The Evolution of European Private International Law – Coherence, Common Values and Consolidation

The last decade has seen a number of important legislative developments in the field of European private international law and cross-border litigation, including the Rome I-III Regulations, the Brussels I (Recast) and Brussels II bis Regulations, the Succession Regulation, and other instruments in the area of civil procedure.

As these legislative initiatives were introduced at different stages and with different objectives, the question is whether they constitute a *coherent legal framework* with *common legal concepts*, which has fostered the development of *common values* and *principles*, or whether they need consolidation or even a new structure.

A joint conference BIICL- Queen Mary University of London taking place on the 25 and 26 of November, will addressed the abovementioned question with the aim to assess the European framework for conflict of laws and jurisdictions and to reflect on the possible directions of its future evolution.

Click here to download the event flyer; here for the program.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (3/2014)

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

- ***Rolf Wagner***: "15 years of judicial cooperation in civil matters"

With the Treaty of Amsterdam entering into force on 1 May 1999 the European Union has obtained the legislative competence concerning the judicial cooperation in civil matters. This event's 15th anniversary gives ample reason to pause for a moment to briefly appreciate the achievements and to look ahead.

- ***Marc-Philippe Weller:*** "Habitual residence as new connecting factor in International Family Law – Counterbalancing changes in the applicable law by the local and moral data approach"

In International Family Law, the traditional connecting factor of nationality is more and more substituted by habitual residence. E.g., according to Article 8 Rome III-Regulation divorce and legal separation shall be subject to the law of the State where the spouses are habitually resident at the time the court is seized. The connecting factor of habitual residence reflects the greater mobility in the 21st century's open societies. However, it affects the permanence of the law applicable in family matters and causes a change in the applicable law with every cross border-transfer of the spouses' habitual residence. This volatility of substantive family law conflicts with the principle of predictability and interferes with the cultural identity of the individual. It therefore requires counterbalance by means of substantial law. One method of counterbalancing changes in the applicable law is the local and moral data-approach, advocated by Albert A. Ehrenzweig and pursued by my great academic mentor Erik Jayme, whom this article is dedicated to. It discusses the local and moral data-approach and shows its limits of application, especially in the area of ordre public.

- ***Alfred Escher/Nina Keller-Kemmerer***: "On the way to the American Rule? The unconstitutionality of recent German Federal Court's (BGH) decisions on limiting foreign correspondence lawyers' reimbursement claims for litigation costs"

German procedural law is guided by the so called Unterliegenshaftung. According to this principle, which is nearly equal to the English Rule, the unsuccessful party is obliged to pay the costs of the proceedings and the extrajudicial costs necessarily incurred by the applicant in taking the appropriate legal action (lawyers' fees and expenses). In accordance to this

guiding principle of German procedural law, the determination of the amount of fees for foreign correspondence lawyers had been based on the relevant foreign law and was not limited to the amount of German correspondence lawyers. In 2005 however, the German Federal Court (BGH) changed this lawful and prevailing jurisprudence and limited the fees for foreign correspondence lawyers to the regulations of the German Rechtsanwaltsvergütungsgesetz (Act on the Remuneration of Lawyers). This article takes the BGH's recent decision of 2012 concerning this question of law as a reason to stress especially two important aspects which only received little attention in the discussions in 2005: That the German Federal Court's decision is not only inconsistent with fundamental principles of German procedural law, but also incompatible with the Constitution.

- ***Chris Thomale***: "Brussel I and the eastern EU enlargement – defining the scope ratione temporis of Reg (EC) 44/2001"

The European Court of Justice recently held that for the Brussels I-Regulation to be applicable for the purpose of the recognition and enforcement of a judgment, it is necessary that at the time of delivery of that judgment the regulation was in force both in the Member State of origin and in the Member State addressed. This decision raises general questions on the spatial and temporal scope of the Brussels I-Regulation as well as the normative relationship between its Art. 2 et seqq. and Art. 32 et seqq., which are discussed in this article.

- ***Moritz Brinkmann***: "International jurisdiction with respect to avoidance claims in the context of insolvency proceedings regarding credit institutions"

At the centre of the case, that is an ancillary proceeding to the insolvency proceedings regarding the Lehman Brothers Bankhaus AG, are intricate issues regarding the international jurisdiction with respect to avoidance claims: The most pertinent is the question whether the doctrine developed in Deko Marty is also applicable in the context of the Directives 2001/24/EC on the reorganisation and winding up of credit institutions and 2001/17/EC on the reorganisation and winding-up of insurance undertakings. If this was answered in the affirmative, one has to ask whether national legislation that implements

the directives into the law of a Member State can be interpreted in conformity with the Directive, even though the legislation does not explicitly deal with ancillary proceedings and the autonomous law of that Member State does not follow the approach taken in Deko Marty. In this sense, the case is also about the limits of the duty of the national courts to interpret national legislation in conformity with European law insofar as it implements directives.

- ***Peter Mankowski***: "Die internationale Zuständigkeit nach Art. 3 EuUnterhVO und der Regress öffentlicher Einrichtungen"

If public bodies enforce claims for maintenance subrogated by them, jurisdiction is vested in the court of the place where the original creditor is habitually resident, by virtue of Art. 3 (b) Maintenance Regulation. Art. 3 Maintenance Regulation establishes a system of general jurisdiction and does not retain the relation which was previously prevailing between Arts. 2 and 5 (2) Brussels I Regulation. Else an unwilling or defaultive debtor would indirectly benefit from the subrogation and the transfer of the claim to the public body. This would generate quite some unwelcome and counterproductive incentives. Conversely, to vest jurisdiction in the court for the place where the original creditor is habitually resident, proves to be advantageous in many regards.

- ***Christoph Thole:*** "Member States may take cross-border evidence without recourse to the methods of the Evidence Regulation"

The Council Regulation (EC) No 1206/2001 has no conclusive character. This was recently ruled by the ECJ. The decision confirms the Court's earlier ruling in Lippens and finally settles a long lasting dispute about the scope of the Regulation. While the ECJ's arguments, which are primarily based on teleological grounds, are convincing and the ruling to be welcomed, it is questionable though, what effect the decision will have on the factual application of the Regulation. The comment analyses the decision and its consequences.

- ***Björn Laukemann***: "Public policy control in European insolvency proceedings in the light of fraudulent recourse to the court's competence

and subreption of discharging residual debts: a creditors' perspective"

Bankruptcy tourism within the European internal market is legion. Especially uninformed and involuntary creditors suffer from cross-border COMIshifts of the insolvent debtor undertaken with fraudulent intention. In this context, it is hardly surprising – as demonstrated by a new decision of the Local court of Göttingen – that the public policy exception comes into play. The article will shed light on the question if the interpretation of Art. 26 of the European Insolvency Regulation has to distinguish between objections concerning the international jurisdiction of the insolvency court (Art. 3 EIR) and alleged violations of the creditors' right to participate effectively in foreign proceedings. The author will point out that infringements against the latter may, under specific conditions, trigger the application of Art. 26 EIR. In this regard, the adequate balance between the creditors' need for a prior legal defence, on the one hand, and their obligation to (constantly) inform about the insolvency of their debtor, on the other, is of peculiar importance. The outcome of the current reform of the Insolvency Regulation will show to what extent it will meet the necessity to strengthen the procedural position of foreign creditors – beyond Art. 26 EIR.

- ***Bettina Heiderhoff***: "The "mirror principle" and the violation of international public policy in German recognition procedures"

For the recognition of divorce decrees from non EU member states, the German courts must determine whether the decision was within the jurisdiction of the foreign court (§ 109 para. 2, nr. 1 FamFG). In order to do so, the German rules on jurisdiction are applied to the foreign case in a "mirrored" fashion (the socalled "mirror principle"). In some special cases, it is debatable, but also decisive, as to whether the German judge must mirror § 98 FamFG or Art 3 et seq Brussels IIbis regulation. This counts, in particular, where one or both of the divorcees may have given up their former nationality of the State of origin. The article indicates that the German court must always mirror § 98 FamFG. The Brussels IIbis regulation can only justify additional competences. In particular, the exclusive competence of art. 6 Brussels IIbis is not applicable in this context. Furthermore, the article points out that each party can refer to a violation of the international public policy during the recognition procedure,

even if he hasn't made use of a possible appeal before the foreign court. It is a question for the individual case if the right to appeal before the court of origin has to be considered by the German court.

