" answer.

Let me briefly comment the Court's interpretation in a reversed order, starting from the third question.

Third State defendants and Article 6 (1)? To the question of applicability of Article 6 (1) to defendants not domiciled in a Member State the Court answered with a clear "No", thus confirming not only the unambiguous wording but also the prevailing view in legal literature.

A close connection? As far as the second question is concerned, the ECJ basically ruled the *Land Berlin* case fulfills the criterion of the close connection as required in Article 6 (1). Although the Court always lays emphasis on the need of a strict interpretation of this rule, recent case-law has shown the opposite trend. With this in mind, the new decision can hardly be qualified as groundbreaking. This, however, cannot be said for the interpretation of the notion of civil matters in *Land Berlin*.

A civil matter? With regard to the (preliminary) question of whether a case as the one described falls under the concept of "civil and commercial matters" in the sense of Article 1 (1) of the Brussels I Regulation, the ECJ recalled its relevant judgments stating that the regulation is not applicable only when a public authority is acting in the exercise of its public powers. In the Court's view, the Land Berlin did not act in the exercise of such powers. The main argument in the reasoning seems to be that the Law on Property and the Law on Investment that are governing the compensation process apply equally to both private persons and public authorities. What is more, the court explains, in order to recover the overpayment, the Land Berlin has to bring an action before a civil court on the basis of a provision of the German Civil Code (Paragraph 812, unjust enrichment). All these circumstances lead the ECJ to the conclusion that we have a civil matter within the meaning of the Regulation despite the involvement of a public authority and the administrative proceedings preceding the compensation.

As convincing as it may seem, this reasoning is far from solid.

To start with, the Court's view on the scope and purpose of the two laws governing the compensation process, the Law on Property and the Law on Investment, seems questionable. While the scope of the laws is not limited to cases involving the ownership of State entities – they can indeed apply when both the previous and the actual owners are private persons, what is completely left aside by the Court is the *purpose* these legislative acts actually seek to achieve and the *nature* of their subject matter. The provisions ensure the compensation for the expropriation of the lawful owner taken place in the circumstances of a totalitarian regime. Even where the State has not (directly) acquired the property, the loss of ownership can still be considered as equal to such an expropriation since it was facilitated by the rules of the regime. What is more, both acts envisage special administrative proceedings preceding the claim for compensation, and even the establishment of special public bodies competent to deal with the multiplicity of restitution cases. And finally, and most importantly, restitution and compensation for expropriation connected with the specificity of a political regime are *per se* matters deeply rooted in the relationship between the private individual and the State.

Furthermore, the Court brings the argument that the restitution of the overpayment is not a part of the administrative procedure foreseen in the

above-mentioned laws. It is not entirely clear whether the ECJ aims at a distinction between the overpayment and the sum which the Land Berlin actually wanted to transfer or between the (over)payment and its restitution. As to the first assumption (which seems less probable), it has to be pointed out that a mistake in an administrative procedure cannot result into the transformation of a public administrative matter into a civil one. With regard to the second interpretation, whether the restitution of a payment is a civil matter or not, is a question necessarily linked to the nature of the payment itself. In a nutshell: Payment, *over*payment and recovery of overpaid amount necessarily share the same legal nature when it comes to ascribing them to the public or the private domain.

The rather supplementary argument of the ECJ concerning the jurisdiction of the Civil courts on the overpayment recovery claims in the aforementioned context is also misleading as it clearly contradicts to established case-law. As the Court rightfully noted in *Lechouritou and others* (paragraph 41), the civil nature of the proceedings previewed in national law is entirely irrelevant when it comes to qualifying a claim for the purpose of Article 1 of the Regulation. From *Lechouritou* (paragraphs 36 f.) we can conclude that it is the nature of the claim, the context it derives from and the acts at the origin of the damage pleaded that are decisive for the qualification of the claim as falling in or outside of the scope. While it is beyond doubt that the questions in the main proceedings of *Lechouritou* – State immunity in the context of armed forces activities during the Second World War – demonstrate a much stronger link to a State related matter, the reasoning of this judgment nonetheless offers clear criteria that can be (or rather should have been) applied to the *Land Berlin* case.

The last point in the reasoning of *Land Berlin* that merits examination is the question of the legal basis of the claim – a factor to which the Court itself seems to ascribe a significant importance. The action for recovery of the overpayment is based on Paragraph 812 (1) of the German Civil Code: a rule governing restitution in cases of unjust enrichment which applies to both private persons and public authorities. However, it seems arbitrary to consider a claim as a civil matter simply because a national legislator has anchored the general provision on unjust enrichment in the Civil Code without distinguishing between public and private cases. This rather technical

approach adopted in *Land Berlin* promotes another, very controversial consequence: It results in the general inclusion of claims based on unjust enrichment into the scope of the Regulation irrespective of their true nature. Unjust enrichment as such, however, cannot exist outside of a context, whether it is a contractual one, a tortious one or – for the sake of this debate – an administrative one.

