New Publication by Mirela Župan (ed): Family at Focus

A collection of papers from the 11th Regional Private International Law Conference held in Osijek, Croatia, on 11-12 June 2014 is out now. The book, edited by Professor Mirela Župan, contains scientiffic contributions by prominent authors on topics ranging from analysing the role and/or meaning of different connecting factors (habitual residence, nationality, party autonomy) to commenting on the effects which ECtHR case law may have on the interpretation of the Hague Abduction Convention. In addition, the book contains six national reports on the operation of the Hague Abduction Convention in the region.
The links to the books in .pdf and .epub formats are available here.

Out now: von Hein & Rühl (eds), Coherence in European Union Private International Law

Readers of our blog might recall that Jan von Hein and I convened a conference on coherence in European private international law in Freiburg i.Br. (Germany) in October 2014 (see our previous post). Today, we are happy to report that the findings of the conference have just been published by the German publishing house Mohr Siebeck.

The volume critically assesses the current state of European private international law including the law of international civil procedure. It sheds light on existing incoherences, describes the requirements for a more coherent regulation and discusses perspectives for a future European codification in the field of private international law. In addition, the volume contains English language summaries of each contribution as well as detailed discussion reports.

More information is available on the publisher's website. The table of contents reads as follows:

Part 1: Grundlagen

- *Jürgen Basedow*, Kohärenz im Internationalen Privat- und Verfahrensrecht der Europäischen Union: Eine einleitende Orientierung
- *Anatol Dutta*, Gemeinsame oder getrennte Kodifikation von IPR und IZVR auf europäischer Ebene: Die bisherigen und geplanten Verordnungen im Familien- und Erbrecht als Vorbilder für andere Rechtsgebiete?
- *Thomas Kadner Graziano*, Gemeinsame oder getrennte Kodifikation von IPR und IZVR: Das schweizerische IPR-Gesetz als Modell für eine europäische Gesamtkodifikation – Lehren für die EU?

Part 2: Der räumliche Anwendungsbereich des europäischen IPR/IZVR

- *Burkhard Hess*, Binnenverhältnisse im Europäischen Zivilprozessrecht: Grenzüberschreitende v. nationale Sachverhalte
- *Tanja Domej*, Das Verhältnis nach „außen": Europäische v. Drittstaatensachverhalte
- *Andrea Schulz*, Die EU und die Haager Konferenz für Internationales Privatrecht

Part 3: Subjektive und personale Anknüpfungspunkte im europäischen IPR/IZVR

- *Felix Maultzsch*, Parteiautonomie im Internationalen Privat- und Zivilverfahrensrecht
- *Frauke Wedemann*, Die Verortung juristischer Personen im europäischen IPR und IZVR
- *Brigitta Lurger*, Die Verortung natürlicher Personen im europäischen IPR und IZVR: Wohnsitz, gewöhnlicher Aufenthalt, Staatsangehörigkeit

Part 4: Objektive Anknüpfungsmomente für Schuldverhältnisse im europäischen IPR/IZVR

- *Michael Müller*, Objektive Anknüpfungsmomente für Schuldverhältnisse im europäischen IPR und IZVR: Die Behandlung vertraglicher Sachverhalte
- *Haimo Schack*, Kohärenz im europäischen Internationalen Deliktsrecht

Part 4: Schutz schwächerer Parteien und von Allgemeininteressen im europäischen IPR/IZVR

- *Eva-Maria Kieninger*, Der Schutz schwächerer Personen im Schuldrecht
- *Urs Peter Gruber*, Der Schutz schwächerer Personen im Familien- und Erbrecht
- *Moritz Renner*, Ordre public und Eingriffsnormen: Konvergenzen und Divergenzen zwischen IPR und IZVR

Latest Issue of RabelsZ: Vol. 80 No. 1 (2016)

The latest issue of "Rabels Zeitschrift für ausländisches und internationales Privatrecht – The Rabel Journal of Comparative and International Private Law" (RabelsZ) has just been released. It contains the following articles:

Armin Steinbach, *Investor-Staat-Schiedsverfahren und Verfassungsrecht* (Investor-State Dispute Settlement and Constitutional Law)

> *Investment treaties allow foreign investors to claim damages against states before tribunals of investor-state dispute settlement (ISDS). More frequently, such dispute settlement procedures tend to replace proceedings before national courts. This has given rise to the heated debate surrounding the ongoing negotiation about the free trade agreements between the European Union and the United States of America. This article identifies and discusses the constitutional law implications of such tribunals. The composition of the tribunals of private persons, the lack of a legal ground for public policy reasons to override investors' rights, the dynamic development of the adjudication based on vague legal terms and the lack of publicity and transparency in the proceedings – all this raises questions from the perspective of democratic principle and rule of law. Based on democratic principle doctrine, this article classifies rulings of tribunals as acts of public authority and highlights the lack of material and personal legitimacy and examines whether a state monopoly of*

adjudication can be derived from the separation of powers principle. It discusses the publicity and control of ISDS tribunals as an obligation enshrined in the democratic principles and highlights the missing legal reviewability of ISDS rulings compared to tribunals established under German administrative law. Finally, the article explores possible compensatory instruments addressing the identified deficits based on an application of investments treaties in line with constitutional law principles.

Reinhard Zimmermann, *Das Ehegattenerbrecht in historisch-vergleichender Perspektive* (The Intestate Succession Rights of the Deceased's Spouse in Historical and Comparative Perspective)

The coordination of the position of the surviving spouse with that of the deceased's (blood-) relatives is one of central problems faced by the intestate succession systems of the Western world. While the succession of the relatives essentially follows one of three different systems (the "French" system, the three-line system, and the parentelic system) which have remained relatively stable, the position of the surviving spouse has, over the centuries, become ever more prominent. Roman law, at the time of Justinian, took account of the surviving spouse only in exceptional situations, medieval customary law often not at all. Today, on the other hand, she (much more often than he) has worked her way up, in most countries, to the position of main beneficiary under the rules of intestate succession, for small and medium-sized estates sometimes even to the position of exclusive beneficiary.

The present essay (based on the author's Rudolf von Jhering lecture at the University of Gießen) traces this development. In doing so it attempts, in the spirit of Jhering, not to line up the laws in the various epochs of our legal history "like pearls on a pearl string" but to look at them as part of a development and to trace their interconnections. The same idea can also be applied to comparative law in view of the fact that the modern national legal systems do not coexist in isolation but in a "system of mutual contact and influence" and, as may be added, on the fertile soil of a common legal culture. Today we find a wide-spread desire to allow the surviving spouse to remain in her familiar environment and to continue to enjoy the standard of living she has become accustomed to. Legal systems still differ as to the way in which best to achieve this aim, i.e. as to the details of the surviving spouse's intestate

succession right. An important guideline for assessing the various solutions to be found in the national legal systems is what the average deceased typically regards as reasonable, as far as the distribution of his estate is concerned. This can sometimes be gauged from the way in which wills are commonly drafted, and it has indeed guided the reforms in a number of countries. In Germany, the so-called "Berlin will" is particularly popular. Nonetheless, it does not appear to offer a satisfactory cue for the regulation of the law of intestate succession. In spite of a certain degree of arbitrariness inherent in this way of proceeding, the surviving spouse will have to be given a share (e.g. one half) of the estate. In addition, she should be granted the right to retain the right to continue to live in the family home.

Talia Einhorn, *The Common Law Foundations of the Israeli Draft Civil Code – A Critical Review of a Paradigm-Shifting Endeavor*

(no English abstract available)

Diegeo P. Fernández Arroyo, *Main Characteristics of the New Private International Law of the Argentinian Republic*

(no English abstract available)

New publications: Practical Handbooks on the Operation of the Service and Evidence Conventions

The Permanent Bureau of the Hague Conference on Private International Law has just published two Practical Handbooks:

* Practical Handbook on the Operation of the Service Convention (4th edition);
* Practical Handbook on the Operation of the Evidence Convention (3rd edition).

Both publications are for sale in e-Book format on the Hague Conference website here.