- ***Jens Adolphsen/Johannes Bachmann***: "The Certification of orders to perform concurrently ("Zug-um-Zug") as European Enforcement Orders"

The reviewed judgment of the Regional High Court of Karlsruhe, Germany is dealing with the certification of an order to perform concurrently ("Zug-um-Zug") as a European Enforcement Order. In contrast to the court, a majority in German literature and jurisprudence denies the possibility of certification in such cases. But "Zug-um-Zug" claims can still be issued as European Enforcement Orders. The following article describes the academic discussion and names the necessary requirements for certification.

- ***Rolf A. Schütze***: "Zur cautio iudicatum solvi juristischer Personen"

German law practices the principle of residence in determining the obligation of cautio iudicatum solvi. It is contested whether legal entities have their usual residence at the place of incorporation or at the place of administration. Contrary to the prevailing opinion in case law and legal writing the OLG Schleswig – in the commented decision – sees the usual residence at the place of incorporation. The author contests that and favours the place of administration as decisive in application of sect. 110 German Code of Civil Procedure.

- ***Stefan Pürner:*** "The reciprocity (concerning the recognition of civil judgments) in the relation between Bosnia and Herzegovina and Germany"

The article describes the development of the German court practice related to the reciprocity concerning the recognition of civil judgments in the relation between Bosnia and Herzegovina and Germany. There are contra dictionary judgments in Germany related to this question. In the midst of the 90s the Higher regional Court Cologne ruled that, due to the war situation in Bosnia and Herzegovina, there would be no reciprocity. The author holds that this judgment was wrong already in the time it was brought. In any case it is

overtaken by the legal development in the meantime which convinced also the newer German court practice to affirm the existence of the reciprocity in the said relation. However, even in the present German legal literature authors deny that the reciprocity exists in mentioned relation. From this, the author draws the conclusion that in cases with foreign elements country- specific knowledge is essential. In addition to that, past former findings of courts should not be just carried forward. Moreover he emphasizes that, in particular in relation to states with a very agile legal development (e.g. the transformation states) the legal situation concerning questions like the reciprocity may be answered only on the basis of laws, judgments and legal literature of the respective states (or by legal opinions of experts or institutions which are specialized in the law of the respective country) as primary source whilst judgments of German (and all other foreign courts) are only secondary sources of information.

- ***Tobias Lutzi***: "France's New Conflict-of-Laws Rule Regarding Same-Sex Marriage and the French ordre public international"

In a lawsuit that attracted huge media attention, the French Cour d'appel de Chambéry has confirmed France's first lower court decision concerning the relation between the new Art. 202-1 § 2 of the Code civil (which provides that same-sex marriage is allowed if only the law of the nationality or the law of the residence of one of the spouses allows it) and bilateral treaties that provide exclusively for the application of the law of the nationality of each spouse. Although the court recognized the superiority of these treaties to the provisions of the Code civil under Art. 55 of the French Constitution, it ruled that the Franco-Moroccan Agreement of 10 August 1981 does not apply to the marriage of a Franco-Moroccan same-sex couple as the prohibition of same-sex marriages contradicts French international public policy.

New Czech Act on Private International Law

By Petr Briza, co-founding partner of Briza & Trubac, a Czech law firm focusing on cross-border litigation and arbitration, among others.

Regular readers of this blog might recall this post that referred to my article at Transnational Notes about the new Czech Act on Private International Law. The article provided a short general description of the new law that entered into effect on January 1, 2014. In this post I would like to introduce in more detail some provisions of the act, especially those that are not preceded by the EU legislation and thus will govern cases heard by Czech courts. Also, below you will find the link to the English translation of the full text of this new act on private international law.

Introductory remarks

For general comments on the new law I refer to my post at Transnational Notes. Here I will only shortly sum up couple of the main facts.

The act (published under No. 91/2012 Coll.) is part of the private law recodification whose main pillars are the new Civil Code (No. 89/2012 Coll.) and the new Business Corporations Act (No. 90/2012 Coll.). The act has 125 sections divided into 9 parts: (1) General Provisions (§ 1 – 5), (2) General Provisions of Procedural International Law (§ 6 – 19), (3) General Provisions of Private International Law (§ 20 – 28), (4) Provisions Concerning Individual Types of Private-Law Relations (§ 29 – 101), (5) Judicial Cooperation in Relations with Foreign States (§ 102 – 110), (6) Insolvency Proceedings (§ 111 – 116), (7) Arbitration and Recognition and Enforcement of Foreign Arbitral Awards (§ 117 – 122), (8) Transitional and Final Provisions (§ 123 – 124) and (9) Entry into Force (§ 125).

Now I will turn to the provisions that might be of interest for foreign readers.

General issues (§ 1-5 and 20-25)

The law regulates general issues of private international law, such as public

policy (ordre public) exception, overriding mandatory rules, renvoi, qualification (characterisation), preliminary questions or application of foreign law. Unlike the previous "old" act (No. 97/1963 Coll.), the law does not define "ordre public"; instead it only introduces public policy (public ordre) exception as such (§ 4). It is expected that Czech courts will interpret the notion of ordre public in line with § 36 of the old act that defined ordre public as "such principles of the social and state system of the Czech Republic and its law that are necessary to insist on unconditionally." The old law did not contain provisions on overriding mandatory norms; the new act regulates them in § 3 (lex fori overriding mandatory norms) and in § 25 (foreign overriding mandatory norms). While § 3 in fact merely acknowledges the existence of lex fori provisions that are always applicable, § 25 dealing with third state overriding mandatory norms resembles to some extent controversial Article 7 para 1 of the Rome Convention. The new act also regulates circumvention (abuse) of law (§ 5) that may relate both to the conflict rules and the rules on jurisdiction. Characterisation should be usually made under Czech law (§ 20). Foreign law is to be ascertained and applied ex officio (§ 23).

Jurisdiction, recognition and enforcement of foreign judgments

As already suggested, the importance of the act lies in the areas outside the scope of the EU law and/or international conventions/agreements. In cases where neither the Brussels I regulation nor the Lugano Convention (or another international agreement) is applicable, jurisdiction in general civil and commercial matters will be governed by § 6 of the act. Under this provision Czech courts have international jurisdiction if they have local jurisdiction (venue) under the Czech Civil Procedure Code (see §§ 84-89a of the Civil Procedure Code – No. 99/1963 Coll.) – one of possible jurisdictional grounds under Czech law is, e.g., an asset location in the territory of the Czech Republic.

The recognition and enforcement of third state (non-EU, non-Lugano) judgments in general commercial and civil matters is governed by §§ 14-16. Apart from traditional grounds for the refusal of recognition (ordre public, res judicata, lis pendens, fair trial) there is mandatory requirement of (material) reciprocity for cases where the decision is against Czech citizen/entity. Also, for a third country judgment to be recognized in the Czech Republic the foreign court has to have jurisdiction under a base of jurisdiction under which Czech courts may assert jurisdiction, unless the defendant voluntarily submitted to the foreign court's jurisdiction (see § 15 (1) a)).

Conflict rules and rules on jurisdiction in specific matters

In this part I will again mention especially those conflict rules and provisions on jurisdiction that fall outside the scope of the EU legislation.

The primary connecting factor for legal capacity of natural persons is place of habitual residence (§ 29 para 1). However, in case of a name the primary connecting factor is the citizenship with habitual place of residence being a subsidiary connecting factor (see § 29 para 3). Capacity and internal matters of legal entities are governed by the law of the place of incorporation (§ 30).

As the Czech Republic is not a party to 1978 Hague Convention on Agency, the act will be applicable to relations between the principal and third person (these matters fall outside the EU law, which is applicable to principal-agent and agent-third person relations). Apart from a general rule on agency with multiple connecting factors (§ 44), there is a special rule on „proxy“ (“die Prokura” in German) and similar specific types of agency (§ 45).

In the area of family law (§ 47 – 67) one might want to take a look at the conflict rule on divorces (§ 50), as the Czech Republic is not bound by the Rome III regulation. Property regimes of spouses shall be governed by the law of the state in which both spouses are habitually resident; otherwise by the law of the state of which both spouses are citizens; otherwise by the Czech law (§ 49 para 3). The conflict rules, rules on jurisdiction and recognition of foreign judgments in matters of establishment and contesting of parentage are contained in § 53-55. International adoption is governed by § 60-63, registered partnerships and similar unions by § 67.

