Save the date: Conference European civil procedure Rotterdam and MPI 25-26 February 2016

On **25 and 26 February 2016** a conference on the theme "***From common rules to best practices in European Civil Procedure***" will be held at Erasmus University Rotterdam. The conference is organised jointly by Erasmus School of Law in Rotterdam (Prof. Xandra Kramer, Alina Ontanu and Monique Hazelhorst) and the Max Planck Institute for European, International and Regulatory Procedural Law in Luxembourg (Prof. Burkhard Hess). The conference will bring together experts in the field of civil procedure and private international law from the European Union and beyond. It seeks to facilitate in-depth discussion and sharing of knowledge, practical experiences, and solutions, with the aim of reinforcing mutual trust and contributing to the further development of European civil procedure.

In the past fifteen years a considerable harmonisation of civil procedure has been achieved in the EU with the aim of furthering judicial cooperation. In recent years, the focus has shifted from minimum standards and harmonised rules to the actual implementation, application, and operationalisation of the rule. Important constituents in this discourse are the interaction between European civil procedure and national law, e-Justice, ADR, and best practices in civil procedure. The conference will focus on how to move beyond common rules and towards best practices that give body to mutual trust and judicial cooperation, which can in turn feed the further development of the European civil procedure framework from the bottom up.

The conference will host four panels:
Panel 1: The need for common standards of EU civil procedure and how to identify them: do we need harmonisation to achieve harmonious cooperation?
Panel 2: Procedural innovation and e-justice: how can innovative mechanisms for dispute resolution contribute to cooperation in the field of civil justice?
Panel 3: How can alternative mechanisms for dispute resolution contribute to

judicial cooperation and what is needed to ensure effective access and enforcement in cross-border cases?
Panel 4: How can the best practices of legal professionals with judicial cooperation be operationalised to improve mutual trust?

Many distinguished specialists (academics, practitioners and policy makers) have confirmed their participation. All those interested in civil procedure, EU law and judicial cooperation are cordially invited to attend.

The program as well as a link for the registration will be posted on this website soon!

European Parliament: Legislative Resolution on the Amendment of the Small Claims Regulation

It has not yet been noted on this blog that the European Parliament, on 7 October 2015, adopted at first reading a legislative resolution on the proposal for a regulation amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure. The resolution as well as the position of the European Parliament can be downloaded here.

Further information is available here.

Thanks to Edina Márton for the tip-off.

Save the date: Conference on the Succession Regulation on 19 November 2015

The European Commission and the Council of the Notariats of the European Union will host a joint conference on the Succession Regulation. The event will take place in Brussels (Belgium) on 19 November 2015 and aims to provide an opportunity for legal professionals to exchange their views and share their experiences regarding the application of the Regulation.

For further information please visit the conference website.

Thanks to Edina Márton for the tip-off.

Anuario Español de Derecho Internacional Privado (New Volume)

Volume XIV-XV of the Spanish journal Anuario Español de Derecho Internacional Privado, *AEDIPr,* devoted to international civil procedural law and private international law, is about to be released. It contains the following sections:

Estudios, in Spanish with a summary in English. This volume includes studies authored by B. Hess, M. Requejo Isidro, L. D'Avout, M. Pertegás Sender, F. Ferrari, J. Álvarez Rubio, A. Dutta, R. Arenas Garcia, P. Jiménez Blanco, A. Espiniella Menéndez, R. Miquel Sala, and D.B. Furnish.

Varia: short papers by young researchers.

Foros Internacionales, informing and commenting on the latest developments at

international fora such as the UE or The Hague Conference, as well as regionally with a particular regard to Latin America.

Textos Legales, both international and Spanish: a very welcome section in light of the seemingly endless activity of the Spanish lawmaker in 2014 and 2015.

Jurisprudencia: the *Anuario* must be described as the best *recueil* of PIL Spanish case law; decisions on inter-regional conflict of laws are included, as well as the administrative decisions from the *Dirección General de los Registros y el Notario* relating to cross-border cases.