As a conclusion, a critical view on this note seems appropriate: Is the position stated here one too deeply rooted in the German understanding of a civil matter that disregards the need of an independent, autonomous definition of the Regulation's scope? While the compensation for expropriations during the NS regime is in Germany indeed framed in an administrative procedure and strongly differs from the civil context, might the European legislator still consider it as a civil matter?

I would argue that this is not the case. The core elements that deserve attention from a EU perspective are: the subject matter of the action and the legal relationships between the parties (*LTU*, paragraph 4; *Lechouritou*, paragraph 30; *Henkel*, paragraph 29). There is no rule under which restitution claims necessarily constitute a civil issue, nor is every action brought before a civil court by all means subject to the Regulation's jurisdiction rules. Therefore, with regard to the aforementioned specifics of the *Land Berlin* case, the judgment sets an alarming trend: Following *Land Berlin*, the Brussels I Regulation risks to eventually apply to subject matters it never meant to govern.

Luxembourg Conference on the Application of Nazi Law by Foreign Authorities

Didier Boden (University of Paris I) will deliver a lecture on Tuesday 7 May in

Luxembourg on the Application of the Third Nuremberg Law by Foreign States.

> *Le 15 septembre 1935, lors du Congrès de Nuremberg, le Reichstag adopta trois lois : la première sur le drapeau du Reich, la deuxième sur la citoyenneté, et la troisième sur « la protection du sang allemand et de l'honneur allemand », qui interdisait aux ressortissants allemands « de sang allemand ou apparenté » d'épouser des « Juifs ». Le lendemain, elle fut appliquée pour la toute première fois au mariage d'un ressortissant allemand à Amsterdam, en vertu des règles du droit international privé néerlandais.*
>
> *L'incident fut immédiatement connu et en quelques jours se répandit aux quatre coins du monde la nouvelle que la troisième des lois de Nuremberg posait un problème très concret de droit international privé, sur lequel chacun des États voisins de l'Allemagne allait devoir se prononcer rapidement. Quelles furent les réponses des gouvernements néerlandais et luxembourgeois ?*

The lecture will take place at 6 pm in the Amphithéatre Tavenas in the Limpertsberg district. It will be delivered in French.

More information is available here.

Succession Mortis Causa: Applicable Law (Paper)

Isabel Rodríguez-Uría Suárez has just published a paper (click here) on the rules on the applicable law laid down by the Regulation 650/2012. The abstract of the paper, from the author, and different from the published version, reads as follows:

> *This paper analyzes the applicable law to the succession* mortis causa *as defined by the European Regulation on Succession. The general rules determining the* lex successionis *and the special rules setting out the applicable law to wills as well as the agreements as to succession are the main subject of this article. The scope of the aforementioned laws is also thoroughly*

analyzed.

On the upside, the author considers that the Regulation is an important improvement in the field of the international successions. She underlines the special features of the general rules laid down by the Regulation, and the special rules applicable to wills and to agreements as to succession. Furthermore the author highlights as extremely positive the distinction between agreements as to succession regarding the succession of one person and agreements as to succession regarding the succession of several persons. She also approves the flexibility of the general rules of the Regulation, welcoming the clause of exception to the more closely connected law, as well as the role played by the party autonomy. In respect to latter, the paper deals with the difference between professio iuris *set out by art. 21, and the possibility of making a* pactum de lege utenda *according to art. 25.3. It is submitted that party autonomy should have been broader in its scope, and that the EU law maker has lost an opportunity to increase the role of the party autonomy, especially allowing a* professio iuris *to the law of the habitual residence of the deceased; this possibility would have been notably positive with regard to the agreements as to succession.*

Notwithstanding her overall favourable assessment of the Regulation, the author is not blind to its downsides. Some options adopted in the Regulation are criticized in as far as they do not guarantee neither the predictability nor the legal certainty of estate planning: yet legal certainty is vital in this realm, especially when it comes to agreements as to successions, which require predictability from the very moment of their formal conclusion. In this sense, the classical approach adopted by the Regulation, placing the forced heirship under the scope of the lex successionis *and fixing the* lex successionis *at the moment of demise (as a general rule), may give raise to several problems, which the paper analyzes in depth. The author assumes that the* professio iuris *would become the key factor providing the security essential to estate planning: but, as nobody can be forced to choose the law applicable to his or her succession, the possibility of coming up against problems of uncertainly (in short, the possibility that the will of the deceased be ruined by the forced heirship rules of a* lex successionis *unknown at the moment of the drawing up of the will or the agreement) remains open.*

The paper has been drawn up as part of a global research project on succession

law at comparative, international and inter-regional levels, sponsored by the Spanish Government. Linked to this same Project we have already given notice in a previous post of a paper on agreements as to successions according to the Proposal of Regulation on succession and wills. Other interesting publications related to the Project, on *Forced Heirship in the Regulation on Successions and Wills*, by Professor Álvarez González (abstract in English and full text in Spanish), and on the *Proposal and the Spanish Interregional Law*, by Isabel Rodríguez-Uría Suárez (abstract in English and full text in Spanish), can be found here and here.