Here is the announcement by the Permanent Bureau, as published in the news section of the Conference's website:
"The new editions of these Handbooks bring together and synthesise the wealth of case law and commentary on the Convention on the one hand, as well as the work of the Special Commission and practice communicated by Contracting States on the other. Furthermore, in recent years, new issues have arisen with respect to the operation of the Conventions, many of which are the result of unprecedented technological developments. Thus, these new editions also include comprehensive research and analysis relating to the use of information technology in the operation of the Conventions, an area that continues to evolve.

Before their official release, both Handbooks were formally approved by the Council on General Affairs and Policy, the highest organ of the Hague Conference on Private International Law. This of course only increases the authoritative value of these Handbooks as a secondary source of information on the operation of these important Conventions.
For more information, please see the Service and Evidence Sections of the Hague Conference website."

ERA Conference on Recent case law of the ECtHR in family matters

Objective
This seminar will provide participants with a detailed understanding of the most recent jurisprudence of the European Court of Human Rights (ECtHR) related to family law matters.

The spotlight is centred on Article 8 (respect for private and family life) in conjunction with Article 14 (prohibition of discrimination) and Article 12 (right to marry). The case law of the ECtHR concentrates not only on the legal implications but also on social, emotional and biological factors.

Key topics
Notion of family life – current definition and interpretation by the ECtHR
International child abduction
Balancing children's rights, parents' rights and public order
Surrogacy parenthood
Home births and assistance rights
Abortion
Same-sex relationships and trans individuals' gender recognition

Who should attend?
Lawyers specialised in family law, human rights lawyers, judges dealing with family law matters, ministry officials, representatives of NGOs and child's rights organisations.

See the full programme here.

German EUPILLAR Project Conference on "The Assessment of European PIL in Practice – State of the Art and Future Perspectives" (Freiburg, 14-15 April 2016)

It has already been mentioned on this blog that the European Commission is funding an international research project on "European Private International Law – Legal Application in Reality" (EUPILLAR). The project, which is led by Prof. Paul

Beaumont and Dr. Katarina Trimmings from the University of Aberdeen (UK), will last for two years and involves six research partners from the Universities of Freiburg (Germany), Antwerp (Belgium), Wroclaw (Poland), Leeds (UK), Milan (Italy) and Complutense (Madrid, Spain), examining the case law and legal practice on the main EU private international law instruments in the Court of Justice of the European Union and in the participating Member States. The key objectives of the project are to consider whether the selected Member States' courts and the CJEU can appropriately deal with the relevant cross-border issues arising in the European Union context and to propose ways to improve the effectiveness of the European PIL framework.

After a practitioners' workshop has already been conducted in Freiburg last year, the German branch of the project (Prof. Jan von Hein) is now organizing an academic conference which focuses on the experience gathered in German court practice so far. The conference will take place on 14-15 April 2016 in Freiburg and features high-level academics dealing with pervasive issues such as European and domestic court organization, the methods of evaluating PIL instruments and the application of foreign law in practice. Moreover, court practice on PIL instruments such as Rome I and II, Brussels I(bis) and II(bis) will be analyzed and discussed. The conference language is German and the proceedings will be published in the „Zeitschrift für Vergleichende Rechtswissenschaft". Participation is free of charge, but requires a prior registration. For the full programme and further details, see here. For registration, please click here.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1/2016: Abstracts

The latest issue of the *"Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)"* features the following articles:

H.-P. Mansel/K. Thorn/R. Wagner, **European conflict of laws 2015: Reappraisal**

The article provides an overview of developments in Brussels in the field of judicial cooperation in civil and commercial matters from December 2014 until November 2015. It summarizes current projects and new instruments that are presently making their way through the EU legislative process. It also refers to the laws enacted at the national level in Germany as a result of new European instruments. Furthermore the authors look at areas of law where the EU has made use of its external competence. They discuss both important decisions and pending cases before the ECJ as well as important decisions from German courts pertaining to the subject matter of the article. In addition the article also looks at current projects and the latest developments at the Hague Conference of Private International Law.

