# Second Issue of 2013's Rivista di diritto internazionale privato e processuale

*(I am grateful to Prof. Francesca Villata – University of Milan – for the following presentation of the latest issue of the RDIPP)*

The second issue of 2013 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released. It features three articles and two comments.

In her article *Nerina Boschiero*, Professor of International Law at the University of Milan, addresses the issue of "Corporate Responsibility in Transnational Human Rights Cases. The U.S. Supreme Court Decision in *Kiobel v. Royal Dutch Petroleum*" (in English).

> *With a decision based upon the consideration that all the significant conduct occurred outside the territory of the United States, in Kiobel the U.S. Supreme Court unanimously ruled that the presumption against extraterritoriality applies to claims under the Alien Tort Statute, and that nothing in the statute refutes that presumption. However, in its decision the Supreme Court did not directly address the issue whether a corporation can be a proper defendant in a lawsuit under the ATS. In this article, the Author begins by providing a substantial "pre-Kiobel" analysis of the business-human rights relationship. Furthermore, in addressing – with reference to the Kiobel case – the issues of corporate liability and extraterritorial jurisdiction over abuses committed abroad, the Author provides a detailed description of the governments' positions on universal civil jurisdiction, also providing a critical evaluation of the arguments put forth by the EU Member States on the extraterritorial application of ATS. As the Author illustrates, this decision is far more complex and problematic than it may appear: it in fact leaves a number of questions open on what exactly remains of the ATS, as well as various uncertainties due to the substantive differences between the majority opinion and the different concurring opinions, difficult to be reconciled and harmonized, especially from an European standpoint.*

In his article *Andrea Bonomi*, Professor of Comparative Law and Private international Law at the University of Lausanne, provides an assessment of the new EU Regulation on succession matters in "Il regolamento europeo sulle successioni" (The EU Regulation in Matters of Successions; in Italian).

> *The European Regulation on Succession Matters, adopted on 4 July 2012, will be applicable from 17 August 2015 to the succession of persons who die on or after this date. The final text reflects in its main features the Commission proposal of 2010, albeit with several amendments. Among the most important novelties, we will mention the restructuring of the jurisdictional scheme, the introduction of an exception clause and of some specific provisions concerning wills and the formal validity of mortis causa provisions, as well as the admission of renvoi. Several useful clarifications have also been included, sometimes in the text of the Regulation and sometimes in the preamble, inter alia with respect to the definition of "court", the determination of the last habitual residence of the deceased, the "acceptance" of evidentiary effects of authentic instruments, and the purpose and effects of the European Certificate of Succession. Overall, the Regulation is a very detailed and well-balanced instrument. In the majority of cases, the adoption of the habitual residence as the main criteria for the allocation of jurisdiction and the determination of the applicable law will allow national courts in the Member States to regulate the succession according to their domestic law. Derogations from this approach result in particular from the admission of party autonomy, and are mainly provided for estate planning purposes. The unification of the conflict of law rules in the Member States as well as the extension of the principle of mutual recognition to decisions and authentic instruments to succession law matters will also significantly contribute to legal certainty, and further estate planning. Last but not least, the European Certificate of Succession will greatly facilitate the transnational administration of estates by heirs and representatives. On the other hand, the main weaknesses of the new instruments concern the relationships with non-Member States, and with those Member States who are not subject to the Regulation (Denmark, Ireland, and the United Kingdom); potential conflicts with the courts of those States, due to the wide reach of the Regulation's jurisdictional rules, cannot be avoided through lis pendens and recognition mechanisms. It is therefore to be hoped that the efforts of harmonization in the area of international succession will continue under the auspices of the Hague Convention at a global level.*

In her article *Francesca C. Villata*, Professor of International Law at the University of Milan, addresses the reorganisation of the Greek sovereign debt in "Remarks on the 2012 Greek Sovereign Debt Restructuring: Between Choice-Of-Law Agreements and New EU Rules on Derivative Instruments" (in English).

> *The paper analyses – from a choice-of-law perspective – the restructuring mechanism implemented for the Greek sovereign debt bonds in 2012. In this respect, on one hand, the role played by parties' autonomy in determining the law applicable both to contractual and to non-contractual matters is emphasised; on the other hand, an analysis of the relevant EU Regulations on CDSs and derivative instruments, as wells as of the Mi-FID II and MiFIR proposals is conducted mainly through the lens of unilateral mandatory rules following the lex mercatus approach. The paper concludes with an auspice for the adoption of uniform rules on the insolvency or pre-insolvency of states, providing for agreed-upon restructuring processes.*

In addition to the foregoing, the following comments are also featured:

*Olivia Lopes Pegna*, Researcher of International Law at the University of Florence, "L'interesse superiore del minore nel regolamento n. 2201/2003" (The Superior Interest of the Child in Regulation No 2201/2003; in Italian).

> *The European Union is increasingly concerned with private international law instruments regarding, directly or indirectly, children. The UN Convention on the rights of the child (Art. 3) and the European Charter of Fundamental Rights (Art. 24) require that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests be a primary consideration. It is therefore mandatory for EU Institutions, and for national judges, to construe and apply EU legislative instruments in compliance with this principle. The present work concerns rules on jurisdiction and enforcement of foreign judgments that expressly refer to the best interests of the child in order to operate, and in particular the rules set in Regulation No 2201/2003 (Brussels II-bis) concerning decisions on parental responsibility. It tries to show how, and to what extent, "the best interests of the child" principle introduce flexibility, or even derogate, to the traditional private international law methods. The case-law of the European Court of Justice on the Brussels II-bis Regulation is examined, together with the main decisions of the Italian courts,*

*in order to evaluate to what extent effectiveness to the aforementioned principle is guaranteed in the application of the Regulation's provisions. It is also suggested that the Regulation shall be construed in a way that permits, in some circumstances, the participation of the child to the proceedings for recognition and enforcement of foreign decisions.*

*Nicolò Nisi* (PhD candidate at the Bocconi University), "La giurisdizione in materia di responsabilità delle agenzie di rating alla luce del regolamento Bruxelles I" (Jurisdiction over the Liability of Rating Agencies under the Brussels I Regulation; in Italian).

*A recent judgment delivered by the Italian Supreme Court decided upon the jurisdiction over damage claims brought by investors against rating agencies based in the U.S., allegedly liable for issuing inaccurate ratings capable of having a significant impact on their investment decisions. In this regard, the new Regulation (EU) No 462/2013 amending Regulation (EC) No 1060/2009 on credit rating agencies has introduced a new Article 35-bis specifically addressing the liability of rating agencies but it failed to provide some guidance with respect to private international law issues. The Italian Supreme Court declined its jurisdiction on the grounds of Article 5(3) of Regulation (EC) No 44/2001 ("Brussels I") and ruled that the "place where the harmful event occurred" is localized at the place of the initial damage, i.e. where the shares were first purchased at an excessive price, without any reference to the seat of the depositary bank, nor to the place where the rating is issued. This judgment turned out to be very interesting since it was the first Italian judgment to deal with jurisdiction issues relating to liability of rating agencies under the Brussels I Regulation and it provided for the opportunity to make a contribution to the discussion on the interpretation of Article 5(3) in case of financial torts and purely financial losses.*

Indexes and archives of the RDIPP since its establishment (1965) are available on the website of the Department of Italian and Supranational Public Law of the University of Milan.