Materiales de la Práctica: reports related to PIL from several institutions like the Consejo General del Poder Judicial.

Bibliografía: a thorough review of Spanish books and papers on PIL published in the last two years, as well as a selection of foreign literature.

You can access the whole ToC here: AEDIPr 2014-2015.

The journal is edited by *Iprolex* and distributed by *Marcial Pons*.

Public hearing on the Reform of the Brussels IIa Regulation

On 12 October 2015, the Committee on Legal Affairs of the European Parliament held a public hearing on the reform of the Brussels IIa Regulation. A video of the hearing is available here.

Further information on the public hearing, including the programme and the written contributions can be downloaded here.

Thanks to Edina Márton for the tip-off.

Out now: RabelsZ, Vol. 79 No 4 (2015)

The new 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:

Giesela Rühl and **Jan von Hein**, *Towards a European Code on Private International Law?*

> *One of the most important dates in the history of European Private International Law is 2 October 1997. On that day the Member States of the European Union signed the Treaty of Amsterdam – and endowed the European legislature with near to full competences in the field of Private International Law. What followed was a firework of legislative actions leading to the adoption of no less than 15 Regulations on various aspects of choice of law and international civil procedure. The fact that the pertinent legal rules are scattered across various legal instruments that do not add up to a comprehensive, concise and coherent body of rules, however, gives rise to a number of concerns. Therefore, the European Commission as well as the European Parliament have called for a discussion on the future of European Private International Law in general and the merits and demerits of a European Code on Private International Law in particular.*
>
> *Based on a study commissioned by the Committee on Legal Affairs of the European Parliament, the following article seeks to contribute to this debate. It is organized in four parts: The first part analyses the current state of European Private International Law (PIL), in particular its perceived deficiencies. The second part describes possible courses of action to overcome these deficiencies, including a European Code on PIL. The third analyses the merits and demerits of possible courses of action, including the adoption of a European Code on PIL. The fourth part suggests a course of action that will gradually lead to a more coherent legislative framework for European PIL.*

Dieter Henrich, *Privatautonomie, Parteiautonomie: (Familienrechtliche) Zukunftsperspektiven* (Private Autonomy, Party Autonomy: (Family Law) Future Perspectives)

Much as it previously dominated the law of contracts, private autonomy increasingly dominates the area of family law. Party autonomy, the right of the parties to select the applicable law, has found acceptance in international family law. The consequences in many areas are nothing less than revolutionary, including divorce by mutual consent, cohabitation instead of marriage, children having two legal fathers or two legal mothers or even three parents (sperm donor and a lesbian couple), surrogate motherhood, and impacts on divorce and maintenance in choice-of-law cases. Not all of these developments may be welcomed by all individuals. But in better serving self-determination, they are attractive to others and represent future perspectives.

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

The intestate succession systems are based, everywhere, on the idea of family succession. The deceased's family consists of his (blood-)relatives as well as, possibly, his or her surviving spouse. The law, therefore, is faced with two central tasks: (i) to determine in which sequence the deceased's relatives are called to inherit and (ii) to coordinate the position of the survivingspouse with that of the relatives. The present paper analyses how the intestate systems of the Western world deal with the first of these tasks. In spite of differences in detail, they can be subdivided into three types: the "French system", the three-line system, and the parentelic system. Analyzing them in historical and comparative perspective reveals basic commonalities (e.g. the preference given to descendants, and succession per stirpes), but also curious relics of past ages (e.g. the concept of "representation", paterna paternis materna maternis, and la fente successorale). Other criteria relevant for a comparative assessment of the different solutions advocated by the three systems are consistency in the implementation of fundamental structural ideas, the avoidance of inconsistencies in evaluation, of arbitrariness, and of discrimination, the ability to forestall manipulations, and the preference for simplicity over complexity. The presumed intention of a typical deceased can be an important argument for

