La Ley-Unión Europea, July 2012

A new article from Prof. Patricia Orejudo Prieto de los Mozos (Complutense University, Madrid) entitled "La nueva regulación de la ley aplicable a la separación judicial y al divorcio: aplicación del Reglamento Roma III en España" is to be found in the Spanish magazine *La Ley-Unión Europea* of July 31, 2012. The summary reflects the critical view of the author:

> The Rome III Regulation, the first instrument of enhanced cooperation adopted in the EU, seeks to provide "a clear and comprehensive legal framework on applicable law to divorce and legal separation. " However, it does not increase legal predictability, nor does it prevent (on the contrary, it could encourage) the so called "race to the courts." Furthermore, when applied in Spain it will add regulatory fragmentation and complexity to an already intricate situation, making it more difficult to manage for the Spanish legal operators. If we sum this to the democratic deficit inherent to the adoption process and with the fact that the Regulation serves best the conservative values of other Member States, the Spanish decision to participate is hard to understand.

A comment on the recent ECJ ruling *Oracle v. UsedSoft*, from Prof. Miguel Michinel (University of Vigo), has also been published in the same issue of the magazine.

Foreign Notary Deed in Spain

A recent press release from the *Consejo General del Poder Judicial (General Council for the Judiciary)* reports an interesting ruling of the Spanish Supreme Court. The decision, of 19 June 2012, ratifies the one of the previous instance according the registration in a Spanish Land Registry of a deed of sale of an immovable located in Spain, notarized by a German Notary. Taking into account

the rules of private international law the Supreme Court confirms the validity of the foreign deed in Spain as a basis for a Registry record.

In the instant case litigation arose from the sale of an apartment in Tenerife, which was acquired undivided by two German citizens. One of them sold his share to a third party with the consent of the other; the transfer was formalized by a German notary and the acquirer sought to have it recorded in the Land Registry of Puerto de la Cruz. The registrar refused, considering that the German document lacked full legal force in Spain; his decision was upheld by the General Directorate for Registries and Notaries, but rejected on appeal both by the Court of First Instance and the *Audiencia Provincial*, as well as by the Supreme Court.

According to the Supreme Court, a decision such as the one taken by the registrar and supported by the General Directorate cannot be approved under the current understanding of the freedom to provide services at the European Union level; also, to require the involvement of a Spanish Notary would mean an unjustified limitation to the freedom of transfer of goods. Article 1462 of the Spanish Civil Code, which applies in the case, equates issuing of a public deed with delivery of the sold thing; the provision does not require that the deed be granted by a Spanish Notary public, therefore a formally valid deed granted by a foreign Notary will have the same effect (in terms of equation with delivery) as one notarized in Spain. The Supreme Court believes that this interpretation matches the EU tendency to avoid duplication of formal requirements, once they have been fulfilled in a member State for a purpose identical or similar to that required in the State where the act thus documented aims to produce effects. To back this opinion the Court leans on the Commission's Green Paper of December 14, 2010 entitled "Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records"; on the consistency of the understanding with the Spanish regulation on foreign investments, which does not require that contracts be notarized by a Spanish Notary; and on Article 323 of the Spanish Civil Procedure Act, which accords full evidential effect to public documents formalized abroad when comparable to the Spanish "escritura pública" in as far as the role of the Notary is concerned, regardless of the formal differences.

Two members of the Court do nevertheless dissent with the idea that Article 1462 Civil Code allows for the same treatment to be granted to Spanish and foreign deeds, as, according to the provision, equation between the public deed and the

delivery of the sold asset is excluded when the deed states (or it can easily be inferred) otherwise. In this regard, the differences between the German and the Spanish systems for the conveyance of ownership justifies the need for the intervention of Spanish Notaries: only they can safeguard the essential rules of the legal transfer of property that governs our country, which is that of *título y modo* (grounds of acquisition followed by the *traditio* or delivery).