# Gascon on Povse: a Presumption of ECHR Compliance when Applying the European Civil Procedure Rules?

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On the basis of the provisions of Articles 11(8) and 42(2) of the Brussels IIa Regulation, the Austrian courts, after a long and tortuous process, ended up ordering the Povse child's return to Italy, considering that the enforcement system without exequatur introduced by the Regulation at this point didn't allow them to do anything different. This «blind compliance» of the Austrian courts was, in fact, the subject of the complaint against Austria before the European Court of Human Rights (EctHR): both applicants (daughter and mother) complained that the Austrian courts had violated their right to respect for their family life, since they disregarded that the daughter's return to Italy would constitute a serious danger to her well-being and lead to a permanent separation of mother and child.

The basic argument of the Austrian Government against the complaint was to argue that its authorities had merely complied with their obligations under Brussels IIa Regulation and, in accordance with its provisions, they were not entitled to refuse to enforce the return decision nor to rule on its possible negative effects on the child. The Court's decision by majority accepts this argument and declares the application inadmissible. In the opinion of the Court a presumption exists that when a State is limited to meet its obligations as a member of an international organization (in this case, those arising from EU membership), it is also complying with the European Convention on Human Rights (ECHR) if the international organization provides fundamental rights a protection degree equivalent to that derived from the European Convention itself (as with the European Union).

The ECtHR applies to this case the doctrine of "presumption of compliance", which it had previously used in *Bosphorus v. Ireland* (30 June 2005, in a case involving the implementation of Council Regulation No 990/93 concerning trade with the Federal Republic of Yugoslavia), *M.S.S. v. Belgium and Greece* (21 January 2011, in a case regarding the Dublin II Regulation on asylum) and *Michaud v. France* (6 December 2012, final 6 March 2013, concerning the implementation of EU legislation on money laundering and the obligation of lawyers to report suspicious transactions of their clients). In *Povse v. Austria* the focus turns to European Civil Procedure and, more specifically, to Brussels IIa Regulation and the abolition of exequatur in international child abduction matters.

Through this doctrine, the ECtHR seeks to establish an appropriate balance between control and respect for the activities of other international organizations; the Court has stated, in fact, that "the Court may, in the interests of international cooperation, reduces the intensity of its supervisory role" (*Michaud* decision, § 104). In order to decide whether this "presumption of compliance" is applicable, the ECtHR can check three different sets of questions:

a) Check that the international organization, as such, is respectful of fundamental rights in an equivalent way as these are defined in the ECHR. In the case of the EU, this first requirement is recognized without difficulty by the ECtHR, for reasons that need no further explanation here.

b) Check if the specific rule approved by the international organization and that States have the obligation to fulfill is also respectful of the fundamental rights standard set by the ECHR.

In *Povse v. Austria* the ECtHR (§ 80) performs this control when it ascertains that the Brussels IIa Regulation has sufficient mechanisms to control that potential risk to the child has been taken into account at the time of ordering his or her return. The ECtHR does not verify the legitimacy of the return system established by the Regulation from a substantive perspective: in other words, it doesn't check compliance with the right to family life of the rule according to which, if the child's removal is held to be wrongful, he or she must return to the State where he was habitually resident immediately before. But the ECtHR controls indeed that the Brussels IIa Regulation ensures that the decision ordering the return of the child is to be taken after verifying its impact on family and private life of the

child, i.e. on his or her fundamental rights. There is, hence, a control on the existence of internal mechanisms to ensure respect for fundamental rights, even if that control is made in the State of origin and can not be made in the requested State. The legislative decision –taken by the European Union when approving the Brussels IIa Regulation– to place those controls exclusively with the court of origin could not in any way be regarded as infringing the right to private and family life, as it is justified by the need to effectively combat international child abduction in the EU context.

c) Check, although in a limited manner, how State authorities have applied the specific rule approved by the international organization. In particular, the ECtHR feels empowered to check whether the rule grants discretion to the national authority, for then the use of such discretion itself may be detrimental to fundamental rights and could be criticized by the EctHR.

In *Povse v. Austria* the ECtHR concluded that Articles 11(8) and 42(2) of the Brussels IIa Regulation granted no margin for discretion to the Austrian courts required to enforce the Venetian court decision, since the system of the Regulation at this point only allows the law and the courts of the requested State to determine the best way to comply with the order, but does not entitle them to take any decision that may prevent or suspend it, although allegedly it could had the aim of safeguarding fundamental rights.

With or without the *Povse* decision, it is obvious that the implementation of the European civil procedural rules can determine the filing of applications to the EctHR. After the *Povse* decision, it seems clear that these complaints will be resolved by the ECtHR applying the presumption of compliance doctrine. The *Povse* decision may thus serve as a basis for thinking about the control the ECtHR can exercise on the rules integrating the *corpus* of European Civil Procedure Law and on their implementation by national courts.

a) The ECtHR could control, of course, if European civil procedural rules provide for the affected fundamental rights a level of substantive and procedural protection that can be assumed by the ECHR system. As a rule the European legislator is always very careful with these issues, making it difficult to estimate *a priori* the detrimental nature to the fundamental rights of the rules that comprise European civil procedural law. However, casuistry always overflows legislator's forecasts…

For instance, we can think now of the rules establishing minimum standards on service to the defendant of the writ commencing the proceedings, which can be found in Article 14 of the European Enforcement Order Regulation, as well as in the European Order for Payment Procedure Regulation and in the European Small Claims Procedure Regulation. Approving these rules, the European procedural legislator has considered as tolerable certain mechanisms of service without proof of receipt by the debtor, although it is not always easy –at least from my perspective– to assume that the recipient actually received the documents (let's think of deposit of the document in the debtor's mailbox or of postal service without proof). Let's imagine that a default judgment is rendered against a defendant in the State of origin, because the writ commencing the proceedings had been served on him by one of these means and he didn't receive it for reasons that are not attributable to him. The judgment can be certified as European Enforcement Order and the creditor will be able to use it to seek enforcement in another Member State: in that case, the defendant will try unsuccessfully to prevent enforcement arguing that the judgment had been rendered in violation of his right to a fair trial. If the requested State is sued for that reason in the ECtHR (as happened in *Povse*), it could argue the presumption of compliance doctrine. However, when applying it to the case, could the ECtHR retain that Article 14 (c) of the European Enforcement Order Regulation, by endorsing a "too unsafe" service method, may violate the right to a fair trial arising from Article 6(1) ECHR?

b) The ECtHR should also direct control over the way the court acted in a single case, determining whether or not it had any kind of discretion. For example, if we focus on EU regulations that involve cross-border enforcement, it will be necessary to analyze the terms in which they have implemented the principle of mutual recognition and, in particular, if there is a possibility that the requested court refuses the enforcement of the decision from the court of origin.