deciding what might be the most appropriate solution, for the rules on intestate succession should, in case of doubt, reflect what those subject to these rules would typically regard as appropriate, as far as the distribution of their estate is concerned. But there are also issues where reliance on the presumed intention is misplaced. All in all, a reasonably limited parentelic system appears to be the superior intestate succession system. A strongly cultural impregnation of the rules on intestate succession is apparent only if Western and non-Western systems are compared. Within the Western legal world, the differences existing between the legal systems cannot be traced to differences in legal culture. All modern legal systems of the Western world attempt to take account of the deceased's relatives in a rational fashion. In that respect they build on the scheme established in Justinian's novels, the earliest one that can be labelled modern. The "French" system and the three-line system represent different manifestationsof the Justinianic scheme, while the parentelic system implements its underlying ideas in an even more consistent manner, and inspired by Natural law ideas. Why the one system has taken root in one country, and the other in another, is a matter of historical contingency.

Alistair Price and **Andrew Hutchison**, *Judicial Review of Exercises of Contractual Power: South Africa's Divergence from the Common Law Tradition*

No English abstract available

François Du Toit, *The South African Trust in the Begriffshimmel? – Language, Translation and Taxonomy*

No English abstract available

Praxis des Internationalen Privat-

und Verfahrensrechts (IPRax) 6/2015: Abstracts

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

F. Garcimartin, **The situs of shares, financial instruments and claims in the Insolvency Regulation Recast: seeds of a future EU instrument on rights in rem?**
The location of intangible assets is a key issue for the application of certain Private International Law rules. At the EU level, Regulation 1346/2000 on Insolvency proceedings contains three uniform rules on location of assets, one of which deals with claims (Art. 2 (g) III 2000 EIR). The recast of this instrument (Regulation 2015/84) has extended this provision, which now includes eight different rules (Art. 2 (9) EIR Recast). The purpose of this paper is to analyze one set of these rules, specifically those laid down for intangible assets: shares and other financial instruments, claims and cash accounts. The relevance of this analysis is twofold. From a positive-law perspective, it may be useful to resolve some of the problems that the interpretation and application of Article 2 (9) EIR Recast may give rise to in practice. From a normative perspective, Article 2 (9) EIR Recast may be the seed of a future EU instrument on the law applicable to rights in rem. This provision establishes a detailed list of common rules on location of assets. Should the future instrument take as a starting point the traditional conflict of laws rule in this area, i.e. the *lex rei sitae*, this list would be the primary reference to determine the situs of most assets.

M. Lehmann, **A Gap in EU Private International Law? OGH and BGH on the Law Applicable to Liability for Asset Acquisition and Takeover of a Commercial Enterprise**
The contribution discusses a recent tendency in some Member States to avoid applying European conflict laws to certain aspects of the law of obligations. In question are national rules under which persons who take over the entire property or the commercial business of another are liable for the latter's debt. The highest courts in civil matters in Germany and Austria have decided that these issues are not covered by the Rome Convention of 1980, and have instead submitted them to autonomous national conflict rules. An important strand of the

literature wants to transfer this solution to the Rome I and II Regulations. It must be borne in mind, however, that both regulations establish a comprehensive regime for the law of obligations. They do not leave any room for national conflict rules, save for those areas that are expressly exempt from their scope of application. A solution must therefore be found within the regulations themselves. It is suggested here that the type of liability in question could be characterized as an overriding mandatory rule. Looking to the future, it would be preferable if the EU legislator introduced specific conflict rules to address this problem.