In the area of rights in rem § 70 para 2 is especially worth noting; it brings about an important change compared to the previous law by assigning the transfer (creation and extinguishment) of ownership under the law governing the contract on the basis of which the ownership is being transferred. § 73 regulates conflict rules for trusts, including the recognition of foreign trusts in the territory of the Czech Republic; the applicable law is the law of the closest connection with the trust, unless the settlor selects the applicable law. Succession is governed by § 74-79, although the importance of these provisions will be largely diminished by the EU regulation on succession, (fully) coming into force in August 2015.

The field of obligations (§ 84 – 101) is largely covered, except for promissory

notes and bills of exchange (§ 93 – 100), by the EU legislation. One of few provisions of the act from this area that should be fully applicable is § 101 on non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation. These shall be governed by the law of the state in which the violation (the act giving rise to damage) occurred, unless the injured person chooses one of (up to) three other laws the provision offers for choice.

Insolvency, arbitration and assistance from the Ministry of Justice

The act also deals with those aspects of international insolvency not covered by the EU Insolvency Regulation (§ 111). As regards applicable law, the act in principle extends the regime of the regulation also to the cases falling outside the regulation's scope (§ 111 para 3). In cases not covered by the regulation, Czech courts may conduct insolvency proceedings if the debtor has an establishment in the Czech Republic provided it is requested by the creditor with habitual residence or seat in the Czech Republic or the creditor?s claim arose in connection with the establishment?s activities. They can also extend jurisdiction based on the regulation to the debtor's assets in a foreign state other than a Member State of the European Union provided the foreign state attributes effects to the proceedings in its territory. Foreign judgments in the insolvency matters shall be recognized under the condition of reciprocity provided in a foreign state in which it was handed down the debtor has a centre of main interests and provided the debtor?s assets in the Czech Republic are not a subject of pending insolvency proceedings.

The arbitration matters are largely covered by international agreements to which the Czech Republic is a party, namely the New York Convention and the European Convention on International Commercial Arbitration, thus the impact of the act is limited. Still, apart from the recognition and enforcement of foreign arbitral awards (§120 – 122), the act also regulates the conditions under which a foreigner may be designated as arbitrator (§ 118). An admissibility of an arbitration agreement shall be assessed under the Czech law and its material validity shall be governed by the law of the state in which an arbitral award is to be issued.

Finally, there is one specific feature of the act worth mentioning: given the complexity of international matters the act provides an opportunity for courts to consult the Ministry of Justice in cases covered by the act (§ 110). It goes without

saying that such a consultation is optional and the Ministry's opinion is by no means binding upon the court.

Concluding remarks

I will not repeat my conclusion about the act from my post in Transactional Notes, instead I give you an opportunity to make your own conclusions about the act and its potential added value (not only practical but also in comparative perspective): in order to make the new act available to readers from around the world, my law firm has provided for the English translation of the act. You can download it free of charge via this link.

Those who would like to explore the act, its context and related case law may be interested in the commentary I have co-authored together with my colleagues from the Ministry of Justice, Czech Supreme Court and a notary. Unfortunately, it is only in Czech; the same goes for this commentary written by other team of authors.

Any comments or questions regarding the act or its translation are welcome either under the post or at petr.briza@brizatrubac.cz .

Third Issue of 2013's Journal of Private International Law

The latest issue of the *Journal of Private International Law* contains the following articles:

Richard Garnett, Coexisting and Conflicting Jurisdiction and Arbitration Clauses

> *It is increasingly common for parties to an international contract to include both jurisdiction and arbitration clauses. While in some cases the clauses can be reconciled by principles of contractual interpretation, in other circumstances*

a true conflict between the clauses exists. The main contention of this article is that it is not appropriate, as many common law courts appear to have done, to resolve such a conflict by choosing arbitration over litigation based on some presumed superiority of the arbitral process. Instead, courts should adopt an evenhanded approach and apply a version of the 'more appropriate forum' test.

Pippa Rogerson, Problems of the Applicable Law of the Contract in the English Common Law Jurisdiction Rules: The Good Arguable Case

English law as the applicable law of the contract is a basis for jurisdiction in English service out cases (ie cases involving foreign defendants that are not covered by the Brussels I Regulation or the Lugano Convention). It is also a factor in the exercise of jurisdiction. In both instances the determination of the applicable law and the assessment of its relevance raise difficult legal and practical questions. The courts use the "good arguable case" test to resolve those difficulties. Many recent decisions illustrate that the test is insufficiently clear. This article discusses those questions. It concludes that the differences between the existence and the exercise of jurisdiction have been overlooked. Further it suggests that the problem lies in the competing objectives underlying the decision on jurisdiction.

Uglješa Grušic, The Right to Strike Versus Fundamental Economic Freedoms in the English Courts, Again: Hiding Behind the "Public Law Taboo" In Private International Law

This article notes the High Court's decision in British Airways Plc v Sindicato Espanol de Pilotos de Lineas Aeras, a case concerning the relationship between the right to strike and fundamental economic freedoms guaranteed by the TFEU. The court declined jurisdiction on the ground that the case involved the enforcement of foreign public law, thus falling outside the scope of the European rules of adjudicatory jurisdiction. By analysing the CJEU case-law on the concept of "civil and commercial matters", and the nature and detailed rules on which the claim in BA v SEPLA was based, this article concludes that the High Court was wrong in hiding behind the "public law taboo" in PIL. The discussion, in turn, underlines the relevance of PIL for the relationship between the right to strike and fundamental freedoms and, more generally, the role of this discipline in the EU legal framework.

Verity Winship, Personal Jurisdiction and Corporate Groups: *Daimlerchrysler AG v Bauman*

This article proposes a framework for understanding what is at stake in the US Supreme Court's upcoming decision in DaimlerChrysler AG v Bauman. Argentine plaintiffs sued a German corporation in US courts, alleging violations of the Alien Tort Statutes. The outcome and consequences of the Supreme Court's decision depend on how the Court analyses three aspects of personal jurisdiction. The first is the extent to which a subsidiary's contacts with a forum state can be attributed to the corporate parent. The second is whether the contacts are so extensive that the court may exercise jurisdiction over a defendant for any cause of action, even one unrelated to the contacts. The third is whether jurisdiction is "reasonable". The opinion promises to provide either much-needed guidance about jurisdictional attribution within corporate groups, or an example of the discretionary, policy-driven analysis of when jurisdiction is reasonable in the context of multinational businesses.

Chukwuma Okoli, The Significance of the Doctrine of Accessory Allocation As a Connecting Factor Under Article 4 of the Rome I Regulation

The doctrine of accessory allocation is given special significance as a connecting factor by the framers of Rome I Regulation (through Recitals 20 and 21) in utilising the escape clause and principle of closest connection under Article 4. This article analyses the application of the doctrine under the Rome Convention; the possible reasons why the framers of Rome I gave the doctrine special significance; the nature of inquiry a Member State court would be faced with in applying the doctrine especially in very closely related contracts such as back-to-back contracts; and the dilemma faced by the court in determining the quantum of weight to attach to the application of the doctrine as it relates to displacing the main rule(s). The author concludes by stating that there is need for more clarity on the significance of the doctrine of accessory allocation as a connecting factor under Article 4 of Rome I.

Sharon Shakargy, Marriage by the State or Married to the State? on Choice of Law in Marriage and Divorce

The paper suggests reshaping the choice of law rules for marriage and divorce and basing them on the parties' will rather than on the will of the parties' home country. The paper discusses the evolution of choice-of-law in matters of marriage and divorce in relation to that of substantive marriage law in Western legal systems prior to WWII and today. It argues that the early view of marriage and divorce as matter of state concern was reflected in the choice of law rules.

However these current rules have not internalized changes that have occurred in the way national laws treats marriage today, according to which marriage is regarded far more as a private matter. The paper therefore agues that while in the early period there was a close correlation between the substantive regulation of marriage and divorce and the choice-of-law rules in this field, this correlation no longer exists. In order to re-establish the correlation between substantive law and the choice of law rules, the paper identifies leading theoretical features of modern-day marriage law, including the principle of party autonomy. The paper concludes by suggesting ways of incorporating the modern view of marriage and divorce in choice of law.

Elena Rodríguez-Pineau, Book Review: Brauchen Wir Eine Rom O-verordnung? (Do We Need a Rome 0 Regulation?)

Unfair Terms in Low-Cost Airline Contracts: A Spanish Court Takes a Bold Step

Many thanks to Cristian Oró Martínez, Senior Research Fellow at the MPI Luxembourg.