In *Povse v. Austria* controversy arose on the occasion of the implementation of one of the pieces of the Brussels IIa Regulation ¬the return of wrongfully removed children– in which the rule granted no discretion to the addressed court: this lack of discretionary leeway drifts from the absence of an opposition to enforcement in which a public policy clause could be activated. Indeed, opposition to enforcement of a foreign decision based on the infringement of public policy is the gateway to the protection of fundamental rights in international judicial

cooperation systems. The choice to suppress it or to keep it will have important implications if the issue is examined from the perspective of a potential review by the ECtHR.

(i) In regulations establishing enforcement without exequatur and without public policy clause (Brussels IIa on child abduction and visits, European Enforcement Order, European Payment Order Procedure, European Small Claims Procedure and Brussels III) no critics can be made to the executing State which has not taken into account the possible violation of fundamental rights occurred in the original proceedings and which has not denied or suspended enforcement for this reason (precisely what happened in *Povse v. Austria*). There is, therefore, no control in the State of enforcement, and no further control can either be expected to be made by the ECtHR over the requested State, since the latter could benefit from the presumption of compliance doctrine.

It is perhaps ironic that a lower internal control also determines a lower external control by the ECtHR. This appearance, however, vanishes if attention is drawn to the following issues:

— Controls exist in the State of origin and they are sufficient to consider the right to a fair trial preserved (which is an issue that could also be scrutinized by the ECtHR, as in *Povse*).

— Eventually the courts' activity in the State of origin may also be subject to the scrutiny of the ECtHR. This, indeed, should be the most logical reaction, as it is more reasonable to blame the court of origin for a fundamental right violation than to blame the enforcement court for failing to offset the effectiveness of a foreign decision adversely affecting a fundamental right (although this sort of control is certainly possible and sometimes necessary). This is, without doubt, the clearest conclusion to be drawn from the *Povse* decision (endorsed by the critics that the ECtHR itself formulates against the applicants for failure to exhaust their means of defense before the Italian courts).

(ii) There are still regulations that maintain the public policy clause as a control tool in the State of enforcement (Brussels I, Brussels Ia –even if exequatur proceedings have been abolished–, Brussels IIa –for any matters apart from child abduction and visits–, and Regulation on Successions and Wills). If the application of one of those regulations in a particular case was under the control of the

ECtHR, the question arises to what extent the existence of public policy clause would be relevant to analyze the existence of the elements of the "presumption of compliance". Can we understand that the existence of a "public policy exception" grants the court of enforcement a sufficient degree of discretion, whose exercise could be controlled by the ECtHR?

It is clear that the public policy clause can be used to refuse the enforcement of decisions that have been obtained violating fundamental rights or whose content itself violates a fundamental right. From this point of view, the ECtHR could criticize a national court for not using it in a particular case: like it or not, the existence of a public policy clause places the enforcement court in a position to guarantee the violated fundamental right, precisely a position it would not have if cross-border enforcement would be articulated through a system which did not include the public policy exception. This conclusion, however, should be made subject to a condition: the invocation of the public policy exception by the person against whom enforcement has been sought, since in the European procedural system in civil matters the breach of public policy can't be ascertained by the court on its own motion. Hence, the absence of an active defense by the debtor places the enforcement court in the same position of "no discretion" that exists in regulations with no public policy exception.

This review and this definition of public policy will certainly be carried out by the ECtHR with the aim to control the way in which the courts exercise discretion; and this control on discretion, in itself, does not constitute direct control or attack against European civil procedure rules. However, if we take into account the fundamentals of this control and the context in which it operates, it is clear that the door is open to revision and, with it, to definition by the ECtHR about what should be understood for "public order" in the context of the implementation of European civil procedure rules.

# Povse v. Austria: Taking Direct Effect Seriously?

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Perhaps one of the most difficult questions in International Law is the relationship between international conventions. States must comply with the obligations established in the treaties they are bound by. All the parties to the treaty are entitled to require the application of the treaty, which is compulsory for them. A problem arises when a State is bound by more than one treaty, and compliance with of one of them implies the violation of another one. Art. 30 of the Vienna Convention on the Law of the Treaties sets rules to avoid the problems linked to the coexistence of treaties, but these rules do not suffice to solve all the difficulties which may arise. Let's take the case of two conventions to which only a few States are simultaneously parties. According to the Vienna Convention, when the parties to the later treaty do not include all the parties to the earlier one, "as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations". In other words, if State "A" is bound by treaty "1" with State "B", and by treaty "2" with State "C", "A" must apply treaty "1" in its relations with State "B" and treaty "2" in its relations with State "C". However, sometimes this is simply not possible; both treaties apply simultaneously, and compliance with one of them implies the immediate breach of the other.

At first sight, this was the situation in *Povse*. The enforcement in Austria of the Venice Youth Court's return orders allegedly violated art. 8 of the ECHR; at the same time, it had to be granted according the EU Regulation 2201/2003. The conflict between the international obligations arising from EU law and from the European Convention seemed unavoidable; Austria had to decide between two international obligations. It was not possible to correctly apply both the European Convention and the European Union Regulation.

Of course, as the ECtHR decision in *Povse* shows, this is not completely true. The ECtHR has interpreted the Convention on Human Rights in a way that resolves the contradiction between the Convention and EU Law; according to the Court, a

Contracting State fulfils its obligations as a member of the Convention when it simply complies with its obligation as member of an international organisation to which it has transferred a part of its sovereignty, provided that the international organisation "protects fundamental rights (…) in a manner which can be considered at least equivalent (…) to that for which the Convention provides". However, I am still interested in showing how the contradiction between the Convention on Human Rights and EU law works, in order to fully understand the meaning of the case law of the ECtHR.

There are cases in which compliance with European Union law implies a breach of the European Convention. From a pure Public International Law perspective, the breaching State incurs in international responsibility. There is also an internal perspective. International treaties are part of the internal law of the State, and judges, authorities, and the public in general must observe, respect and apply them. How do they deal with the contradiction between different treaties? How do judges, authorities, etc., comply with EU law and with the ECHR in case of a conflict? This is not an easy question. If we only take into consideration the internal law of the States and international law, the answer is that each State decides in which way international law is implemented by its authorities and courts; national courts are bound by the domestic provisions on the internal effect of international law. However, the answer is not exactly the same when it comes to EU Law: at least, if we take the direct effect of EU Law seriously. As the ECJ has already held, EU law confers rights to individuals which the courts of Member States of the European Union must directly recognise and enforce. This means that the courts of the Member States are directly bound by EU law. State law is not needed for the direct application of EU law to be achieved. That is the reason why some academics have held that the courts of the Member States should be seen as Courts *of the European Union* when they apply EU law (see A. Barav, "La plenitude de competénce du juge national en sa qualité de juge communautaire", *L'Europe et le Droit. Mélanges en homage à Jean Boulouis*, Paris, Dalloz, 1991, pp. 93-103, pp. 97-98 and 103; D. Ruiz-Jarabo Colomer, *El juez nacional como juez comunitario*, Madrid, Civitas, 1993).

If Member State courts are to be considered not as national courts, but as EU courts, when they apply Union law, a breach of the ECHR arising out of the application of EU law by a national court should not be attributed to the State, but to the EU itself. It would not be coherent to admit the direct effect of EU Law

and, at the same time, to hold that Member States are liable for a breach of the ECHR arising out of the application of EU Law by their national courts.