C. Kohler, **Special Rules for State-owned Companies in European Civil Procedure? (ECJ, 23.10.2014 – Case C-302/13 – flyLAL-Lithuanian Airlines AS, in liquidation, v Starptautiska lidosta Riga VAS, Air Baltic Corporation AS)**

In Case C-302/13, *flyLAL-Lithuanian Airlines*, the ECJ held that an action for damages resulting from the alleged infringement of EU competition rules by two Latvian companies, *Starptautiska Lidosta Ri-ga* and Air Baltic, was civil and commercial in nature. It was irrelevant in that respect that the in fringement was said to result from the determination by the defendant *Starptautiska Lidosta Ri-ga* of airport charges pursuant to statutory provisions of the Republic of Latvia. Equally irrelevant was the fact that the defendant companies were wholly or partly owned by that Member State. Furthermore, the ECJ specified the grounds which would bar the recognition and enforcement of a judgment ordering protective measures as being contrary to the public policy of the Member State addressed. The Court ruled that the mere invocation of serious economic consequences for state-owned companies do not constitute such grounds. The author welcomes the judgment as it clarifies that there is no special regime for state-owned companies in European civil procedure. He adds that the ECJ's opinion 2/13 on the accession of the EU to the European Convention of Human Rights, given shortly after the judgment in Case C-302/13, does, in principle, not affect the relevance of the public policy exception in Regulation Brussels I.

F. Wedemann, **The Applicability of the Brussels Ia Regulation or the European Regulation on Insolvency Proceedings in Company Law Liability Cases**

The ECJ's *G.T. GmbH* decision is important for European civil procedure law as it has significant implications for the demarcation between the scopes of the Brussels Ia-Regulation and the European Regulation on Insolvency Proceedings in

company law liability cases. The author analyses these implications. First of all, she identifies and critically discusses the general guidelines established or confirmed by the decision: (1) The fact that a liability provision allows an action to be brought even where no insolvency proceedings have been opened, does not per se preclude such an action from being characterized as falling within the scope of Art. 3 (1) European Regulation on Insolvency Proceedings. Rather, it is necessary to determine whether the provision finds its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings. (2) In cases where no insolvency proceedings have been opened, actions fall within the scope of the Brussels Ia Regulation. (3) Cases where insolvency proceedings have been opened, but the action in question is brought by someone other than the liquidator, require a differentiating treatment. (4) The defendant's domicile is irrelevant for the applicability of Art. 3 (1) European Regulation on Insolvency Proceedings. (5) The jurisdiction based on Art. 3 (1) European Regulation on Insolvency Proceedings is exclusive. Subsequently, the author focusses on German company law and its broad range of liability provisions and examines the consequences of *G.T. GmbH* for jurisdiction in proceedings based on these provisions.

F. Temming, **International jurisdiction over individual contracts of employment – How wide is the personal scope of Art. 18 et sqq. of the Brussels I Regulation?**

This case note is about the question whether or not independent sales representatives can be considered as employees for the purposes of Art. 18 et sqq. of the Brussels I Regulation (44/2001/EC). This could be the case if an individual sales representative renders his services only to one principal and does not employ personnel on his own account. The resulting economic dependence vis-à-vis his principal could call for the jurisdictional protection that is granted by Art. 18 et sqq. of the Brussels I Regulation (44/2001/EC) to individual employees. Whereas the Regional Higher Labour Court of Düsseldorf (*LAG Düsseldorf*) denied the analogous application of Art. 18 et sqq. of the Brussels I Regulation (44/2001/EC) in favour of the claimant, there is a good case that – in light of recent judgements – the Court of the European Union could consider individuals, who are economically dependant on their partner of a service contract, to fall under its flexible autonomous concept of "employee", if the degree of subordination due to a right of direction was comparable to the one of an employee. If this case is referred to the Court of the European Union, it will have

the potential of becoming a landmark case.

M. Fornasier, **The law applicable to employment contracts and the country of closest connection under Art. 8(4) Rome I**
In its *Schlecker* judgment (Case C-64/12), the European Court of Justice shed some light on the escape clause in the choice-of-law rule regarding employment contracts (Art. 8 (4) Rome I Regulation). The Court held that the employment relationship may be more closely connected with a country other than that in which the habitual workplace is located even where the employee carries out the work habitually, for a lengthy period and without interruption in the same country and where, thus, the territorial connection of the employment contract with the habitual workplace is particularly strong. The following case note analyses to what extent the ruling is reconcilable with the principle of favor laboratories and whether it is consistent with the case law of the ECJ relating to the posting of workers. Moreover, the paper examines the impact of the judgment on mechanisms of collective labor law such as collective bargaining and employee participation.