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"

Proposal for a Regulation on the Circulation of Public Documents

The European Commission has issued last week a new Proposal for a Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the european Union and amending Regulation (EU) No 1024/2012 (COM(2013) 228).

The proposal establishes a clear set of horizontal rules exempting public documents falling under its scope from legalisation or similar formality (Apostille). In (sic) also foresees simplification of other formalities related to the cross-border acceptance of public documents, namely of certified copies and certified translations. In order to guarantee the authenticity of public documents which circulate from one Member State to another, it introduces an effective and secure administrative cooperation based on the Internal Market

Information System ("the IMI"), established by Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012.15 The IMI includes also a functionality to maintain a repository of model templates of public documents used within the Single Market that can serve as first checking point of unfamiliar documents.

The proposal also establishes Union multilingual standard forms concerning birth, death, marriage, registered partnership and legal status and representation of a company or other undertaking. In addition, with the aim to further reduce the remaining translation requirements for EU citizens and businesses, such Union multilingual standard forms could be established at a later stage for public documents relating to name, parenthood, adoption, residence, citizenship and nationality, real estate, intellectual property rights and absence of a criminal record. The Union multilingual standard forms should not be mandatory but when used they
have the same formal evidentiary value as the simular public documents drawn up by the authorities of the issuing Member State.

The press release of the Commission can be found here.

H/T: Maarja Torga

Symeonides on the Hague Principles on Choice of Law

Dean Symeon C. Symeonides (Willamette University – College of Law) has posted The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments on SSRN.

This Article discusses The Hague Principles on Choice of Law for International Contracts, a new soft-law instrument recently adopted by the Hague Conference of Private International Law.

The Principles will apply to "commercial" contracts only, specifically excluding consumer and employment contracts. For this reason, the Principles adopt a decidedly liberal stance toward party autonomy, exemplified inter alia by a strong endorsement of non-state norms. Such a liberality would be unobjectionable, indeed appropriate, if a contract's "commerciality" alone would preclude the disparity of bargaining power that characterizes consumer and employment contracts. The fact that — as franchise contracts illustrate — this is not always the case makes even more necessary the deployment of other mechanisms of policing party autonomy. The Principles provide these mechanisms under the rubric of public policy and mandatory rules, but their effectiveness is not beyond doubt.

The Principles are intended to serve as a model for other international or national instruments and as a guide to courts and arbitrators in interpreting or supplementing rules on party autonomy. Like other international instruments, the Principles are as good as the consensus of the participating delegations would allow. But the real test of success for these Principles depends not on academic approbation but on their reception by contracting parties, courts, and arbitrators. While it is too early to tell whether the Principles will pass this test, there is reason for optimism.

In any event, and regardless of whether they will be widely accepted, the Principles will enrich the quality of the international discourse by providing a guiding light in the search for proper solutions to the problems encountered in honoring, and defining the limits of, contractual choice of law in international contracts. This alone would be a significant contribution to the advancement of the art and science of law-shaping.

The Article is forthcoming in the *American Journal of Comparative Law* (Vol. 61, 2013) and, in French, in the *Revue critique de droit international privé*.

First Issue of 2013's Journal of Private International Law

The latest issue of the *Journal of Private International Law* was just released.

Reid Mortensen, Woodhouse Reprised: Accident Compensation and Trans-Tasman Integration

> *Australia and New Zealand have created a single civil judicial area, which gives all courts in each country a complete adjudicative jurisdiction and a barely qualified enforcement jurisdiction throughout the whole trans-Tasman market area. The risk of concurrent proceedings and incompatible judgments is minimised only by the power of courts to stay proceedings on the ground of forum non conveniens or when enforcing a choice-of-court agreement. The scheme rests on the 'strikingly similar' quality of the two countries' legal systems. However, New Zealand's Accident Compensation Act 2001 maintains a unique, comprehensive no-fault compensation scheme for accidents which also prohibits all court-based claims for compensation for personal injuries. It is 'strikingly dissimilar' to the common law systems of personal injuries compensation found in the Australian states. And, given that the Australian common law systems are often much more generous in the awards given for personal injuries, the New Zealand scheme has been a significant motivation for New Zealanders' forum shopping in Australia. This does not appear to have been addressed well by the new trans-Tasman scheme for civil jurisdiction. The article considers the confounding role that the Accident Compensation Act may continue to play in trans-Tasman civil jurisdiction, and its implications for the principles of forum conveniens, choice-of-law and the enforcement of personal injuries awards between Australia and New Zealand.*