The Commercial Court (*Juzgado de lo Mercantil*) nº 5 of Madrid delivered on 30 September 2013 a judgment in an action brought by the Spanish consumer association *Organización de Consumidores y Usuarios* (OCU) against the Irish airline Ryanair. OCU asked the Commercial Court to declare that 20 of the general terms and conditions used by the airline are unfair, and hence should not be binding on consumers, as provided by the Spanish Law on the protection of consumers and users (which transposed Directive 93/13, on unfair terms in consumer contracts). OCU also sought an injunction to prevent Ryanair from continuing to use these allegedly unfair terms and conditions.

In its judgment, the Commercial Court held that 8 of the general terms issued by

Ryanair are unfair, and hence void. These terms deal with a variety of issues relating to the contract of carriage concluded between the airline and its customers: (i) the choice of Irish law and the submission to Irish courts (Art. 2.4); (ii) the limitation of accepted travel documents (Art. 3.1.1 and annex on travel documentation); (iii) the 40 € fee for the re-issue of a boarding card at the airport (annex with table of optional fees); (iv) the possibility for the airline to refuse to carry passengers or their baggage (Art. 7.1.1); (v) the prohibition to carry in the checked baggage certain items, including money, jewels, cameras, computers, medicines, glasses, mobile phones, tobacco or passports (Arts. 8.3.2 and 8.3.3); (vi) the possibility for the airline to charge a storage fee for luggage not collected within a reasonable time (Art. 8.8.1); (vii) the possibility for the company to change the flight timing without having to justify it, and without giving the passenger the option to terminate the contract (Arts. 9.1.1 and 9.1.2); and (viii) the prohibition to pay in cash any fee or tax charged at the airport (Art. 18). According to the judgment, Ryanair should refrain from using these terms in future contracts.

To date, all these clauses continue to appear on the airline's website. The judgment of the Commercial Court of Madrid can of course be appealed – and it is highly likely this has been the case. Its effective impact, therefore, remains to be seen. However, it may constitute a first step for the protection of consumers against alleged abuses by low-cost airlines.

Nevertheless, from a PIL perspective, the question which arises is whether the Spanish court was right in assessing the compatibility of the contract with Spanish consumer legislation. Ryanair claimed that the choice of Irish legislation was valid under Art. 5(2) of the Rome I Regulation, which allows parties to choose, among others, the law of the country where the carrier has its habitual residence. The court fails to address this allegation, and simply states that the choice of court and choice of law clause is invalid under Art. 90.3 of the Law on the protection of consumers and users. The reason would be that it causes a significant imbalance in the parties' rights and obligations and hinders the consumer's right to take legal action, insofar as it forces this weak party to litigate in a foreign country and under a foreign law, thus increasing the costs of the suit.

The Commercial Court bases its reasoning not only on the Spanish Law on consumer protection, but also on the provisions of Directive 93/13 and on some

judgments in which the ECJ has interpreted it. It is arguable that, under Art. 23 of the Rome I Regulation, the Directive on unfair terms could trump the conflictual solution of Art. 5(2) of the Rome I Regulation. However, even in such scenario, the Commercial Court should have justified the reason why the Spanish transposition of the Directive on unfair terms should prevail over the Irish transposition. The problem stems from the Spanish Law on the protection of consumers and users, which purports to apply when the contract is closely connected with the territory of a State party to the EEA, *irrespective of the law chosen by the parties* (Art. 67.1). It is arguable that this provision should be read in light of Art. 6(2) of Directive 93/13, which states that "Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law *of a non-Member country*". Thus, the Spanish legislation should only prevail over the parties' choice of a third-State law, but not over the choice of the law of a Member State. Indeed, in the latter case the protection granted by the Directive is in principle guaranteed – at least as long as the ECJ does not declare that that particular Member State failed to correctly transpose it.

Therefore, the assessment of all the allegedly unfair terms should have probably been carried out under Irish law. The ensuing question is: would they be held unfair under Irish law? Or even: should they be considered unfair under the Directive itself? If so, the ECJ may end up having its say in the issue. We shall keep an eye on future developments – just as low-cost airlines will surely also do.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (6/2013)

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

- ***Bernhard Pfister***: "Kollisionsrechtliche Probleme bei der Vermarktung von Persönlichkeitsrechten" – the English abstract reads as follows:

Internationally famous celebrities often commercialize their personality rights in different countries. The following article tries to solve the problem, what national law is applicable in regard to the protection of these rights; the relevant sources of law for a German court are Arts. 42, 40 and 41 EGBGB. In this context, German courts and literature mostly deal with defamation by the press. In those cases, the personality of the defamed is offended and the law of the state, where the injured person lives (Erfolgsort) or where the newspaper is published (Handlungsort), is applicable. The issue of protection of commercially used property rights, however, is a different matter: The personality of the celebrity is not harmed, but the property right gained by her/his achievement. It is situated in the country, where the she/he is known.

Only the law of the state, where the advertisement was placed, has to be applied. This is the place, where the action occurred (Handlungsort) and where the damage was caused (Erfolgsort). Neither the law of the country, where the advertising documents had been written, nor the law of the country of the habitual residence are applicable.

- ***Kurt Lechner:*** "The interplay between the law applicable to the succession and national property law (lex rei sitae) in the EU regulation on successions"

The line the European regulation on successions draws between the law applicable to the succession on the one hand, and property law on the other hand, raises specific questions in legal practice. The way a legatum vindicationis is to be treated by German law is a good example. Only a thorough analysis of the provisions in the regulation and their historic evolution in the law-making process can illustrate the functioning of the regulatory system. The stipulations of Article 1 (2) lit. l together with recital 18 of the regulation are the result of a carefully considered compromise between the institutions involved in the legislative process. Besides leaving the national register proceedings as such unaffected, the final wording expressly states that it is the national law that determines "the effects of recording or failing to record such rights in a register". Moreover, as far as immovable property is concerned,

recital 18 confirms the lex rei sitae principle. The European legislator hence gives precedence to the national property law, the accuracy of registers and the protection of bona fide rights over a more comprehensive application of the law applicable to the succession. As a result, and as far as real estate located in Germany is concerned, neither can rights in rem be created nor ownership be transferred without registration in the German land register. Accordingly, the protection of the integrity of the German land register and the protection of bona fide rights require a formal agreement (Auflassung) between the parties involved in the transfer of ownership.

- ***Matthias Weller***: "Keine Drittwirkung von Gerichtsstandsvereinbarungen bei Vertragsketten" – the English abstract reads as follows:

In Refcomp the ECJ rejected any binding effect of a choice of forum clause on following buyers in the distribution chain raising an "action directe" under French law against the first seller. The judgment is unconvincing both in its reasoning and its result. It appears preferable to characterise as contractual the direct claim against the first seller if and to the extent the claim aims at compensating the contractual interests in full performance. The characterisation as delictual results in unforeseeable places of jurisdiction at the domicile of the respective buyer in the distribution chain. If the applicable law grants a direct claim to a third party, thereby transgressing the relativity of the contract, it appears justified to bind the privileged third party to what the contractual parties agreed for each other in respect to claims compensating the contractual interest.

- ***Jan von Hein***: "The applicability of Art. 5 No. 3 Brussels I-Regulation to damages caused by multiple tortfeasors"

In Melzer v. MF Global UK Ltd, the CJEU refused the application of article 5 no. 3 of the Brussels I Regulation in a case in which the plaintiff who claimed to have been harmed by multiple tortfeasors had sued only the alleged accomplice, a London broker, at the place where the main perpetrator, a German company, had committed the relevant acts, i.e. defrauded the claimant. The German courts had so far applied a principle of "reciprocal attribution of the place where the event occurred" amongst multiple tortfeasors in such

cases. The CJEU argued, however, that there is no equivalent autonomous concept in the Regulation, that art. 5 no. 3 must be interpreted restrictively and that the plaintiff could instead have sued under art. 5 no. 1 or art. 6 no. 1 of the Regulation. In his critical note, Jan von Hein argues that, given the substantial convergence of Member States' laws on joint and several liability of multiple tortfeasors, the Court should have contributed to the development of an autonomous rule on attribution. The doctrine of restrictive application of art. 5 no. 3 is not absolute, but must be balanced against the principle of effet utile. The alternatives suggested by the CJEU – generously re-characterizing claims sounding in tort as contractual or suing all alleged tortfeasors at the same time – are, in a large number of cases, either not available or lead to unsatisfactory consequences. Particularly in the given case, a suit against the main perpetrator would not have been admissible because of its insolvency. The note concludes with an outlook on pending cases concerning infringements of intellectual property rights.