K. Kroll-Ludwigs, **Conflict between the Hague Protocol on the law applicable to maintenance obligations (2007) and the Hague Maintenance Convention (1973): lex posterior derogat legi priori?**

On 18.6.2011, the European Union set into force the Hague Protocol on the law applicable to maintenance obligations of 23 November 2007 and established common rules for the entire European Union aiming to determine unanimously the applicable law where debtor and creditor are in different countries. The Protocol replaced the Hague Convention of 2 October 1973 on the Law applicable to maintenance obligations. Due to its universal application, its rules apply even if the applicable law is the law of a non-Contracting State. However, note that non-EU-States, as Turkey, Switzerland, Japan and Albania are not bound by the Protocol. As well as Germany they are Contracting States of the Hague Maintenance Convention. From the German perspective, in relation to these States the question raises whether the rules of the Hague Maintenance Convention still apply. Taking into account that the Protocol – unlike the Hague Maintenance Convention – enables the parties to choose the applicable law, determining the relevant legal instrument is of great practical importance.

F.M. Wilke, **The subsequent completion of German judgments to be enforced abroad**

Under certain conditions, a German court can pass a judgment without a statement of facts and even without reasons. This can lead to problems abroad if the decision is to be recognized and enforced there. This is why the implementing

statute concerning recognition and enforcement (AVAG) contains provisions that cover the subsequent completion of such decisions in light of certain international conventions and, so far, the Brussels regime. After the reform of the German Code of Civil Procedure (ZPO) in light of the Brussels I Recast, however, the scope of application of the AVAG does not extend to the Brussels I Regulation anymore. At first sight, this may seem plausible because of the abolition of exequatur. Yet it might be necessary for a court of an EU member state to examine the facts of a case and/or the reasons behind a decision in order to determine if its recognition/enforcement should be refused (Articles 45, 46 Brussels I Recast). This short article analyses for which cases the legal basis for subsequent completion seems to have vanished and how to deal with them. Essentially, the solutions de lege lata are to bypass the scope of application of the AVAG or to proceed by analogy. In a potential future reform, the respective AVAG provisions simply should be integrated into the ZPO.

S. Kröll, **The law applicable to the subjective reach of the arbitration agreement**

Defining the parties to an arbitration agreement, in particular whether nonsignatories are bound by the agreement, is one of the pervasive problems in international arbitration. It generally involves a number of conflict of laws questions some of which have been addressed by the German Supreme Court in its decision of 8 May 2014. A party's reliance on the „group of companies doctrine" does not relieve the courts from a detailed analysis of the various relationships involved. In most cases, it is the law governing the arbitration agreement which also determines who are the true parties to the arbitration agreement.

M. Weller, **No effect of foreign mandatory provisions on arbitration agreements under German law according to § 1030 ZPO**

The material scope of arbitration agreements, in particular with regard to tort claims, is a constant point of controversy before state courts. The note on the judgment by the Upper Regional Court Munich identifies opposing trends in German and European case law. The judgment also decides on the (lack of) influence of foreign mandatory provisions, arbitrability according to foreign law and the foreign ordre public on arbitration agreements, subject to German law.

C. Althammer/J. Wolber, **Cross-border enforcement of coercive fine orders in Europe and limitation on enforcement**

The European Court of Justice ruled in the case of Realchemie Nederland BV./. Bayer CropScience AG that decisions ordering a coercive fine fall within the scope of the Brussels I Regulation. This ruling made the German Federal Court of Justice decide upon the effects of a limitation on the crossborder enforcement of such an order. The judgment of the German Federal Court of Justice reveals a traditional understanding of the international law of enforcement and provokes the question if this approach is still appropriate for cross-border enforcement in Europe, especially as the recast of the Brussels I Regulation abolished the exequatur proceeding. The article examines the effects of obstacles resulting from national law of enforcement on the conditions of cross-border enforceability under the Brussels I and Ia Regulation. In this way the article leads into an issue that has so far not been discussed to a sufficient extent: the relationship between the cross-border enforceability of judgments and the national laws of enforcement.