Of course, the point of view I have just explained is far from being the common understanding of the relationship between EU Law and the ECHR. Nevertheless, maybe the way in which the European Court of Human Rights has dealt with the contradiction between EU law and the European Convention on Human Rights in *Povse* is nothing but a consequence of the impossibility to put the blame on the State for the "mistakes" of EU law. Perhaps when the EU becomes a member of the European Convention on Human Rights this will be more evident – maybe then we will realise that, in cases like *Povse*, the complaint ought to be addressed to the EU and not to the Member States.

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# Requejo on Povse

### Introduction

The accession of the European Union (EU) to the European Convention on Human Rights is proving difficult. PIL has not been spared.

In the field of recognition the biggest concern was not long ago represented by the conflict between the ECtHR decision in *Pellegrini*, and the European will to eliminate the intermediate procedure to declare the enforceability of foreign judgments – replacing the conditions usually required at the State where enforcement is sought by some controls operated in the Member State of origin. If *Pellegrin*i was to be followed, the unconditional system of recognition set in Art. 42 of the Brussels II bis Regulation would be incompatible with the ECHR. That the ECtHR decision in *Pellegrini* has been put forward as an argument against the abolition of the exequatur in the Commission proposal to recast Council Regulation (EC) no 44/2001 does therefore not come as a surprise; nor do the efforts by Member States designed to limit the effects of *Pellegrini* case (for instance by way of considering the decision of the ECtHR limited to cases where the State of origin is not a contracting State of the ECHR).

At first sight, the ECtHR decision to the application nº 3890/11, *Povse v. Austria*, based on the *Bosphorus test*, is the bridge to reconcile the positions.

## Bosphorus test as applied to Povse

The so called *Bosphorus* test is based on the following premise: contracting States transferring sovereign powers to an international organization retain responsibility for the acts of their organs, "regardless whether the act or omission was a consequence of domestic law or of the necessity to comply with international obligations". However, in as far as the international organization "is considered to protect fundamental rights (…) in a manner which can be considered at least equivalent to that for which the Convention provides", a presumption that the contracting State has complied with the ECHR enters into play, if he lacked discretion in relation to the obligations derived from his membership to the international organization. Therefore, a three-step exam in needed in order to determine whether there is equivalence between the protection offered by the Convention and the international organization at stake (step 1), and the degree of freedom of the concerned State (step 2); finally, the arguments against the presumption of equivalence in the specific case must be discarded (step 3).

*Step1 in Povse*: *Whether the relevant organization is considered to protect fundamental rights*. In the *Povse* decision this point is dealt with exclusively in par. 77, in such a manner that it is not only superficial, but inexistent (see the *Bosphorus* decision, num. 159-165, remitting to 73-81). This is not only striking, but disappointing. First, because as of today, i.e. at the relevant time of the analysis, the existence of truly "substantive guarantees" offered by the EU as a unit (instead of as a bunch of diverse systems striving for coherence), is not self-evident. Second, because the real issue at stake is precisely that of the compatibility between the ECHR and the guarantee's system provided by the EU in Regulation Brussels II bis: a system where the protection of the fundamental rights rests exclusively on the Member State of origin. By considering the ECJ as single key element of the control mechanism, the ECtHR avoids the issue; at the same time, it narrows the reach of its pronouncement. The ECtHR's approach may be explained in different ways, starting with the actual submission of the applicants: they contested the "equivalent protection" only by reference to the role of the ECJ in the present case. It should be added that the *Bosphorus* test has been used by the ECtHR on several occasions, in a way that may be considered

consistent but not necessarily uniform, precisely because the different degrees of depth of the ECtHR's exam in order to affirm or to deny the equivalence of the protection offered by the international organization under review.

*Step2 in Povse: Discretion*. There was no discussion as regards Austria's lack of discretion under Art. 42 of the Brussles II bis Regulation.

*Step3: Whether the presumption has been rebutted in the present case*. In contrasts to step 1, the analysis here was performed extensively. Two elements seem to be essential: the role of the ECJ defining the applicability and interpretation of the relevant legal provisions (par. 85); and the *status quo* before the court of origin (the opportunity open to the applicants to still rely on their Conventions rights there: par. 86). The importance given to those issues legitimates further questions. To start with, what would happen in the absence of consultation of the ECJ? On the one hand, the stress put by the ECtHR in the ECJ's role suggests that the answer would have been different in the absence of a preliminary ruling (or at least, of a referral by the national court, even if rejected by the ECJ).On the other hand, the ECJ's ruling in the aff. C-211/10, stating that any change in the situation of the abducted child with consequences on the return order must be pleaded before the competent court in the Member State of origin, creates a legal precedent for all member States, therefore exempting them from referring new queries on the same subject.

As for the second element retained by the ECtHR (the *status quo* in Italy), would its decision have been the same had the applicants exhausted their resources before the Italian courts without success? In the light of par. 86, the likely answer is yes. Presumably, this would also be the answer in the case of a complaint addressed, either simultaneously or consecutively, against two respondent States –the State of origin, and the Stated where enforcement is sought-, even if the ECtHR declares the first one in breach of the Convention when applying Art. 11 (8) the Brussels II bis Regulation (which is not a hypothetical situation: see *Sneersone and Kampanella v. Italy*).

## Consequences

An interpretation of *Povse* in the sense that it sanctifies the Regulation mechanism of fundamental rights protection would result in the immunity of the State where enforcement is sought. In return, it places the ECtHR applicants in

an uncomfortable situation when formulating their complaints: they must be very be cautious and select the correct respondent State. Special care and legal knowledge, improbable in the average individual applicant (representation before the ECtHR is not compulsory), will be required.

## Bosphorus+Povse applied to Regulation 44/01 (and Regulation 1215/2012)

What would be the likely outcome of the *Bosphorus* test if applied to other UE PIL instruments, such as the Regulation 44/01 or the Brussels I recast Regulation? According to both instruments (albeit following different ways) the requested State is allowed to refuse the declaration of enforceability if specific, restricted grounds provided by the Regulations themselves are present; in particular, if such declaration is manifestly contrary to public policy. Thus at first glance, the answer is that these cases are not eligible for the *Bosphorus* presumption (However, it is so to the extent that the States have discretion when implementing the legal obligations steaming from their membership; whether this is the case as regards public policy may be discussed in the light of *Krombach* and *Gambazzi*).

## UE accession to ECHR

EU accession to the ECHR means the end of the *Bosphorus* test. Admittedly, the equivalence presumption in favor of the EU itself is no longer justified. However, it is worth considering whether it should not survive in the context of the analysis of a Member State compliance with the Convention, if he had to blindly obey a mandate of the EU; indeed, the presumption of equivalence makes more sense because the UE accession to the ECHR. In this context, provided that no ECtHR's decision has yet been pronounced against the EU, maintaining a rebuttable presumption of equivalence would simplify the applicant's choice of the correct respondent (see 3).

# Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (5/2013)

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

- ***Robert Magnus*:** "Choice of court agreements in succession law"

*The EU Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (Succession Regulation), most recently adopted by the European Parliament and the Council of the European Union introduces the possibility for parties of a probate dispute to conclude a jurisdiction agreement. This article compares the new rules on jurisdiction agreements with the current legal situation in Germany, where such agreements in succession matters have not been much in use. As the Succession Regulation is for several reasons rather unsatisfactory the article further discusses more convincing alternatives (e.g. prorogation by the deceased in testamentary dispositions, arbitration agreements).*

- ***Maximilian Eßer***: "The adoption of more far-reaching formal requirements by the EU Member States under the Hague Protocol on the Law applicable to Maintenance Obligations"

*Art. 15 of Regulation (EC) No 4/2009 refers to the Hague Protocol of 2007 for the determination of the law applicable to maintenance obligations. The Protocol was ratified by the EU as a "Regional Economic Integration Organisation". The formal requirements in Art. 7 (2) and Art. 8 (2) of the Protocol have to be considered as minimum standards. In order to protect the weaker party from a hasty and heedless choice of applicable law on maintenance obligations, the choice-of-law agreement should from this perspective be recorded in an authentic instrument. In his essay, Eßer illustrates that neither public international law nor European Union law prevent the EU Member States from adopting more farreaching formal requirements.*

- ***Herbert Roth:*** "Der Einwand der Nichtzustellung des verfahrenseinleitenden Schriftstücks (Art. 34 Nr. 2, 54 EuGVVO) und die Anforderungen an Versäumnisurteile im Lichte des Art. 34 Nr. 1 EuGVVO" – the English abstract reads as follows:

*The European Court of Justice has correctly decided, that the Court of the Member State in which enforcement is sought may lawfully review the effective delivery of the initial trial document even if the exact date of service is specified in the certificate referred in Article 54 of the COUNCIL REGULATION (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. The Court also held convincingly, that the recognition and therefore enforcement of a default judgement is normally not manifestly contrary to public policy in the sense of Article 34 No 1 of the Council Regulation 44/2001 despite the fact that the default judgement itself does not provide any legal reasoning. Exceptions are necessary if the defendant had no effective remedy against the decision in the Member State of origin.*

- ***Jörg Pirrung:*** "Procedural conditions for compulsory placement of a child at risk of suicide in a secure care institution in another EU Member State"

*Judgment and View in case S.C. clarify important questions of judicial cooperation within the EU in child protection matters. According to the ECJ, a judgment ordering compulsory placement of a 17 year old child in a secure care institution in another Member State according to Article 56 of the Brussels IIa regulation N 2201/2003 must, before its enforcement there against the will of the child, be declared to be enforceable/registered in that State. Appeals brought against such a registration do not have suspensive effect. Further activity of the EU and/or national legislators should ensure, by developing concrete rules, that the decision of the court of the requested State on the application for such a declaration of enforceability shall be made with particular expedition. Though there may be differences of opinion as to certain aspects regarding the answer given by the ECJ in point 3 of the operative part of its decision, – one might have preferred the way via enforcement of a provisional protective measure taken, on the basis of the recognition of the decision of the State of origin, by the State requested, such as the English*

*decision of 24 February 2012 – the outcome of the procedure confirms the general impression that the ECJ has developed an effective way of interpretation and application of the regulation. After the entry into force for 25 EU States of the Hague Convention of 19 October 1996 on the Protection of Children, courts in EU States should, as far as possible, try to apply the EU regulation in conformity with the principles of this international treaty.*

- ***Urs Peter Gruber:*** "Die perpetuatio fori im Spannungsfeld von EuEheVO und den Haager Kinderschutzabkommen" – the English abstract reads as follows:

*In a case on the visiting rights of one parent to see the children in the custody of the other parent, the OLG Stuttgart was confronted with an intricate question of jurisdiction. Right after the commencement of the trial in Germany, the child had moved from Germany to Turkey and had acquired a new habitual residence there. The court had to decide whether this change of habitual residence was of relevance for its jurisdiction.*

*Pursuant to the Brussels IIa Regulation, which adheres to the principle of "perpetuatio fori", such a change does not affect jurisdiction of the court seised. However pursuant to the Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, in such a case, jurisdiction shifts automatically to the state in which the new habitual residence of the child is located.*

*Therefore, the OLG Stuttgart had to decide whether jurisdiction was governed by the Brussels IIa Regulation or rather by the above mentioned convention on the protection of minors which both Germany and Turkey are parties of. The OLG Stuttgart held that when defining the exact scope of application of the Brussels IIa Regulation, one should consider the rights and obligations of member states arising from agreements with non-member states. Therefore, in the case at hand, the court held that the jurisdictional issue was not governed by the Brussels IIa Regulation; in order to ensure that Germany complied with its contractual duties in relation to Turkey, it applied the convention on the protection of minors. Consequently, it declined jurisdiction in favour of the competent Turkish courts.*

- ***Fritz Sturm***: "Handschuhehe und Selbstbestimmung" – the English abstract reads as follows:

*For centuries, the aristocracy used proxy marriages to anticipate the ceremony before the bride and the groom had met. Today proxy marriages are utilized for immigration purposes.*

*In many countries, such as Germany, Austria, Switzerland and the UK, this form of marriage is not permitted. Nevertheless, those countries recognize proxy marriages performed in a state where such marriages are permitted, if the representative has been given precise instructions. The US also apply the lex loci celebrationis, whereas French conflict of laws always requires the physical presence of the French spouse (Art. 146-1 C.civ.).*

*It is interesting to note that in cases where the representative did not receive precise instructions, certain German judges refer to the ordre public. Indeed, the prevailing German doctrine refuses to view the question of the validity of a marriage solemnised by a representative with such unlimited power as a question of form, but sees it as a problem of substantive validity, and infers from the lack of the spouses' consent that such a marriage is null and void according to Art. 13 EGBGB.*

*However, as this paper shows, the prevailing doctrine has to be rejected in this respect. It goes astray as it does not reflect the fact that a marriage concluded through a representative authorized to independently choose the bride or groom himself may in fact later be approved by the spouse represented by him. This power of approval has to be qualified as a question of form and is therefore subject to the lex loci celebrationis.*

*An additional argument against this doctrine is that, if the representative has the aforementioned freedom of choice, Art. 13 EGBGB does not lead to a void marriage, but to a relationship which can only be dissolved by divorce.*

- ***Carl Friedrich Nordmeier***: "Estates without a Claimant in Private International Law – Hidden Renvoi, § 29 Austrian PILC and Art. 33 EU Succession Regulation"

*According to § 1936 German Civil Code, estates without a claimant are*

*inherited by the State, whereas § 760 Austrian Civil Code provides a right to escheat for assets located in Austria. In addition, § 29 Austrian Code of Private International Law (PILC) determines the lex rei sitae as applicable, including the question if there are heirs. The same is true for laws that do not have a rule corresponding to § 29 PILC but contain hidden renvois. Art. 33 of the new European Succession Regulation (ESR) solves the problem of how to treat estates without a claimant in transborder cases only partially. It is recommended to apply the lex rei sitae in conflict cases not covered by the rule. Art. 33 ESR is applicable if only a part of the estate remains without claimant or if assets are located in third countries. Sufficient protection for creditors of the estate is granted as long as they are entitled to seek satisfaction of the assets which a State appropriates. Overall, § 29 PILC provides a better solution for dealing with estates without a claimant than Art. 33 ESR.*