J. Schilling, **The International Private Law of Freight Forwarding Contracts**
After having taken position to charter parties in its ICF-decision already, the ECJ now comments the international private law of freight forwarding contracts. In its *Haeger & Schmidt* ruling the court clarifies that those contracts, which exclusively state an obligation to arrange for transport cannot be considered contracts of carriage in the meaning of Art. 4 para. 4 Rome Convention or Art. 5 para. 1 Rome I Regulation. However a freight forwarding contract falls within the material scope of the special rule for transport contracts, if its principal purpose is the transport as such of the goods. This can be considered, if the forwarding agent is performing the transport partially or entirely by himself, or in case of freight forwarding at a fixed price. The question of qualification will particularly be relevant in cases to which the Rome I Regulation applies, because the differences between the conflict of laws regime for general contracts and that for contracts of carriage have increased. As the uniform transport law does generally not apply to freight forwarding contracts, the recent ECJ decision on the international private law of those contracts appears even more important.

J. Hoffmann, **Duties of disclosure towards contracting parties without knowledge of the contract language**
The judgement of the German Federal Labour Court discussed in this article had

to determine the legal consequences of the conclusion of a standard contract with an employee who had no knowledge of the language of the contract. Although neither the validity of the contract nor the inclusion and validity of the standard terms are in question, the information imbalance should be addressed by accepting a precontractual duty to explain the contract contents in appropriate cases. Such a duty should specifically be acknowledged if the precontractual negotiations were conducted in a different language. It can also be endorsed as a contractual obligation based on the fiduciary duty of the employer towards his employee as long as the language deficit remains.

M. Zwickel, **Prima facie evidence between lex causae and lex fori in the area of the French Road Traffic Liability Act (Loi Badinter)**

The decision of the Regional Court Saarbrücken, which had already given rise to a preliminary ruling by the ECJ regarding the "effective service of notice of proceedings on the claims representative of a foreign insurer", relates to the problem of the usability of German prima facie evidence in a case to be decided in accordance with French law. The jurisprudence of the French *Cour de cassation* does not permit any reduction in the standard of proof within the framework of road traffic liability. Adducing the prima facie evidence – contrary to French civil law – therefore potentially leads to a divergence of procedural and substantive law. The decision makes it especially clear that prima facie evidence within and outside of the scope of Art. 22 (1) Rome II-Regulation can sensibly only be treated in accordance with the *lex causae*.

M. Stürner, **Enforceability of English third party costs order**

The German *Bundesgerichtshof* (*BGH*) had to deal with an application to declare enforceable a third party costs order issued by the English High Court in the context of an insolvency proceeding. The *BGH* left open the question whether that decision falls within the scope of the Brussels I Regulation or the Insolvency Regulation as both regimes should not leave any gap between them and also provide identical grounds for refusing recognition. On that basis, the *BGH* held that the third party costs order did not violate German public policy. The author generally agrees with the decision.

H. Roth, **Actions to oppose enforcement and set-off**

Due to the close connection with the enforcement procedure, the exclusive jurisdiction of Article 22 (5) Lugano Convention of 2007 includes actions to oppose enforcement pursuant to § 767 of the German Code of Civil Procedure

(*ZPO*).
Contrary to the view of the Federal High Court of Justice (BGH), § 767 ZPO can be applied even if the court seized would not be internationally competent in case of an independent legal assertion of the counterclaim.
The court is able to assess preliminary questions, which were submitted in defense, regardless of the restrictions by the law relating to jurisdiction. This principle also applies to the set-off.