P. Mankowski, **Inhibitions against arrest of ships abroad inside or outside an insolvency context?**

Sometimes seemingly technical cases at first instance open up a plethora of questions touching upon basics and fundamentals of international procedural law. Whether a court can inhibit parties from pursuing enforcement or arresting ships abroad in- or outside an insolvency context is precisely such a case. It touches upon the permissibility of measures against enforcement abroad and upon the universality approach in modern international insolvency law. Furthermore, it is inexplicably linked with the question to which extent (registered) ships are to be treated like real estate.

D. Otto, **Internationale Zuständigkeit indischer Gerichte bei Markenverletzungen**

In its decision of 15.10.2014, the Delhi High Court had to resolve whether it had competence in the international sense for a lawsuit by a U.S.-based claimant without a presence in India against an Indian-based defendant, who had his business in a different state. Under Indian civil procedure rules, a court has jurisdiction in the international sense against a defendant residing within the jurisdiction of the court. As per such rule, claimant would have to litigate before the Bombay High Court, not the Delhi High Court. The Claimant invoked a new legal provision that gives jurisdiction in disputes involving copy right or trademark violations in India also to a court at the place where the claimant carries on business. Claimant argued that it did “carry on business” within the

jurisdiction of the Delhi court because its website could be accessed in Delhi. The court accepted that. This Article questions such decision as previous jurisprudence by Indian courts required that an "essential" part of claimant's business is carried out in India; access to a website alone was deemed insufficient.

F. Heindler, **Austrian Supreme Court on Remuneration of Heir Locators**
The Austrian Surpreme Court in Civil Matters (Oberster Gerichtshof) has changed its jurisdiction on claims by commercial heir locators. Under Austrian law, according to the Oberster Gerichtshof, commercial heir locators are still entitled to reimbursement for expenses in negotiorum gestio. However, the amount of remuneration is no longer calculated in relation to the heir's inheritance right.

Call for papers: A conference in Santiago de Compostela on Security Rights and the European Insolvency Regulation

This post has been written by Ilaria Aquironi.

On 15 April 2016 the Law Faculty of the University of Santiago del Compostela will host an international conference on *Security Rights and the European Insolvency Regulation: from Conflicts of Laws towards Harmonization*. The event is part of the *Security Rights and the European Insolvency Regulation Project.*

Speakers include Paul Beaumont (Univ. of Aberdeen), Francisco Garcimartín Alferez (Univ. Autonoma of Madrid), Juana Pulgar Esquerra (Univ. Complutense of Madrid) and Anna Veneziano (Unidroit).

With a view to promote scientific debate on the topic, a call for papers has been issued. The organizers will consider papers addressing, in particular: (a) Security

Rights, Set-Off, Transactional Avoidance and Conflict-of-Laws Issues; (b) Security Rights and Insolvency Law in National Legislation, in particular taking into account the New Approach to Business Failure and Insolvency as proposed by the 2014 European Commission Recommendation; (c) Harmonization Trends at an international level.

Submissions should be sent by 11 March 2016 either to Marta Carballo Fidalgo (*marta.carballo@usc.es*) or to Laura Carballo Piñeiro (*laura.carballo@usc.es*).

Further information about the project is available here. The call for papers can be downloaded here.

EBS Law School Lecture on "Cross border insolvency: National principles and international dimensions" on 18 February 2016 at EBS Law School in Wiesbaden

by Jonas Wäschle

Jonas Wäschle, LL.M. is a research fellow at the EBS Law School Research Center for Transnational Commercial Dispute Resolution at EBS University for Economics and Law in Wiesbaden (www.ebs.edu/tcdr).

The Research Center for Transnational Commercial Dispute Resolution at EBS Law School will host a lecture on cross border insolvency. Hon. Elizabeth Stong, judge since 2003 at the U.S. Bankruptcy Court, Eastern District of New York, Professor Dr Heinz Vallender, University of Cologne, former judge at the Insolvency Court of Cologne, and Jennifer Marshall, Partner in Allen & Overy London and General Editor of the Sweet & Maxwell loose-leaf on European cross-

border insolvency, will talk to us on cross-border insolvencies.