Liber Amicorum for the Croatian Professor Emeritus Krešimir Sajko

Liber Amicorum for Professor Emeritus Krešimir Sajko was published within the *Collected Papers of the Zagreb Law Faculty*, volume 62, numbers 1-2. The papers in Croatian, German and English language published in the Liber Amicorum fall under the topics on private international law, international civil procedure, international commercial arbitration and alternative dispute resolution, as well as private law – comparative and Croatian. The table of contents is available here: 00 Nulti.indd. Professor Emeritus Sajko is one of the renowned Croatian professors of private international law, while his interests reach much further which is confirmed in his rich opus listed here 27 Popis radova.indd.

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.

Benedetta Ubertazzi's book on Exclusive Jurisdiction in IP

Benedetta Ubertazzi, an Assistant Professor of International Law at the Faculty of Law of the University of Macerata (Italy), has published a book titled "**Exclusive Jurisdiction in Intellectual Property**". The issue of exclusive jurisdiction in intellectual property matters, especially those related to existence and validity of intellectual property rights, was revived in the recent years due to several important court cases, including the CJEU judgment in GAT v. LuK, the US ruling in Voda v. Cordis, and the UK decisions in Lucasfilm v. Ainsworth. In this book Benedetta Ubertazzi argues that the grounds regularly invoked to

support the exclusive jurisdiction rules related to intellectual property rights do not stand the test of justifiableness. Moreover, she purports that such exclusive jurisdiction should be abandoned because it runs contrary to public international rules concerning the avoidance of a denial of justice.

The book is published in 2012 by Mohr Siebeck as 273rd title in a series of books *Studien zum ausländischen und internationalen Privatrecht (StudIPR)* and available for order here, also as an e-book. The article by the same author on this topic was published in 15 Intellectual Property L. Rev. 357 (2011) and available here.

Recent Canadian Conflicts Articles

The following articles about conflict of laws in Canada were published over the past year or so:

Elizabeth Edinger, "Is Duke v Andler Still Good Law in Common Law Canada?" (2011) 51 Can Bus LJ 52-75

Matthew E Castel, "The Impact of the Canadian Apology Legislation when Determining Civil Liability in Canadian Private International Law" (2012) 39 Adv Q 440-451

Nicholas Pengelley, "This Pig Won't Fly: Death Threats as Grounds for Refusing Enforcement of an Arbitral Award" (2010) 37 Adv Q 386-402

Tanya Monestier, "Is Canada the New 'Shangri-La' of Global Securities Class Actions?" (2012) 32 Northwestern Journal of International Law and Business _.

Electronic access to these articles depends on the nature of the subscriptions. Some journals are available immediately through aggregate providers like HeinOnline while others delay access for a period of months or years.

Declaration of Committee of Ministers on Libel Tourism

The Committee of Ministers of the Council of Europe has adopted on July 4th a Declaration of the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, "Libel Tourism", to Ensure Freedom of Expression.

> *1. The full respect for the right of all individuals to receive and impart information, ideas and opinions, without interference by public authorities and regardless of frontiers constitutes one of the fundamental principles upon which a democratic society is based. This is enshrined in the provisions of Article 10 of the European Convention on Human Rights ("the Convention", ETS No. 5). Freedom of expression and information in the media is an essential requirement of democracy. Public participation in the democratic decision-making process requires the public to be well informed and to have the possibility of freely discussing different opinions.*

> *2. Article 10 of the Convention also states that the right to freedom of expression "carries with it duties and responsibilities". However, States may only limit the exercise of this right to protect the reputation or rights of others, as long as these limitations are "prescribed by law and are necessary in a democratic society". In this respect, in its reply to Parliamentary Assembly Recommendation 1814 (2007) "Towards decriminalisation of defamation", adopted on 7 October 2009, the Committee of Ministers endorsed the Parliamentary Assembly's views and called on member States to take a proactive approach in respect of defamation by examining domestic legislation against the case law of the European Court of Human Rights ("the Court") and, where appropriate, aligning criminal, administrative and civil legislation with those standards. Furthermore, the Committee of Ministers recalled Parliamentary Assembly Recommendation 1589 (2003) on "Freedom of expression in the media in Europe".*