- ***Dieter Henrich:*** "Familienrechtliche Vorfragen für die Nebenklageberechtigung in einem Strafverfahren"
- ***Mathias Reimann***: "The End of Human Rights Litigation in US Courts? The Impact of Kiobel v. Royal Dutch Petroleum Co., 569 U.S. — (2013)"

*For three decades, the Alien Tort Claims Act provided non-US citizens with a jurisdictional basis to bring (private) tort actions in US federal courts for violations of international human rights norms against alleged perpetrators, both foreign and domestic. Especially suits against multinational corporations for aiding and abetting human rights violations committed by governments in developing countries against the local population had become numerous and turned into a major irritant in boardrooms and government offices.*

*In a landmark decision announced in April of 2013, the US Supreme Court decided that the Alien Tort Claims Act does not apply extraterritorially. Since virtually all cases brought by aliens arose and arise from acts committed outside of the United States, at first glance it seems that the Court has rendered the lower courts' extensive 30-year jurisprudence under the statute all but moot. This is a major victory in particular for multinational corporate defendants as well as a major defeat for human rights protection in US courts.*

*Yet, it is far from clear whether the decision really amounts to a death sentence for tort-based human rights litigation in US courts. The split decision may leave*

*room for some claims under the statute, e.g., if the acts were planned or knowingly tolerated by an American defendant on US soil. It also does not affect claims under the (more narrowly drafted) Torture Victim Protection Act of 1991, nor does it bar actions brought in the state courts under domestic (instead of international) law. Last, but not least, the decision cannot destroy the lasting legacy of the case law under the Alien Tort Claims Act which not only generated important decisions in international law but also increased the awareness of the human rights implications of foreign investment.*

- ***Wolfgang Winter:*** "Einschränkung des extraterritorialen Anwendungsbereichs des Alien Tort Statute" – the English abstract reads as follows:

*On April 17, 2013 the U.S. Supreme Court issued its decision in Kiobel et al. v. Royal Dutch Petroleum et al. regarding the extraterritorial scope of the Alien Tort Statute, a provision dated 1789. The Court unanimously dismissed the complaint, filed by Nigerian citizens residing in the United States, alleging that the defendant non-U.S. companies aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria. The Court's majority applied the rule of presumption against extraterritoriality to claims under the Alien Tort Statute and found that this presumption was not rebutted by the text, history, or purpose of the Alien Tort Statute. The minority vote required a nexus to the United States which did not exist in the present case.*

*The decision has to be applauded. It continues a recent development of U.S. Supreme Court decisions, avoids friction with the sovereignty of other nations, provides legal certainty and is in line with the historical context of the Alien Tort Statute.*

- ***Ulrich Spellenberg***: "Consequences of incapacity to the validity of contract and set-off"

*The judgment of the Austrian Supreme Court could have been an opportunity for the Court to rule on two major questions of private international and procedural law which are much discussed in Germany and much less in Austria, namely what law to apply on the consequences of incapacity to contract and whether international jurisdiction is necessary to plead a set-off. Unfortunately*

*the Court left the first one open, as it could, and did not even mention the second. Nevertheless, the judgment suggests remarks on these problems as well in Austrian as in German law.*

- ***Leonid Shmatenko***: "Die Auslegung des anerkennungsrechtlichen ordre public in der Ukraine" – the English abstract reads as follows:

*The rather undefined legal term of „public policy" leads to a great legal uncertainty in the Ukrainian jurisprudence and jeopardizes the recognition and enforcement of arbitral awards. By taking a clear position upon what falls under the public order and what not, the newest decision of the Ukrainian High Specialized Court on Civil and Criminal Cases is somewhat revolutionary. Even though it does still not provide a clear definition of the former, it provides a first glimpse of hope that someday Ukrainian courts may find one and thus, guarantee legal certainty for the recognition and enforcement of foreign arbitral awards and lead to an arbitration friendly environment.*

- ***Sebastian Krebber***: "The application of the posting-directive: Conflict of Laws, Fundamental Freedoms and Assignment of the Tasks among the Competent Courts"

*The decision of the OGH deals with the application of the posting-directive in the country of reception and reveals how uncertain the handling of the directive still is, because it duplicates employment conditions: on the one hand, the employment conditions of the law applicable to the employment contract and, on the other hand, the employment conditions of the law of the country of reception. The article attempts to show that the relationship between the general legal theory of the law of fundamental freedoms and the posting directive developed in Laval, Rüffert and above all in Commission/Luxembourg makes it possible to view the posting directive as a legal instrument whose only task is to secure the application of the employment conditions of the country of reception as set out in Art. 3 of the directive. Thus, the subject of the proceedings of the court in the country of reception with jurisdiction under Art. 6 of the posting-directive is limited to the enforcement of Art. 3 of the directive. The issues of the law of fundamental freedoms, conflict of laws and substantial law raised by the duplication of employment conditions are to be dealt with by the courts of general jurisdiction of Art. 18 et seq. Brussel I regulation.*

- ***Reinhold Geimer***: "The Registrability of a Real Estate Purchase Agreement Established by a German Notary with the Spanish Land Register – A Comment on Tribunal Supremo, 19/06/2012 – 489/2007"

*The Spanish Supreme Court confirmed that registrations of ownership with the Spanish land register may be based on authentic instruments drawn up by German civil law notaries. In spite of some (misleading) comments on European law, the judgment heavily relies on specific provisions of Spanish law on the access of foreign instruments to the Spanish land register. According to the Spanish Supreme Court, any authentic instrument of foreign origin producing the same evidentiary effects as a Spanish authentic instrument can be registered with the land register. This result reflects current Spanish practice and is due to the effects of registration: registration in the Spanish land register is not needed to establish ownership, but only entails bona-fide effects. This is why the Spanish Supreme Court decision has no effects on German practice where registration is needed to complete the transfer of ownership. As a result, German register law makes a distinction between evidentiary effects of authentic instruments and substantive law requirements they have to meet. This distinction does not contravene European law as solely the Member States are competent to determine the rules according to which ownership is transferred.*

- ***Burkhard Hess***: "Das Kiobel-Urteil des US Supreme Court und die Zukunft der Human Rights Litigation – Tagung am MPI Luxemburg"
- ***Erik Jayme/Carl Zimmer:*** "Die Kodifikation lusophoner Privatrechte – Zum 100. Geburtstag von António Ferrer Correia"
- ***Deniz Deren/Lena Krause/Tobias Lutzi:*** "Symposium anlässlich der 100. Wiederkehr des Geburtstags von Gerhard Kegel und der 80. Wiederkehr des Geburtstags von Alexander Lüderitz vom 1.12.2012 in Köln"
- ***Jens Heinig***: "Die Wahl ausländischen Rechts im Familien- und Erbrecht"

# TDM 4 (2013) – Ten years of Transnational Dispute Management

TDM has published its special anniversary issue. According to the Editorial by Mark Kantor, and especially relevant to readers of this site, "the TDM community has not limited itself to investment treaty disputes. Instead, we have promoted discussion of international commercial arbitration, litigation over international issues in national courts, mediation of cross-border disputes, administrative law in national and international tribunals, labor and environmental disputes, the overlap between human rights law and tribunals and investments, the overlap between WTO dispute resolution and investments, administrative law and international matters, treaty making and treaty unmaking, and so many other methods for transnational dispute management." With articles from leading authorities on timely topics of regional and substantive interest, the anniversary issue is no different.