The focus will be on the techniques to reconcile national principles with the challenges from international cases. Starting with a key note lecture by Stong on her experiences from a US perspective, her European counterparts will pick up the ball and present and compare European practice. The speakers will look at recent US and European cases and refer to guiding principles. This input will be measured against the principles of the UNCITRAL Model Law on Cross-Border Insolvency with its 2014 Guide to Enactment and Interpretation and the European Insolvency Regulation Recast of 2015. All attendees are invited to join the discussion chaired by Dr Oliver Waldburg, Partner in Allen & Overy.

The Lecture will be held on 18 February 2016 at 6.30 p.m. in Lecture Room "Sydney". The program will be as follows:

Welcome and Introduction

Prof. Dr. Matthias Weller, Mag.rer.publ., EBS Law School, Wiesbaden

Keynote Lecture

Hon. Elizabeth Stong, U.S. Bankruptcy Court, E.D.N.Y.

Panel discussion

Chair: Dr. Oliver Waldburg, Allen & Overy Frankfurt

Hon. Elizabeth Stong, U.S. Bankruptcy Court, E.D.N.Y.

Prof. Dr. Heinz Vallender, University of Cologne

Jennifer Marshall, Allen & Overy London

Get-together at the Lounge of the EBS Law School

The lecture will be held in co-operation with:

Allen & Overy | Harvard Law School Association of Germany e.V. | Deutsch-Amerikanische Juristen-Vereinigung e.V.

We would like to cordially invite you to join the lecture! Further questions and registrations may be addressed to claudia.mueller@ebs.edu.

US Supreme Court Enforces No-Class-Action Arbitration (Again): DIRECTV, Inc. v. Imburgia

By Verity Winship (University of Illinois College of Law).

In *DIRECTV, Inc. v. Imburgia* – decided on December 14, 2015 – the US Supreme Court enforced a no-class-action arbitration clause, shutting down a consumer class action.

The consumer contract at issue provided that "if the law of your state" did not allow waiver of class arbitration, the agreement to arbitrate as a whole was invalid. At the time DIRECTV drafted the contract, California law made class-arbitration waivers unenforceable. But the US Supreme Court later undid this in *AT&T Mobility LLC v. Concepcion*, which required California to enforce these waivers under US federal law – the Federal Arbitration Act (FAA).

Against this backdrop, the *DIRECTV* majority opinion navigates choice of law and the interplay between US state and federal law in a few discrete steps.

First, the parties could elect invalid California law as their choice of governing law. "In principle," Justice Breyer indicates, writing for the majority, parties "might choose to have portions of their contract governed by the law of Tibet, the law of pre-revolutionary Russia, or (as is relevant here) the law of California … irrespective of that rule's invalidation in *Concepcion*".

Second, the state court held that the parties had elected invalid California law. The state court has the final word on the interpretation of state law, and contract law is at the heart of this subnational prerogative. So the Supreme Court must live with the California state court's holding that the contractual selection of "law of your state" included now-invalid California law (the last on Justice Breyer's list above).

But, *third*, the state court's interpretation singled out arbitration contracts, so was pre-empted by the Federal Arbitration Act.

The Supreme Court reasoned that the California state court decision must not conflict with the FAA. In particular, it must put arbitration contracts on "equal footing" with all other contracts. According to the Supreme Court, the California court singled out arbitration when interpreting the phrase "law of your state". Federal law accordingly pre-empted its decision and the arbitration agreement must be enforced.

The two dissenting opinions make very different points.

Justice Thomas would restrict the reach of the FAA so that it does not reach state courts.

A separate dissent by Justices Ginsburg and Sotomayor highlighted the underlying dynamics that have made this area of the law so controversial in the US and that perhaps have pushed the Supreme Court to revisit these questions repeatedly in recent years. In particular, the dissent decried the majority's reading of the FAA to "deprive consumers of effective relief against powerful economic entities that write no-class-action arbitration clauses into their form contracts." The dissent would not "disarm consumers, leaving them without effective access to justice".