H. Odendahl, **The 1961 Hague Protection of Minors Convention – How vital is the fossil?**
The Austrian Supreme Court of Justice had to decide upon the recognition of a Turkish court decision on the custody of a child of Turkish nationality living in a foster family in Austria, which was based on Art. 4 of the 1961 Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants. Recognition was rejected for reasons of public policy (Art. 16). The following article discusses the remaining scope of this outdated convention and the impact of its application in relation to its successor, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children, as well as the 1980 Luxembourg European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children.

A new article-by-article commentary of the Brussels Ia Regulation

An extensive article-by-article commentary, in German, of Regulation (EU) No 1215/2012 (Brussels Ia) has recently been published by Verlag Dr. Otto Schmidt.

This is actually the fourth edition of the volume dealing with jurisdiction and the

recognition and enforcement of judgments in civil and commercial matters of the 4-volume commentary of EU law on international litigation and conflicts of laws drawn up under the direction of Thomas Rauscher.

The authors of the volume are Prof. Dr. Stefan Leible (Univ. Bayreuth), Prof. Dr. Peter Mankowski (Univ. Hamburg), Dr. Steffen Pabst (LVV Leipziger Versorgungs- und Verkehrsgesellschaft mbH) and Prof. Dr. Ansgar Staudinger (Univ. Bielefeld).

For more information, see here.

Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR, Band I (Brüssel Ia-VO), 4th edition, Verlag Dr. Otto Schmidt, 2015, 1456 pages, ISBN 978-3-504-47202-3, 249 Euros.

Now hiring: Assistant in Private International Law in Freiburg (Germany)

At the Institute for Foreign and Private International Law of the **Albert-Ludwigs-University Freiburg im Breisgau** (Germany), **a vacancy** has to be filled at the chair for **private law, private international law and comparative law (chairholder: Prof. Dr. Jan von Hein)**, from 1 January, 2016 with

a legal research assistant (salary scale E 13 TV-L, personnel quota 50%) limited for 2 years.

The assistant is supposed to support the organizational and educational work of the chairholder, to participate in research projects of the chair as well as to teach his or her own courses (students' exercise). Applicants are offered the opportunity to obtain a doctorate.

Applicants are expected to be interested in the chair's main areas of research. They should possess an above-average German First State Examination (at least "vollbefriedigend") or a foreign equivalent degree and be fluent in German. In addition, a thorough knowledge of German civil law as well as conflict of laws, comparative law and/or international procedural law is a necessity. Severely handicapped persons will be preferred provided that their qualification is equal.

Please send your application (curriculum vitae, certificates and, if available, further proofs of talent) to Prof. Dr. Jan von Hein, Institut für ausländisches und internationales Privatrecht, Abt. III, Peterhof, Niemensstr. 10, D-79098 Freiburg (Germany) no later than 30 November, 2015.

As the application documents will not be returned, applicants are kindly requested to submit only unauthenticated copies. Alternatively, the documents may be sent as a pdf-file via e-mail to ipr3@jura.uni-freiburg.de.

Lehmann on "Recognition as a Substitute for Conflict of Laws?"

Matthias Lehmann, University of Bonn, has posted 'Recognition as a Substitute for Conflict of Laws?', a chapter in a forthcoming book on 'General Principles of European Private International Law' (Stefan Leible, ed.), on SSRN. The piece weighs a whole spectre of arguments for and against an EU version of the Full Faith and Credit Clause in the US constitution. It summarizes over a decade scholarly debate in Europe, fuelled by of ECJ decisions and Commission proposals. In the end, Lehmann rejects a general rule of recognition with regard to 'legal situations' created in other Member States. Yet he favours obliging authorities and courts to recognise such situations where they are recorded in official documents or public registers, provided that appropriate conditions and safeguards are in place. Among the latter is a sufficient connection between the legal situation and the Member State of origin of the document or register entry as well as a well-defined public policy exception. Lehmann concludes that

recognition will not replace conflict of laws, but may be a welcome second pillar for achieving harmonious solutions in a judicial area with rising mobility of its citizens. He therefore encourages the European Commission to pursue his ambitious idea of introducing a rule of recognition into EU law.

The piece can be downloaded here.