# ELI – UNIDROIT Joint Workshop on Civil Procedure

In 2013, the European Law Institute (ELI) and UNIDROIT agreed to work together in order to adapt the 2004 Principles of Transnational Civil Procedure developed by the American Law Institue and UNIDROIT from a European perspective and develop European Rules of Civil Procedure. This project will take the 2004 Principles as its starting point and will develop them in light of: i) the European Convention on Human Rights and the Charter of

Fundamental Rights of the European Union; ii) the wider acquis of binding EU law; iii) the common traditions in European countries; iv) the Storme Commission's work; and v) other pertinent European sources.

### The 1st exploratory workshop in Vienna

The 1st exploratory workshop, to be held in Vienna on 18 and 19 October 2013, aims at an initial analysis of a series of different topics, ranging from due notice of proceedings to enforcement, with a view to identifying the most promising issues and the most appropriate methodological approach for the project. The event will be divided into a public conference, scheduled for 18 October, and an in-depth workshop for invited participants following the public discussion, which should lay the foundations for the elaboration of the ultimate project design by the ELI and UNIDROIT.

The workshop will bring together leading experts from academia and legal practice in the field of civil procedural law. It is anticipated that it will both produce an inspiring debate and mark an important first step towards establishing a working group that can carry the project to a successful conclusion.

# Programme: Public Conference

## Friday 18 October 2013

*Venue: Palace of Justice, Schmerlingplatz 11, Vienna, Austria*

Chair: **Loïc Cadiet** (University Paris 1, President of the International Association of Procedural Law)

10:30-11:00 Opening and Welcome by the Secretary-General of UNIDROIT and the President of the ELI

11:00-12:00 The 2004 ALI/UNIDROIT Principles: **Geoffrey C. Hazard** and **Antonio Gidi** *(American Law Institute)*

12:00-12:30 General Discussion

12:30-13:30 Lunch break

13:30-14:00 The European Acquis of Civil Procedure: Constitutional Aspects
**Alexandra (Sacha) Prechal** *(Court of Justice of the European Union)*

14:00-14:30 European Acquis of Civil Procedure: The Existing Body of Rules
**Burkhard Hess** *(Max Planck Institute Luxembourg)*

14:30-14:45 Procedure: The Agenda of the European Commission
**Paraskevi Michou** *(European Commission)*

14:45-15:15 General Discussion

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Beginning at 15:30 on Friday 18 October, and continuing on the morning of 19 October from 09:00 to 14:00 there will be a closed expert seminar. Friday's session will be chaired by **Thomas Pfeiffer** from Heidelberg University, and will focus on the following topics: Structure of the Proceedings, Provisional and Protective Measures and Access to Information and Evidence. **Marcel Storme** will chair the session on Saturday morning and oversee discussions on: Due Notice of Proceedings, Obligation of the Parties and Lawyers and Multiple Claims and Parties. It will be followed by the afternoon session, chaired by **Verica Trstenjak** where the following topics will be discussed: Costs, Lis Pendens and Res Judicata and Transparency of assets and enforcement.

More information is available here.

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# ECHR Upholds Abolition of Exequatur

On 18 June 2013, the European Court of Human Rights delivered its judgment in *Povse v. Austria.*

Readers will recall that the Court of Justice of the European Union had also delivered a judgment in the same case in 2010. Marta Requejo had reported on

the case and summarized the facts here.

The case was concerned with a dispute relating to the custody of a child under the Brussels IIa Regulation. A return order had been issued by an Italian court. As the Brussels IIa Regulation has abolished exequatur with respect to return orders, the issue was whether an Austrian court was compelled to enforce an Italian order despite the allegation that the Italian court might have violated human rights.

The Strasbourg court held that the return order could be challenged before the court of origin, and that it would always be possible to bring proceedings against Italy should such challenge fail. The abolition of exequatur, therefore, was not dysfunctional from the perspective of the European Court of Human Rights.

> *86. The Court is therefore not convinced by the applicants' argument that to accept that the Austrian courts must enforce the return order of 23 November 2011 without any scrutiny as to its merits would deprive them of any protection of their Convention rights. On the contrary, it follows from the considerations set out above that it is open to the applicants to rely on their Convention rights before the Italian Courts. They have thus far failed to do so, as they did not appeal against the Venice Youth Court's judgment of 23 November 2011. Nor did they request the competent Italian court to stay the enforcement of that return order. However, it is clear from the Italian Government's submissions that it is still open to the applicants to raise the question of any changed circumstances in a request for review of the return order under Article 742 of the Italian Code of Civil Procedure, and that legal aid is in principle available. Should any action before the Italian courts fail, the applicants would ultimately be in a position to lodge an application with the Court against Italy (see, for instance neersone and Kampanella v. Italy, no. 14737/09, 12 July 2011, concerning complaints under Article 8 of the Convention in respect of a return order issued by the Italian courts under the Brussels IIa Regulation).*
>
> *87. In sum, the Court cannot find any dysfunction in the control mechanisms for the observance of Convention rights. Consequent]y, the presumption that Austria, which did no more in the present case than fulfil its obligations as an EU member State under the Brussels Ila Regulation, has complied with the Convention has not been rebutted.*

*H/T: Maja Brkan*

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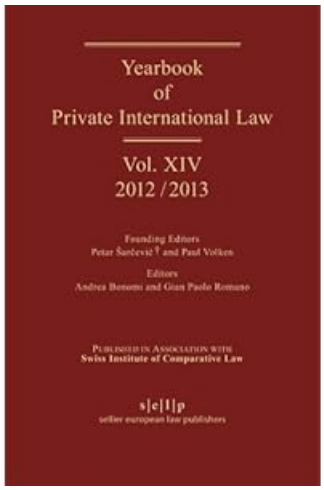
# Yearbook of Private International Law, Vol. XIV (2012-2013)

The latest volume of the Yearbook of Private International Law was just released.




**Doctrine**

- Marc Fallon & Thalia Kruger, The Spatial Scope of the EU's Rules on Jurisdiction and Enforcement of Judgments: From Bilateral Modus to Unilateral Universality?
- Pierre Mayer, Conflicting Decisions in International Commercial Arbitration
- Horatia Muir Watt, A Semiotics of Private International Legal Argument
- Thomas Kadner Graziano, Solving the Riddle of Conflicting Choice of Law Clauses in Battle of Forms Situations: The Hague Solution
- Sirko Harder, Recognition of a Foreign Judgment Overturned by a Non-Recognisable Judgment
- Marta Requejo Isidro, The Use of Force, Human Rights Violations and the Scope of the Brussels I Regulation

**A General Part for European Private International Law?**

- Stefan Leible & Michael Müller, The Idea of a "Rome 0 Regulation"

- Luís de Lima Pinheiro, The Methodology and the General Part of the Portuguese Private International Law Codification: A Possible Source of Inspiration for the European Legislator?