- ***Wulf-Henning Roth:*** *"*Choice-of-law clauses in consumer contracts – a difficult matter?"

The judgment of the Bundesgerichtshof (BGH) deals with the use of a choice-of-law clause in the standard terms of a consumer contract. Applying German law to the relevant clause the Court holds that a choice-of-law clause may not be misleading and has to stand up to the standard of transparency. The implications of this approach need to be discussed further on. The Court classified the action for injunctive relief brought by a trade organisation as delictual, applying German private international law of torts, thereby disregarding the Rome II-Regulation. Moreover, the Court hold that the question whether the relevant choice-of-law clause stands up to the standard of transparency shall be determined by the applicable law of torts, instead of classifying this issue as a contractual one. It is suggested that this classification should be reconsidered.

- ***Stefan Arnold***: "Claims for Damages by Private Investors in Foreign Funds – Some Aspects Concerning International Private and Procedural Law"

The Federal Court of Justice (Bundesgerichtshof) reaffirms its jurispru- dence concerning the jurisdiction of German courts in consumer matters under sec. 13 and 14 Lugano Convention 1988. These provisions give German courts jurisdiction in proceedings brought to by German consumers concerning investments in Switzerland. Actions based on an infringement of § 32 German Banking Act (Kreditwesengesetz), on culpa in contrahendo (here: breach of precontractual duties of disclosure) and on prospectus liability according to sec. 127 German Investment Act (Investmentgesetz) are considered as „proceedings concerning a contract" in the sense of sec. 13 Lugano Convention 1988. This wide interpretation is not mirrored at the Conflict of Laws level however. Here, it is argued, the law applicable to damage claims based on an infringement of § 32 German Banking Act and on sec. 127 German Investment Act does not follow the law applicable to the contracts. It must rather be determined according to the Conflict of Law rules as it regards non-contractual obligations.

- ***Marc-Philippe Weller/Bettina Rentsch***: "The Combination Theory (Kombinationslehre) and cross-border Company Conversion: Incentives from EU Law"

The ECJ VALE Case (ECJ, 12.7.2012 – C-378/10 – VALE Építési kft) concerns an Italian Company's conversion into a Hungarian legal form, but being refused to register according to Hungarian corporate law. The Court, with reference to its well-known Cartesio Judgement, considers the refusal, firstly, to fall under the scope of Art. 49, 54 TFEU, and, secondly, to interfere with the EU freedom of establishment. The article examines the consequences of this reasoning for Private International Law. Especially, it adapts the requirements of the so-called Combination Theory, developed by Beitzke, to the requirements of the Freedom of Establishment.

- ***Dieter Martiny***: "Deutscher Kündigungsschutz für das Personal ausländischer Botschaften?" – the English abstract reads as follows:

The case note analyses a judgment of the Federal Supreme Labour Court (Bundesarbeitsgericht; BAG) as well as a related judgment of the European Court of Justice in a case concerning the dismissal of a member of the local staff of the Algerian Embassy in Berlin. The case first required determining whether sovereign immunity of the Algerian State barred German jurisdiction.

The Federal Supreme Labour Court expressed some sympathy for the argument of the Algerian State that the employed driver also performed other duties, such as translation services, which could justify immunity. The Federal Court reversed the judgment of the Appellate Labour Court of Berlin-Brandenburg for insufficient findings of fact and remanded the matter back to the Appellate Court. In respect of the law applicable to the employment contract, there was an implied contractual choice of Algerian law, and therefore the so-called "principle of favourability" under Article 6 of the Rome Convention of 1980 had to be applied. Subsequently, after it again rejected immunity, the Appellate Labour Court of Berlin- Brandenburg referred the case to the European Court of Justice for clarification on whether an embassy constitutes a branch, agency or other establishment within the meaning of Article 18(2) of Regulation No. 44/2001. The Court of Justice ruled that Article 18(2) must be interpreted as meaning that an embassy of a third State situated in a Member State is an "establishment" within the meaning of that provision in a dispute concerning a contract of employment concluded by the embassy on behalf of the sending State, where the functions carried out by the employee do not fall within the exercise of public powers (an act iure gestionis). It is for the national court seized to determine the precise nature of the functions carried out by the employee. There is no uniform European approach for the interpretation of international law criteria, and the European Court of Justice has insofar no competence to render such a decision. However, the European Court of Justice affirmed the rejection of immunity as concerns the preliminary reference procedure. According to the European Court of Justice, an embassy may be equated with a centre of operations which has the appearance of permanency and contributes to the identification and representation of the State from which it emanates. A dispute in the field of employment relations has a sufficient link with the functioning of the embassy in question with respect to the management of its staff.

The agreement on jurisdiction in favour of the Algerian courts did not preclude the jurisdiction of German labour courts. Article 21(2) of Regulation No. 44/2001 must be interpreted as meaning that an agreement on jurisdiction concluded before a dispute arises falls within that provision in so far as it gives the employee the possibility of bringing proceedings not only before the courts ordinarily having jurisdiction under the special rules in Articles 18 and 19 of that regulation, but also before other courts, which may include courts outside

the European Union. However, a jurisdiction clause depriving the employee of a possibility to sue would have no effect.

The case note discusses the concept of immunity in cases of employment of embassy personnel. It argues that performance of additional duties like translation services cannot justify an exclusion of jurisdiction. The application of the pro- visions on jurisdiction in labour cases by the European Court of Justice is correct. The applicable law on the employment contract is discussed not only under the Rome Convention of 1980 but also under Article 8 of the Rome I Regulation on contractual obligations of 2008. It is argued that unfair dismissal provisions protecting a single employee are not overriding mandatory provisions under the Convention of 1980 and also not under the Rome I Regulation. However, since the employee habitually carried out his work in Germany and there was no closer connection to Algeria, the standard of protection is German law in any event.

- ***Ulrich Spellenberg***: "Form und Zugang" – the English abstract reads as follows:

The sole director of a German private limited company (GmbH) wants to resign and sends his notice to the sole shareholder of the company, a Californian Incorporated Company. The reception of the notice is confirmed by a fax sent by a person whose position or function in the Incorporated Company remains unclear. The Commercial Register in Hamburg and the lower German courts who dealt with the case refuse to enter the termination of the director's function in the commercial register because he didn't establish that his notice reached a competent person or organ of the American Incorporated Company. The federal Court (BGH) allows the appeal by applying the German rules to decide when a notice is deemed to have reached its addressee since it was sent from Germany. The outcome in this case is correct but the reasoning is not. In contradiction to its former ruling and to the general opinion the Court falsely classifies "reception" as matter of form of legal acts in the sense of Article 11 EGBGB which alternatively applies the law of the place of sending and the law of the contract. However, reception is not a matter of "form" and the Court would at least have needed to support its new classification with reasons.

- ***Csongor István Nagy***: "Cross-border company conversions in a legal

vacuum: the Hungarian Supreme Court's follow-on judgment in VALE"

After the CJEU's judgment in VALE, the EU right to cross-border conversions remains a largely unregulated right. When national law contains no special rules concerning international conversions, the judge has to apply, by analogy, the rules of domestic conversions to cross-border conversions. The Hungarian Supreme Court's judgment in the principal proceeding is a good example for what kind of troubles emerge, if as to cross-border conversions the companies and their founders, instead of concrete requirements, have to fulfill conditions that are interpreted and applied mutatis mutandis. The moral of the Hungarian Supreme Court's judgment is that conversions raise complex issues, which are to be addressed not in the court room but through careful legislation. Cross-border company conversions in a legal vacuum: the Hungarian Supreme Court's follow-on judgment in VALE

Civil Justice in the EU – Growing and Teething?

This post has been jointly drafted by Gilles Cuniberti, Xandra Kramer, Thalia Kruger and Marta Requejo.

Civil Justice in the EU – Growing and Teething? Questions regarding implementation, practice and the outlook for future policy is the title of the conference held in Uppsala, Sweden, on Thursday and Friday last week, co-organised by the Swedish Network for European Legal Studies in collaboration with the Faculty of Law at Uppsala University and the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law (see Prof. Cuniberti's announcement with the program here). This has been the first conference organized by the Max Planck Institute Luxembourg outside of the Grand Duchy.