Samuel Zogg, Accumulation of Contractual and Tortious Causes of Action under the Judgments Regulation

> *This article examines jurisdictional issues under the Judgments Regulation in cases where a claimant alleges to have, from one and the same incident, a contractual and a tortious cause of action, both providing for full compensation. It analyses the relationship between Article 5(1) and 5(3); particularly, whether and to what extent these provisions are mutually exclusive and whether they*

provide for accessory jurisdiction for related claims. Furthermore, the question is raised whether the claimant is free to "choose" the jurisdictional rule by skilful drafting of his claim.

As far as the claimant is free to pursue his claims in different fora, questions of how to deal with such parallel proceedings are discussed; namely, whether lis pendens exists (Article 27) and whether Article 28 applies. After termination of such proceedings, delicate res judicata issues arise; particularly whether and to what extent a judgment on one claim precludes judgment on the other and, if not, how double satisfaction may be prevented.

Rita Matulionyte, Calling for Party Autonomy in Intellectual Property Infringement Cases

This article discusses the possibility of parties choosing the applicable law for intellectual property (IP) infringements. Although party autonomy in IP cases has been explicitly denied in the Rome II Regulation, the recent worldwide academic proposals, such as ALI, CLIP, Transparency and the Joint Japanese-Korean proposal, have suggested a party autonomy rule in IP infringement cases. This paper demonstrates that, as a general matter, this approach is reasonable. It further discusses the most suitable scope and limitations of party autonomy for IP infringements.

José Velasco Retamosa, International Protection of United Nations System Emblems: Private International Law Issues

This article deals with the international protection that national and international Law grants to the United Nations system emblems. The study is carried out from a multidisciplinary perspective due to its relation with the different areas of Law, with special reference in each case to questions referred to in Private International Law. The intervention of the rules of public as well as private law supposes that the symbols and emblems that represent the international Organization and, more specifically, their protection, comes from the observation of the different areas of the legal system which range from Public and Private International Law in general to the specific regulations on industrial property rights. In this regard, when the protection transcends borders and the interest is located in more than one State, the rules of International private Law find their importance in the protection of these types of symbols and emblems.

Laurens Timmer, Abolition of *Exequatur* under the Brussels I Regulation: Ill Conceived and Premature?

On the 6 December 2012, the Council of EU Justice Ministers adopted a recast of the Brussels I Regulation. Among other changes, the recast provides for the abolition of the exequatur procedure. The changes had been proposed by the Commission in 2010, but have been significantly revised before being adopted by the European Parliament and the Council. This article examines and criticises both the adopted changes and the claims made in the political arena in regard to the necessity of these changes. The author favours the use of less radical measures to achieve the goal of abolition, which is avoiding unnecessary costs and delays in cross-border procedures within the European Union.

Martina Melcher, (Mutual) Recognition of Registered Relationships via EU Private International Law

An ever growing number of bi-national couples and increased population mobility together with highly heterogenous national substantive and conflict rules regarding couple relationships, such as same-sex marriage or registered partnerships, inevitably lead to limping relationships, different legal effects and disparate decisions. In addition to practical difficulties for such couples, the non-recognition of already registered relationships likely infringes their fundamental freedom of movement and human rights. For these reasons, the current article argues that registered relationships with cross-border effects should be recognised as such outside their state of origin. An analysis of several options to recognise those relationships shows that unified conflict rules are best suited to achieve this purpose. Whereas automatic recognition appears to be particularly attractive as it would not require the Member States to adopt new rules, such an instrument could not replace conflict rules altogether, but would only add to the legal complexity. In contrast, an EU regulation on the law applicable to registered relationships would create a comprehensive set of unified rules, thus guaranteeing an equal legal treatment of the relationship independent from the location of the competent court within the EU.In order to ensure the recognition of an already registered, or somehow formalised, relationship in another Member State, the article favours the place of registration as the main connecting factor for questions on the establishment, the personal legal effects and the dissolution of such couple relationships.

Other possible connecting factors, such as domicile, nationality or habitual residence, are discussed as well. Furthermore the potential necessity to limit the registration of aliens in order to confine system shopping and fraus legis is assessed. Finally, the article also tackles the problem of a possible refusal of recognition based on grounds of public policy and evaluates some arguments that have been brought forward in this context in national legal systems.

Fabrício Bertini Pasquot Polido, Review Article: How Far Can Private International Law Interact with Intellectual Property Rights? A Dialogue with Benedetta Ubertazzi's book *Exclusive Jurisdiction in Intellectual Property*