**Protection of Personality Rights**

- William Bennett, New Developments in the United Kingdom: The Defamation Act 2013
- Laura E. Little, Internet Defamation, Freedom of Expression, and the Lessons of Private International Law for the United States
- Michel Reymond, Jurisdiction in Case of Personality Torts Committed over the Internet: A Proposal for a Targeting Test
- Thomas Thiede, A Topless Duchess and Caricatures of the Prophet Mohammed: A Flexible Conflict of Laws Rule for Cross-Border Infringements of Privacy and Reputation

**The Chinese Private International Law Acts: Some Selected Issues**

- Jin HUANG Creation and Perfection of China's Law Applicable to Foreign-Related Civil Relations
- Yujun Guo, Legislation and Practice on Proof of Foreign Law in China
- Yong Gan, Mandatory Rules in Private International Law in the People's Republic of China
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- Guangjian Tu, The Codification of Conflict of Laws in China: What Has/Hasn't Yet Been Done for Cross-Border Torts?
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- Weidong Zhu, The New Conflicts Rules for Family and Inheritance Matters in China

**News from Brussels**

- Susanne Knöfel / Robert Bray, The Proposal for a Common European Sales Law: A Snapshot of the Debate
- Maria Álvarez Torne, Key Points on the Determination of International Jurisdiction in the New EU Regulation on Succession and Wills

**National Reports**

- Adi Chen, The Limitation and Scope of the Israeli Court's International Jurisdiction in Succession Matters
- Sandrine Giroud, Do You Speak Mareva? How Worldwide Freezing Orders Are Enforced in Switzerland
- Anil & Ranjit Malhotra, All Aboard for the Fertility Express: Surrogacy and Human Rights in India
- Tuulikki Mikkola, Pleading and Proof of Foreign Law in Finland
- Zeynep Derya Tarman, The International Jurisdiction of Turkish Courts on Personal Status of Turkish Nationals

**Forum**

- Rui Pereira Dias, Suing Corporations in a Global World: A Role for Transnational Jurisdictional Cooperation?
- Johanna Guillaumé, The Weakening of the Nation-State and Private International Law: The "Right to International Mobility"
- Tamas Dezso Czigler / Izolda Takacs, Chaos Renewed: The Rome I Regulation vs Other Sources of EU Law: A Classification of Conflicting Provisions

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# Second Issue of 2013's Journal of Private International Law

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

*Sixto Sánchez-Lorenzo,* Common European Sales Law and Private International Law: Some Critical Remarks

> *The Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales constitutes an attempt to avoid transaction costs caused by legal diversity within the European Union. However, the character and scope of CESL rules, together with their complex interaction with European conflict-of-laws rules and the substantive acquis, leads to a scenario*

*of legal uncertainty. This means that the intended objective will not be achieved and, in certain cases, that consumer protection is sacrificed in favour of traders' interests. In order to illustrate this critical conclusion, this article analyses the character and scope of CESL rules. Secondly, the application of CESL rules is considered in cases of an express or implied choice of law and in the absence of such a choice. Finally, further reflections will focus on the application of overriding mandatory rules and on the seminal question of the applicable law to interpret contracts.*

*Gregor Christandl,* Multi-Unit States in European Union Private International Law

*When in private international law reference is made to a multi-unit State, the question arises which one of the various territorial legal regimes applies to the specific case. With the predominance of territorial connecting factors in EU private international law, this question will become more important in the near future, given that territorial legal regimes will increasingly have to be applied also to non-nationals of multi-unit States. An analysis of the provisions on reference to multi-unit-States in the EU Succession Regulation as well as in previous EU-Regulations on private international law shows a lack of continuity and coherence which reveals that there may be insufficient awareness of the different features of the three models that can be identified for solving the problem of multi-unit-States in private international law. By offering a system of these basic models, this Article puts the provisions on multi-unit-States of the EU Succession Regulation under critical review and pleads for a general, simple and coherent solution with the hope of improving future EU private international law legislation on this point.*

*Tena Ratkovic, Dora Zgrabljicrotar,* Choice-of-Court Agreements under the Brussels I Regulation (Recast)

*In court proceedings commenced after 10 January 2015 the choice of court agreements in the European Union will be regulated by the new Brussels I Regulation (recast). The amendments introduced by the Recast aim to increase the strength of party autonomy as well as predictability of the litigation venue. Therefore, several changes have been made – the requirement that at least one party has to be domiciled in a Member State was abandoned for choice of court agreements, the substantive validity conflicts rule and a rule on severability have been introduced. Most importantly, the rules on parallel proceedings have been altered. This article examines those modifications and discusses their effect on the European Union courts' desirability as a place for litigation.*

*Peter Arnt Nielsen,* Libel Tourism: English and EU Private InternationalLaw

*Libel tourism, which is much related to the UK, is caused by a mixture of factors, such as the law applicable, national and European rules of jurisdiction,*

*national choice of law rules, and case law of the CJEU. These issues as well as aspects of recognition and enforcement of libel judgments in the US and EU are examined. Proposals for reform and legislative action in the EU are made. The effect of the Defamation Act 2013 on libel tourism, in which the UK attempts to strike a better balance between freedom of expression and privacy and to deal with libel tourism, is examined.*

*Stephen Pitel, Jesse Harper,* Choice of Law for Tort in Canada: Reasons for Change

*In 1994 the Supreme Court of Canada in Tolofson v Jensen adopted a new and controversial choice of law rule for tort claims. Under that rule, the law of the place of the tort applies absolutely in interprovincial cases and applies subject only to a narrow exception in international cases. The approaching twentieth anniversary of this important decision is an appropriate time to consider how the rule is operating. In particular, the rule needs to be assessed in light of (a) calls for legislative reform from the Manitoba Law Reform Commission, (b) the European Union's adoption of the Rome II Regulation for choice of law in non-contractual obligations, (c) the ongoing operation of a competing rule under Quebec's civil law and (d) the application of the rule by Canadian courts since 1994. This article will assess Canada's tort choice of law rule and analyse the desirability of reform, looking in particular at the rigidity of the rule, the scope of its exception and possible alternative rules.*

*Henning Grosse Ruse-Khan,* A Conflict-of-Laws Approach to Competing Rationalities in International Law: The Case of Plain Packaging Between Intellectual Property, Trade, Investment and Health

*The idea of employing conflict-of-laws principles to address competing rationalities in international law is unorthodox, but not new. Existing research focusses on inter-systemic conflicts between different areas of international law – but has stopped short of proposing concrete conflict rules. This article goes a step further and reviews the wealth of private international law approaches and how they can contribute to applying rules of another, 'foreign' system. Against the background of global intellectual property rules and their interfaces with trade, investment, health and human rights, the dispute over plain packaging of tobacco products serves as a test case for conflict-of-laws principles. It shows how these principles can provide for concrete legal tools that allow a forum to apply external (ie foreign) rules – beyond interpretative concepts such as systemic integration. The approach hence is one way to take account of the pluralism of global legal orders with significant overlaps and intersections.*