After the formal opening of the conference by **Antonina Bakardjieva Engelberkt**, Stockholm University, Chairman of the Swedish Network for European Legal Studies, Prof. **Burkhard Hess**, Executive Director of the MPI Luxembourg, delivered the keynote address, centered on the current situation of a European procedural law which transgresses the mere coordination of the national procedural systems. In the European framework the national systems do not appear any longer to be self-contained and self-standing: in many respects, European law ingresses and transforms the adjudicative systems of the EU-Member States. Today, European lawmaking often triggers far-reaching reforms of the national systems (Consumer ADR being one example). In addition, the ECJ transforms the adjudicative systems of the Member States as more and more areas of private and procedural law are communitarised and are subjected to its (interpretative) competence. On the other hand, the national procedures in the European Judicial Area are still divergent with regard to their efficiency. In this respect, the case-law of the ECHR on the right of a party to get a judgment in reasonable period of time has not helped to assimilate the level of judicial protection in the Member States. Yet, the different efficiencies of the national systems entail a growing competition among the "judicial marketplaces" in Europe which is reinforced by the European procedural instruments on the coordination of these systems.

Against this background, Prof. Hess stressed the importance of the Commissioner for Justice. Since the entry into force of the Lisbon Treaty, the Commissioner for Justice implements a genuine lawmaking policy, not only with regard to cross-border litigation under Article 81 TFEU, but also with regard to the supervision of the national judicial systems. A new tool is the so-called judicial scoreboard aimed at the evaluation of the adjudicative systems of the EU-Member States. Although this scoreboard does not provide for substantial new information (the data are largely borrowed from the Council of Europe), the political ambition goes further: The Commission understands its mission in a comprehensive way covering all areas of dispute resolution, including the efficiency and the independence of the national court systems.

Prof. Hess went on to say the if the development of the European procedural law is regarded, not from the number of the instruments enacted so far, but from a systematic point of view, the balance would appear less successful. Until now, the law-making of the Union has been mainly sectorial and the choices of legislative

activities have not been comprehensive, but rather incidental. At present, there is no master-plan, no roadmap; a comprehensive and systematic approach is lacking. This situation has been criticized by the legal literature and alternatives have been discussed and proposed. All in all, a more systematic approach with a better coordination of the EU-instruments at the horizontal and the vertical level is needed. And it is the task of procedural science to discuss the different regulatory options with regard of their feasibility and efficiency in order to improve and to systemize European law-making in this field. Thus, the Director of the MPI Luxembourg announced that regulatory approaches of the European law of civil procedural are going to become a major research area of the Institute.

The first panel, which was chaired by **Marie Linton** (University of Uppsala), carried the title ***Avoiding Torpedoes and Forum Shopping***. The four speakers focused on two topics. First, **Trevor Hartley** (London School of Economics) and **Gilles Cuniberti** (University of Luxembourg) explored whether the remedy established by the Recast of the Regulation to reinforce choice of court agreements would indeed eliminate torpedoes, whether Italian or not. While agreeing that the new remedy would probably be satisfactory in simple cases, the speakers debated whether problems might still arise in case of conflicting or complex clauses. Then, **Erik Tiberg** (Government offices of Sweden) and **Michael Hellner** (University of Stockholm) discussed the consequences of the new rules of jurisdiction with respect to third states.

The second panel, addressing alternative dispute resolution, was composed of three speakers. In his speech **Jim Davies**, University of Northampton, provided a broad historical background of the recently adopted Directive on ADR for consumers (Directive 3013/11/EU), starting from the 1998 and 2001 European Commission's Recommendations and moving on to the Commission's Proposal and the Directive's final text. Thereafter, **Antonina Bakardjieva Engelbrekt**, Stockholm University, tackled the new rules on ADR with a view to assessing how these new provisions provide a further step toward network governance in EU consumer protection policy, especially highlighting the role of consumer organizations. Finally, **Cristina M. Mariottini**, Max Planck Institute Luxembourg, addressed two ADR systems concerning disputes over top level domains, and namely ICANN's New gTLD program and dispute resolution system and EURid's ADR system for disputes concerning the ".eu" domain, with a view to assessing whether and to what extent the protection of consumers has been kept

into consideration within these systems.

The third panel, entitled *Simplified procedures and debt collection – much ado about nothing?,* brought together four speakers. **Mikael Berglund** (Swedish Enforcement Authority) noticed that the European enforcement order and the European order for payment procedure are not frequently used in Sweden; on the European small claims procedure there are no reported cases at all. He explained that creditors do not find it worth the time and money because there is no reliable information on the debtor's assets in other Member States; also, that they have problems finding the competent enforcement authority. He presented several practical ideas to cure the enforcement 'Achilles' heel' of EU law. **Carla Crifó,** of the University of Leicester, provided information and several – limitedly available – data on the implementation and enforcement of the European order for payment procedure and the small claims procedure in England and Wales. This shows that little use is made of these European procedures. In this context, Ms Crifò stressed the problem of the use of English in European instruments which does not necessarily correspond to the legal terminology used in the United Kingdom. English courts and practitioners are usually not well-acquainted with these procedures. Against the background of the current "euroscepticism" in England, this situation is not likely to improve. **Xandra Kramer,** of the Erasmus University (Rotterdam)**,** addressed the potential of the uniform European procedures in view of their scope and limitation to cross-border cases. She presented data on the use and appreciation of these procedures in the Netherlands acquired in empirical research and gave recommendations for improvement. Though particularly the use of the European small claims procedures is disappointing up to date, she stressed that one should not be too pessimistic since the European procedures are very new compared to national procedure and the building of a well-functioning European procedural order will take time and efforts. **Cristian Oro Martinez**, from the MPI Luxembourg, reviewed some of the aspects of the Regulation on the European Small Claims Procedure which, besides the general lack of awareness of the instrument, may account for its relatively small success. These issues include, among others, problems such as the territorial scope of application of the Regulation (narrow definition of cross-border cases), the limitation of the right to an oral hearing with regard to non-consumer cases, or the problems arising out of the interface between the Regulation and other EU instruments (especially the Brussels I Regulation), as well as domestic procedural law

Two other panels took place simultaneously after the coffee break, on Family Law and Collective Redress respectively. The first one was composed of three speakers. **Katharina Boele-Woelki,** of Utrecht University, discussed the issue of partial harmonisation, referring to the example of the Rome III Regulation. As today, only 16 of 28 Member States are participating in the Rome III framework. She indicated the different political reasons underlying Member States' choices whether to participate in the Regulation or not. She also showed that fragmented harmonisation is not only the result of enhanced cooperation, but also, in other instruments, of the particular status that some EU Member States (Denmark, Ireland and the UK) have with respect to civil justice. Thus, the application of enhanced cooperation in the Area of Freedom, Security and Justice is a matter of concern. Thereafter **Thalia Kruger,** of the University of Antwerp, discussed the element of choice in the Rome III Regulation, showing that a rule that looks clear at first sight has many underlying uncertainties. The debate raised the issue of how habitual residence can be ascertained as a preliminary matter for purposes of jurisdiction, without requiring too cumbersome an investigation by the judge (with a waste of time as a result).

The third speaker, **Björn Laukemann** of the Max Planck Institute in Luxembourg, addressed the issue of the new Succession Regulation and the European Certificate of Succession. The debate on the subject pointed out the problem of EU certificates that remain valid for only six months, while some national certificates, which will co-exist with the EU certificates, are eternally valid. Another question related to this co-existence is the issue of contradictory certificates (EU and national).

The second track of the fourth section addressed some issues relating to collective redress, especially in the light of the Commission's Recommendation of 11 June 2013. **Eva Storskrubb**, from Roschier, assessed the potential impact of the Recommendation highlighting that, although it is non-binding, its rather prescriptive formulation and the Commission's commitment to review its implementation by Member States may entail significant changes in the domestic regulation of collective actions. **Rebecca Money-Kyrle**, from the University of Oxford, addressed some possible consequences of the Recommendations' approach to legal standing. She pointed out that the basic principles set out in the text may force to do away with existing domestic procedures which are efficient. Moreover, they fail to establish satisfactory rules as regards commonality criteria

or cross-border cases. **Laura Ervo**, from Örebro University, provided several arguments to support an opt-out approach to collective redress, hence critically assessing the Commission's Recommendation in this respect. She drew from models provided by Scandinavian legislation, especially the Danish authority-driven system, to support the idea that only opt-out can guarantee access to justice for all damaged parties. Finally, **Stefaan Voet**, from Ghent University, dealt with different systems of funding of collective actions. He evaluated their compatibility with the principles laid down in the Recommendation on lawyers' remuneration and third-party funding, critically assessing the latter for being sometimes too strict.