3. The European Commission of Human Rights and the Court have, in several cases, reaffirmed a number of principles that stem from paragraphs 1 and 2 of Article 10. The media play an essential role in democratic societies, providing the public with information and acting as a watchdog,1 exposing wrongdoing and inspiring political debate, and therefore have specific rights. The media's purpose is to impart information and ideas on all matters of public interest.2 Their impact and ability to put certain issues on the public agenda entails responsibilities and obligations. Among these is to respect the reputation and rights of others and their right to a private life. Furthermore, "subject to paragraph 2 of Article 10 (art. 10-2), [freedom of expression] is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population".3

4. In defamation cases, a fine balance must be struck between guaranteeing the fundamental right to freedom of expression and protecting a person's honour and reputation. The proportionality of this balance is judged differently in different member States within the Council of Europe. This has led to substantial variations in the stringency of defamation law or case law, for example different degrees of attributed damages and procedural costs, varying definitions of first publication and the related statute of limitations or the reversal of the burden of proof in some jurisdictions. The Court has established case law in this respect: "In determining the length of any limitation period, the protection of the right to freedom of expression enjoyed by the press should be balanced against the rights of individuals to protect their reputations and, where necessary, to have access to a court in order to do so. It is, in principle, for Contracting States, in the exercise of their margin of appreciation, to set a limitation period which is appropriate and to provide for any cases in which an exception to the prescribed limitation period may be permitted".4

Libel tourism and its risks

5. The existing differences between national defamation laws and the special jurisdiction rules in tort and criminal cases have given rise to the phenomenon known as "libel tourism". Libel tourism is a form of "forum shopping" when a complainant files a complaint with the court thought most likely to provide a favourable judgment (including in default cases) and where it is easy to sue. In some cases a jurisdiction is chosen by a complainant because the legal fees of

the applicant are contingent on the outcome ("no win, no fee") and/or because the mere cost of the procedure could have a dissuasive effect on the defendant. The risk of forum shopping in cases of defamation has been exacerbated as a consequence of increased globalisation and the persistent accessibility of content and archives on the Internet.5

6. Anti-defamation laws can pursue legitimate aims when applied in line with the case law of the Court, including as far as criminal defamation is concerned. However, disproportionate application of these laws may have a chilling effect and restrict freedom of expression and information. The improper use of these laws affects all those who wish to avail themselves of the freedom of expression, especially journalists, other media professionals and academics. It can also have a detrimental effect, for example on the preservation of information, if content is withdrawn from the Internet due to threats of defamation procedures. In some cases libel tourism may be seen as the attempt to intimidate and silence critical or investigative media purely on the basis of the financial strength of the complainant ("inequality of arms"). In other cases the very existence of small media providers has been affected by the deliberate use of disproportionate damages by claimants through libel tourism. This shows that libel tourism can even have detrimental effects on media pluralism and diversity. Ultimately, the whole of society suffers the consequences of the pressure that may be placed on journalists and media service providers. The Court has developed a body of case law that advocates respect for the principle of proportionality in the use of fines payable in respect of damages and considers that a disproportionately large award constitutes a violation of Article 10 of the Convention.6 The Committee of Ministers also stated this in its Declaration on Freedom of Political Debate in the Media of 12 February 2004.7

7. Libel tourism is an issue of growing concern for Council of Europe member States as it challenges a number of essential rights protected by the Convention such as Article 10 (freedom of expression), Article 6 (right to a fair trial) and Article 8 (right to respect for private and family life).

8. Given the wide variety of defamation standards, court practices, freedom of speech standards and a readiness of courts to accept jurisdiction in libel cases, it is often impossible to predict where a defamation/libel claim will be filed. This is especially true for web-based publications. Libel tourism thereby also demonstrates elements of unfairness. There is a general need for increased

predictability of jurisdiction, especially for journalists, academics and the media.

9. The situation described in the previous paragraph has been criticised in many instances. Further, in a 2011 Joint Declaration, the United Nations (UN) Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Organisation for Security and Co-operation in Europe (OSCE) Representative on freedom of the media, the Organisation of American States (OAS) Special Rapporteur on freedom of expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on freedom of expression and access to information in Africa stated that jurisdiction in legal cases relating to Internet content should be restricted to States to which those cases have a real and substantial connection.