Under the heading *The Quest for Mutual Recognition,* with Dean **Torbjörn Andersson** as chairman, the first panel of Friday morning discussed several issues related to mutual trust and mutual recognition. **Marie Linton**, from the Uppsala University, addressed the balance between efficiency and procedural human rights in civil justice, particularly in the field covered by the Brussels I Regulation and under the future Brussels I bis Regulation. **Marta Requejo Isidro**, MPI Luxembourg, presented the ECtHR decision of 18 June 2013, *Povse*, pointing out questions that remain open after it. As for the most important, i.e., its possible influence on the abolition of exequatur in civil and commercial matters, Prof. Requejo adopted a somewhat skeptical position on a wide reach of the ECtHR decision, both in the light of the features characterising the Brussels I bis Regulation (although it may still be disputable to what extent there is room for discretion at the requested State), and the reasoning of the Court itself. Finally, **Eva Storskrubb**, Senior Associate, Roschier (Stockholm), dealt with the evolution of mutual recognition as part of a regulatory strategy comparing its Internal Market historical context with the current civil justice context.

The conference ended with a presentation of Future Measures and Challenges by Mr. **Jacek Garstka**, Legislative Officer, DG Justice, European Commission, and **Signe Öhman**, Legal Counsellor, Permanent Representation of Sweden, Brussels. Announcements were made regarding the immediate release of several Commission's Reports – among others, on the Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure; on Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-

Contractual Obligations (Rome II), and on the Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000. Mr. Garstka also referred to future areas of concern for the Commission, such as justice as a means to enhance economic growth, the legal framework of insurance contracts, and the area of insurance law. Ms. Öhman recalled the forthcoming end of the Stockholm program, and ventured an opinion on the follow up. She also pointed out some topics on the Council agenda -data protection, the rights of citizens, judicial networking… This panel was chaired by **Prof. Antonina Bakardjieva-Engelbrekt**, Stockholm University, who pronounced the closing remarks.

The 3rd Petar Sarcevic conference on family law

The Third International Scientific Conference Petar Sarcevic: *Family and Children – European Expectations and National Reality* will take place in Opatija, Croatia, on 20-21 September 2013. The programme of this conference includes the following speakers and topics:

Friday, 20 September

Prof. Dr. KATARINA BOELE-WOELKI
Utrecht University
Family Law in Europe: Past, Present, Future – Keynote Address

Dr. BRANKA RESETAR
J. J. Strossmayer University of Osijek
European Principles on Parental Responsibility in the 2013 Draft Family Act

Prof. Dr. NENAD HLACA

University of Rijeka
Misuse of the Right to Family Reunification

Prof. Dr. AUKJE VAN HOEK
University of Amsterdam
Mediation in Family Matters with a Cross-Border Element – The Dutch Experience

Saturday, 21 September

Prof. PAUL BEAUMONT
Aberdeen University
A Possible Framework for a Hague Convention on International Surrogacy

Prof. Dr. COSTANZA HONORATI
University of Milano-Bicocca
The New Italian Provisions on Unicity of Status Filiationis and their PIL Implications

Dr. INES MEDIC MUSA
University of Split
Cross-Border Placement of a Child under the 1996 Hague Convention and the Brussels II Regulation

Dr. MIRELA ZUPAN
J. J. Strossmayer University of Osijek
Key Issues in the Application of the Maintenance Regulation

Dr. PATRICIA OREJUDO PRIETO DE LOS MOZOS
Compultense University of Madrid
Matrimonial Crisis under the Brussels II Regulation

Dr. THALIA KRUGER
University of Antwerp
Partners Limping Accross Borders?

Prof. Dr. VESNA TOMLJENOVIC and Dr. IVANA KUNDA
EU General Court, University of Rijeka
Rome III: Is it Right for Croatia?

The conference is scheduled to commence at 4 pm on Friday 20 September and

continue the next morning at the hotel 4 opatijska cvijeta, with privileged prices for the conference attendees sending this accommodation form. The registration form for the conference should be sent to zeup@pravri.hr just as any questions regarding the conference. Here are also the details regarding the payment of the conference fee.

This conference follows the two Petar Sarcevic conferences reported previously, the first on the Brussels I Regulation and the second on maritime law. There seems to be no better topic for the third conference devoted to Petar Sarcevic than family law. His academic interests focused not only on private international law but extensively also on family law. In 1998 he became an associate member and in 2001 full member of the prestigious Institut de droit international and was appointed as Rapporteur of the Fourth Commission on the topic "Registered Partnership in Private International Law". He was a member of numerous other international associations, including the International Society of Family Law, where he served as its president from 1997 to 2000 and member of the Executive Council for almost 15 years. Unfortunately, he was unable to lecture at The Hague Academy of International Law on the topic "Private International Law Aspects of Cohabitation Without Formal Marriage" in July 2005.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (4/2013)

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

- ***Bettina Heiderhoff***: "Fictitious service of process and free movement of judgments"

> *When judgments or court orders are to be enforced in other member states, it is an essential prerequisite that the defendant was served with the document*

which instituted the proceedings in sufficient time (Article 34 Nr. 2 Brussels I Regulation).

When the service was conducted in a fictitious manner, the issue of service "in sufficient time" causes friction. It is acknowledged that the measure for timeliness – or, in such a case, more accurately for rightfulness – is not set by the state of origin, but by the recognising state. However, if the criteria are taken from the autonomous procedural rules of the recognising state, as has occasionally happened, minor differences between national laws can cause unreasonable obstacles to the recognition of titles.

In order to fulfill the aim of the Brussels I Regulation, to improve the free movement of judgments and strengthen mutual trust, the criteria must, therefore, not be taken from the national rules of the recognising state, but ought rather to resemble the standards valid for breaches of public policy. Only such a "mildly Europeanized" standard for fictitious services may avoid a trapping of the claimant who, trusting in the decision of the court of origin, is then surprised by the differing measures of the recognising state.

- ***Haimo Schack***: "What remains of the renvoi?"

The renvoi is one of the main principles of classic private international law. The renvoi doctrine aims for the conformity of decisions in different jurisdictions, which may also facilitate the recognition of the decision abroad. With this goal in mind the following article gives an overview of the acceptance of renvoi in different national jurisdictions. In addition, the article evaluates and criticizes the tendency to push back the doctrine of renvoi in international treaties and in EU private international law. Especially in the former domain of renvoi, i.e. the law of personal status, family and inheritance law, the European conflict rules are dominating more and more and preventing the conformity of decisions in relation to third countries. As a means to achieve this decisional harmony the renvoi remains useful, it shows the cosmopolitan attitude of classic private international law.

- ***Hannes Wais***: "Hospital contracts and Place of Performance Jurisdiction under § 29 ZPO (German Code of Civil Procedure)"

This article comments on a recent decision of the German Federal Supreme Court, in which the court ruled that, for payment claims from a hospital contract, § 29 ZPO conferred jurisdiction upon the courts in the locality of the hospital. The Court decided that, not only for the purposes of § 29 ZPO, the place of performance of the monetary obligation from a hospital contract is the creditor's seat and not that of the debtor (in contrast to what is generally accepted for monetary obligations). This article will discuss the implications of this decision, and will consider the possibility of a conceptual "reversal" of § 29 ZPO.

- ***Markus Würdinger***: "Der ordre public-Vorbehalt bei Verzugsaufschlägen im niederländischen Arbeitsrecht" – the English abstract reads as follows:

The substantive ordre public rarely plays a role when it comes to recognition and enforcement of foreign legal decisions. This article deals with such a case. It is about the declaration of enforceability of a Dutch court decision in Germany. The judgment in question decided the applicant's claim for unpaid wages plus a statutory increase of 50% as a penalty for late payment in his favour. The Higher Regional Court of Düsseldorf (OLG) rightly interpreted Art. 34 EuGVVO (Regulation (EC) No 44/2001) narrowly and refused to consider this decision as being comparable to an award of punitive damages.