10. Procedural costs may discourage defendants from presenting a defence thus leading to default judgments. Compensations may be considered disproportionate in the member State where the claim is being enforced due to the failure to strike an appropriate balance between freedom of expression and protection of the honour and reputation of persons.

Measures to prevent libel tourism

11. The prevention of libel tourism should be part of the reform of the legislation on libel/defamation in member States in order to ensure better protection of the freedom of expression and information within a system that strikes a balance between competing human rights.

12. With a view to further strengthening the freedom of expression and information in member States, an "inventory" of the Court's case law in respect of defamation could be established with a view to suggesting new action if need be. Further, if there is a lack of clear rules as to the applicable law and indicators for the determination of the personal and subject matter jurisdiction, such rules should be created to enhance legal predictability and certainty, in line with the requirements set out in the case law of the Court. Finally, clear rules as to the proportionality of damages in defamation cases are highly desirable.

13. Against this background, the Committee of Ministers:

– alerts member States to the fact that libel tourism constitutes a serious threat to the freedom of expression and information;

– acknowledges the necessity to provide appropriate legal guarantees against awards for damages and interest that are disproportionate to the actual injury, and to align national law provisions with the case law of the Court;

– undertakes to pursue further standard-setting work with a view to providing guidance to member States.

1 Goodwin v. United Kingdom, European Court of Human Rights, 27 March 1996, paragraph 39.

2 De Haes and Gijsels v. Belgium, European Court of Human Rights, 24 February 1997, paragraph 37.

3 Handyside v. United Kingdom, European Court of Human Rights, 7 December 1976, paragraph 49.

4 Times Newspapers Ltd. (Nos. 1 and 2) v. United Kingdom, European Court of Human Rights, 10 March 2009, paragraph 46.

5 Times Newspapers Ltd. (Nos. 1 and 2) v. United Kingdom, European Court of Human Rights, paragraph 45.

6 Tolstoy Miloslavsky v. United Kingdom, European Court of Human Rights, 13 July 1995, paragraph 51.

7 "Damages and fines for defamation or insult must bear a reasonable relationship of proportionality to the violation of the rights or reputation of others, taking into consideration any possible effective and adequate voluntary remedies that have been granted by the media and accepted by the persons concerned."

The Future of the European Insolvency Law (Conference)

A conference under the title *The Future of the European Insolvency Law – Reforming the European Insolvency Regulation,* organized by the Institut für ausländisches und internationales Privat- und Wirtschatftsrecht (Ruprecht-Karls Universität, Heidelberg) and the Institut für Zivilverfahrensrecht (Universität Wien) will take place in Heidelberg on Friday 27th and Saturday 28th. Attendance is by invitation only. Here is the programme:

Friday 27th July, from 2 p.m.:

(Welcome)

14.15-14.30 Jérôme Carriat, DG Justice – European Commission, Principal Administrator : *Current developments in European insolvency law – A brief report from Brussels*

14.30-16 Chair: *Prof. Dr. Burkhard Hess* / Mr Christopher Seagon*: Scope of the insolvency regulation (Listed proceedings in the Annexes – Recognition and enforcement of foreign insolvency proceedings*)

16.30- 18 Chair: *Prof. Dr. Burkhard Hess* / Prof. Dr. Paul Oberhammer: *The concept of COMI*

Saturday 28th July, from 9 a.m.

9-10.30 Chair: *Prof. Dr. Burkhard Hess* / Prof. Dr. Paul Oberhammer: *Main and secondary insolvency proceedings*

11-12.30 Chair: *Prof. Dr. Thomas Pfeiffer* / Prof. Dr. Paul Oberhammer: *Insolvency within multinational enterprise groups*

14-16.30 Chair: *Prof. Dr. Thomas Pfeiffer*/ Prof. Dr. Andreas Piekenbrock: *Applicable law*

New Book on Court Jurisdiction and Proceedings Transfer Act

Thomson Reuters Carswell has just published *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* by Vaughan Black, Stephen G.A. Pitel and Michael Sobkin. More information is available here.