- ***Urs Peter Gruber***: "Die Vollstreckbarkeit ausländischer Unterhaltstitel – altes und neues Recht" – the English abstract reads as follows:

For a maintenance creditor, the swift and efficient recovery of a maintenance obligation is of paramount importance. In the Brussels I Regulation – which until recently was also applicable with regard to maintenance obligations – and in various conventions there are procedures for the declaration of enforceability of decisions. In these procedures, the courts have to ascertain whether there is a maintenance claim covered by the Regulation or the convention and whether there are reasons to refuse recognition of the foreign decision. In the new Regulation (EC) No 4/2009 on maintenance obligations however, a declaration of enforceability of decisions is no longer required, provided that the decision was given in a Member State bound by the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations. In this case, a decision

on maintenance obligations given in a Member State is automatically enforceable in another Member State. The article discusses recent court decisions on the declaration of enforceability in maintenance obligations. It then examines the changes brought about by the Regulation (EC) No 4/2009 on maintenance obligations. Weighing the interests of both the creditor and the debtor, it comes to the conclusion that the abolition of the above-mentioned procedures is fully justified.

- ***Wolf-Georg Ringe***: "Secondary proceedings, forum shopping and the European Insolvency Regulation"

The German Federal Supreme Court held in a recent decision that secondary proceedings according to Article 3(2) of the European Insolvency Regulation cannot be initiated where the debtor only has assets in a particular country. The requirements for an "establishment" go beyond this and require an economic activity with a "minimum of organisation and certain stability". This decision stands in conformity with the leading academic comment and other case-law. Nevertheless, the decision is a good opportunity to stress the importance of secondary proceedings and their function to protect local creditors. This is particularly true where the secondary proceedings are initiated (as here) in the context of a cross-border transfer of the "centre of main interests" (COMI) of the debtor. The ongoing review of the European Insolvency Regulation should respond to this problem in one of the regulatory options provided.

- ***Moritz Brinkmann***: "Ausländische Insolvenzverfahren und deutscher Grundbuchverkehr" – the English abstract reads as follows:

Art. 16 EIR provides for the automatic recognition of insolvency proceedings which have been commenced in another member state. The recognition of insolvency proceedings pertains not only to the debtor's power with respect to the estate, but also to his procedural position as well as to questions regarding company law or the law of land registries. The decision rendered by the OLG Düsseldorf (March 2, 2012) illustrates that these consequences are easily ignored in the routine of everyday legal life as long as courts and parties have difficulties in accessing reliable information as to the status of foreign proceedings. The existing deficits in terms of access to information regarding

foreign insolvency proceedings may thwart the concept of automatic recognition. Hopefully, the coming reform of the EIR will address this issue (see proposed Art. 22 EIR in COM (2012) 744 final).

- ***Kurt Siehr***: "Equal Treatment of Children of Unmarried Parents and the Law of Nationality"

A child of unmarried parents acquires nationality of Malta only if the child is recognized by the Maltese father and legitimized by marriage or court decision. The European Court of Human Rights decided that this provision violates the European Convention of Human Rights, especially Article 8 on the right of family life and Article 14 on non-discrimination. There are doubts whether the decision is correct. A more careful phrasing of Maltese law could avoid the violation of the Convention. Or is the decision of the European Court of Human Rights its step further towards a human right for nationality?

- ***Fritz Sturm***: "Forfeiture of the choice of surname: The European Court of Human Rights compels the Swiss Federal Court to set aside its former judgment"

The Swiss Federal Court, 24 May 2005, did not authorize foreign husbands to have their surname governed by their national law (s. 37 ss. 2 Swiss Private International Law Act) when they have previously chosen to take the wife's surname as the family name, situation which could not have occured if the sexes had been reversed. In fact, in this case the husband's surname would automatically become the family name and the wife could choose to have her surname governed by her national law. For the Court of Strasburg this difference in treatment is discriminatory (violation of art. 14 in conjunction with art. 8 ECHR). The Swiss Federal Court has therefore been compelled to set aside its former judgment.

- ***Dirk Looschelders:*** "Jurisdiction of the Courts for the Place of Accident in case of a Recourse Direct Action by a Social Insurance Institution against the Liability Insurer of the Tortfeasor"

In the present judgement the Austrian High Court (OGH) deals with the

question whether a social insurance institution can sue the liability insurer of the tortfeasor in the courts for the place where the harmful event occurred. The OGH comes to the conclusion that such a jurisdiction is granted at least by Article 5 no 3 Brussels I Regulation. The problematic issue whether the priority provision of Article 11 (2) read together with Article 10 s. 1 Brussels I-Regulation applies, is left undecided. In the decision Vorarlberger Gebietskrankenkasse the European Court of Justice has held that the social insurance institution cannot take a recourse direct action against the liability insurer under Article 11 (2) read together with Article 9 (1) (b) Brussels I Regulation. According to the opinion of the author, jurisdiction in such cases shall generally not be determined by Chapter II Section 3 of the Brussels I Regulation. Therefore, Article 11 (2) read together with Article 10 s. 1 Brussels I Regulation is inapplicable, too. In consequence, contrary to the opinion of the OGH, the social insurance institution cannot be regarded as an injured party in terms of Article 11 (2) Brussels I-Regulation.

- ***Michael Wietzorek***: "On the Recognition of German Decisions in Albania"

There is still no established opinion as to whether the reciprocity requirement of § 328 Sec. 1 No. 5 German Civil Procedure Code is fulfilled with regard to Albania. A decision of the High Court of the Republic of Albania dated 19 February 2009 documents that the Court of Appeals of Durr?s, on 5 December 2005, recognized two default judgments by which the Regional Court of Bamberg had ordered an Albanian company to pay two amounts of money to a German transport insurance company. One single court decision may not be sufficient to substantiate that there is an established judicial practice. Yet the reported decision appears to be the only one available in the publicly accessible database of the High Court dealing with the recognition of such foreign default judgments by which one of the parties was ordered to pay an amount of money.

- ***Chris Thomale***: "Conflicts of Austrian individual labour law and the German law of the works council – intertemporal dimensions of foreign overriding mandatory provisions"

The Austrian Supreme Court (Oberster Gerichtshof) recently held that the cancellation of an individual employment contract between a German employer

and an Austrian employee posted in Austria was valid despite the fact that the employer failed to hear his German works council properly beforehand. The case raises prominent issues of intertemporal conflicts of laws, characterization of the mentioned hearing requirement and the applicability of foreign overriding mandatory provisions, which are discussed in this article.

- ***Sabine Corneloup: "***Application of the escape clause to a contract of guarantee"

The French Cour de cassation specifies how to apply the escape clause of Art. 4 n° 5 of the Rome Convention to a contract of guarantee. The ancillary nature of guarantees leads national courts often to the application of the law governing the main contract, on the basis of a tacit choice of law or on the basis of the escape clause. The latter is to be used very restrictively, according to the Cour de cassation. It is necessary to establish first that the ordinary connecting factor, designating the law of the habitual residence of the guarantor, is of no relevance in the examined case. Only after this step, the courts can examine the connections existing with another State. This restrictive interpretation adds a condition to the text that seems neither necessary nor appropriate.

- ***Oliver Heinrich/Erik Pellander***: "Das Berliner Weltraumprotokoll zum Kapstadt-Übereinkommen über Internationale Sicherungsrechte an beweglicher Ausrüstung"
- ***Stefan Leible***: "Hannes Unberath † (23.6.1973–28.1.2013)"

New French Book on European

Divorce Law

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

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

With the contributions of :

Alegría Borrás, Hubert Bosse-Platière, Maria Novella Bugetti, Christelle Chalas, Sabine Corneloup, Alain Devers, Christina Eberl-Borges, Marc Fallon, Aude Fiorini, Estelle Gallant, Cristina González Beilfuss, Urs Peter Gruber, Petra Hammje, Rainer Hausmann, Natalie Joubert, Marco Jung, Paul Lagarde, Elena

Lauroba Lacasa, François Leborgne, Yves-Henri Leleu, Luís de Lima Pinheiro, Eric Loquin, Alberto Malatesta, Françoise Monéger, Horatia Muir Watt, Valérie Parisot, Carlo Rimini, Thomas Simons, Miguel Teixeira de Sousa.

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. Articles 24-27, par Christelle CHALAS

. Préliminaire aux articles 28 et s., par Urs Peter GRUBER

. Articles 37-39, 46, 49, 52, par Alain DEVERS

. Articles 59-60, 62-63, par François LEBORGNE

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

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

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

More information is available here.