The *Court Jurisdiction and Proceedings Transfer Act* puts the important topic of the jurisdiction of Canadian provincial courts in civil and commercial cases on a clearer statutory footing. It is in force in British Columbia, Saskatchewan and Nova Scotia. The approach to jurisdiction adopted under the CJPTA is different in several respects from the common law approach, and so provinces that have adopted it are undergoing a period of transition. One of the key issues for courts in applying the CJPTA is interpreting its provisions and explaining how they operate. *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* examines the growing body of cases and provides a comprehensive account of how the CJPTA is being interpreted and applied by the courts.

The Supreme Court of Canada has, in its April 2012 decisions on jurisdiction, indicated a willingness to develop the common law in a way that is highly mindful of the approach taken under the CJPTA. As a result, the analysis of the CJPTA will also be of use to those in Canadian common law provinces and territories that have not enacted the CJPTA.

The book may also appeal as a comparative law resource on conflict of laws, especially to those interested in how traditional rules can be affected, directly and indirectly, by statutory reform.

Nioche on Provisional Orders in European PIL

Marie Nioche, who lectures at Nanterre University and practices at Castaldi Mourre, has published La décision provisoire en droit international privé.

The book, which is based on the doctorate of Dr. Nioche, explores the legal regime of provisional orders in civil and commercial matters in European private international law.

One essential idea that it advances is that the language of the Brussels I Regulation and of many scholars is misleading. Article 31 refers to provisional *measures*. Dr. Nioche's claim is that it is critical to distinguish between provisional *orders* and provisional *measures*. Orders are court decisions and judicial in nature. Measures are carried out by other state officials, often after a court gave its leave by issuing a provisional order. They do not raise comparable issues. For instance, while it is correct to wonder whether measures could be extra-territorial (state officials carrying them ought to remain on the territory of their state), there is no reason to challenge the recognition of court orders. Conceptual clarity would help asking the right questions.

Another goal of the book is to challenge the idea that provisonal orders are so peculiar that they should not be able to circulate in Europe as any other judgments. Dr. Nioche offers a thorough analysis of the concept of provisional order and demonstrates that it shares all the features of judicial decisions, and should thus be treated likewise.

These are only a couple of ideas developed by the book. A full table of contents is available here. The French abstract reads:

> *Les difficultés rencontrées pour définir le régime applicable au contentieux provisoire dans le cadre du Règlement n°44/2001 ont pour origine le caractère hétéroclite de la catégorie « mesures provisoires et conservatoires ». L'unité de la catégorie peut néanmoins être atteinte en changeant de perspective.*

L'auteur propose une distinction transversale entre la « décision provisoire » et les mesures qu'elle ordonne. La notion de « décision provisoire », dont le caractère juridictionnel – et « décisionnel » au sens du Règlement – est démontré, constitue une catégorie de droit international privé plus homogène et plus pertinente.

Ce travail de définition et de qualification clarifie l'ensemble des questions qui se posent en matière de contentieux provisoire européen. Internationalement compétent, le juge du fond doit pouvoir prononcer l'ensemble des décisions provisoires, quel que soit le lieu où elles ont vocation à produire leurs effets. Toutefois, certaines d'entre elles – que l'auteur propose d'appeler les décisions provisoires per partes – produisent leurs effets hors du territoire du for plus facilement et plus vite que d'autres – que l'auteur nomme les décisions provisoires per officium. Génératrice de forum shopping et de conflits de procédures et de décisions, la compétence locale d'un juge d'appoint, fondée sur l'article 31 du Règlement, doit être essentiellement limitée aux décisions provisoires per officium.

L'ouvrage intègre les derniers développements relatifs au contentieux provisoire européen, en particulier la Proposition de révision du Règlement n°44/2001 du 14 décembre 2010 et la Proposition de règlement portant création d'une ordonnance européenne de saisie conservatoire des comptes bancaires du 25 juillet 2011.

More details can be found here.