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FACILITATING CROSS-BORDER FAMILY LIFE: TOWARDS A COMMON EUROPEAN UNDERSTANDING

REPORT ON THE GERMAN EXCHANGE SEMINAR

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A joint project of the Institute for Comparative Law, Conflict of Laws and International Business Law at Universität Heidelberg, Universitat de València, Università di Verona, Università degli studi di Milano, Lund University, the University of Osijek, the Max Planck Institute Luxembourg for Procedural Law und the Asociacion Española de Abogados de Familia

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SUMMARY

The German Exchange Seminar hosted by the Institute for comparative law, the conflict of laws and international business law of Heidelberg University focussed on the following aspects of European private international law in family and succession matters:

- matrimonial matters: treatment of same-sex marriages and private divorces under the Brussels II bis Regulation, Rome III Regulation and other instruments referring to "marriage" and "divorce"
- parental responsibility and child abduction: new provisions of the Brussels II bis Recast Proposal, including the new definition of "child" and minimum requirements for the hearing of children
- maintenance obligations: enforcement and requests for modification of judgements that originate from another Member State
- matrimonial property and property consequences of registered partnerships: interplay with the Succession Regulation in relation to the allocation of accrued gains in the event of death of one of the spouses under § 1371 German Civil Code (BGB); determination of the first common habitual residence after the conclusion of the marriage; *perpetuatio fori*; formal requirements for choice of law agreements
- successions: concept of habitual residence; legacies by vindication; interpretation of "joint will" and "agreement as to succession" under the Succession Regulation; interplay with the Matrimonial Property Regimes Regulation; limitations regarding the contents of the European Certificate of Succession
- public documents: provisions of the new Public Documents Regulation and first experiences with their application in practice
- means of judicial cooperation: the existing networks of liaison judges and their importance for the practical implementation of European instruments

SUMMARY IN GERMAN

Das vom Institut für ausländisches und internationales Privat- und Wirtschaftsrecht Heidelberg organisierte deutsche Austauschseminar befasste sich im Schwerpunkt mit folgenden Aspekten des Europäischen internationalen Familien- und Erbrechts:

- Ehesachen: Umgang mit gleichgeschlechtlichen Ehen und Privatscheidungen nach der Brüssel IIa-Verordnung, der Rom III-Verordnung und anderen Rechtsakten, die an die Begriffe „Ehe“ und „Scheidung“ anknüpfen
- Kindschafts- und Kindesentführungssachen: die neuen Bestimmungen in der Neufassung der Brüssel IIa-Verordnung, einschließlich der neuen Definition des Begriffs „Kind“ und den Mindestanforderungen an die Anhörung von Kindern
- Unterhaltssachen: Vollstreckung und Anträge auf Abänderung von Entscheidungen aus anderen Mitgliedstaaten
- güterrechtliche Angelegenheiten: Zusammenspiel mit der EuErbVO beim Zugewinnausgleich von Todes wegen gem. § 1371 BGB; Bestimmung des ersten gemeinsamen gewöhnlichen Aufenthalts nach der Eheschließung; *perpetuatio fori*; Anforderungen an Rechtswahlvereinbarungen
- Erbsachen: das Konzept des gewöhnlichen Aufenthalts; Vindikationslegate; Auslegung der Begriffe „gemeinschaftliches Testament“ und „Erbvertrag“ im Rahmen der Verordnung; Zusammenspiel mit der EuGüVO; Beschränkungen in Bezug auf den Inhalt des Europäischen Nachlasszeugnisses
- öffentliche Urkunden: die Bestimmungen der neuen EuUrkVO und erste Erfahrungen mit ihrer praktischen Anwendung
- Methoden richterlicher Zusammenarbeit: bestehende Netzwerke von Verbindungsrichtern und ihre Wichtigkeit für die praktische Umsetzung der europäischen Regelungsinstrumente

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A. INTRODUCTION

The German Exchange Seminar was hosted by the Institute for comparative law, the conflict of laws and international business law of Heidelberg University. It was held on 17 May 2019 on the premises of the International Science Forum Heidelberg (IWH). All presentations and discussions were held in German.

The seminar was divided into four sections, each consisting of two presentations followed by general discussion.

The eight speakers and four moderators were selected with regard to their professional backgrounds and expertise in European private international law in family and succession matters. The pre-registered participants (26 in total) included academics, judges, ministry staff members and notaries.

Most speakers were asked to present one instrument of European private international family and successions law so that each instrument was subject of at least one presentation. Each presentation addressed current problems with the respective legal instrument, assessed its functionality in practice and submitted reform proposals for further optimization.

Focus was also placed on methods for increasing the efficiency of cross-border proceedings such as cooperation between judges, the use of Central Authorities, liaison judges and direct judicial communications. Therefore, the seminar also included a special presentation about the often neglected field of liaison judges and their importance for the practical implementation of international instruments.

The transcripts of the presentations and the discussions will be published in a conference volume.

B. BRUSSELS II BIS REGULATION

The Seminar addressed both the existing Brussels II bis Regulation[1] and the Brussels II bis Recast Proposal[2].

I. FAMILIARITY

In the course of the discussions the participants agreed that the Brussels II bis Regulation was generally known and that most practitioners were already well-versed in its application. The findings in regard to the deficiencies of the Regulation and possible methods for solving them are presented in Section C.

II. LIASON JUDGES

Another emphasis was laid on the work of the liaison judges who provide informal help for other judges dealing with cross-border family matters. There are currently two networks of liaison judges: the European Judicial Network for Civil and Commercial Matters (EJN) and the International Hague Network of Judges (IHNJ). The purpose of the EJN is to optimize judicial cooperation between courts of different Member States in international civil and commercial proceedings. The judges of the IHNJ mainly focus on such cooperation in child return proceedings.

In 2017, the four German liaison judges, one of which was the seminar's speaker on this topic, answered 242 requests of German judges and judges of other Member States. The numbers are increasing every year.

There are usually two kinds of requests: First, there are requests for information in particular cases for which they need to contact certain judges in another Member State. This especially concerns information in regard to parallel proceedings in another Member State. Then, there are much broader requests concerning various aspects of international family law. In this regard, the liaison judges provide informal advice relating to all pressing questions judges may face during their proceedings; the speaker described this service as "kind of a help desk". 197 of the 242 requests in 2017 were of this kind.

Despite their increasing practical importance, there have only been few academic publications in regard to liaison judges, their work and their relation to other means of judicial cooperation. This may be due to the fact that this particular form of judicial cooperation is not mentioned in the existing legal framework. Although the Brussels II bis Regulation serves as a cornerstone for judicial cooperation in international family law proceedings, there are still no explicit provisions in this regard. Even in the Recast Proposal, there are only minor remarks concerning this matter, when compared with

[1] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p. 1–29.

[2] Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) - General approach, ST 15401 2018 INIT, 2016/0190 (CNS).

the provisions for judicial cooperation in Art. 42 Insolvency Regulation[3]. This is another topic which would warrant further attention during the reform process.

[3] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, 05.06.2015, p. 19–72.

C. BRUSSELS II BIS RECAST PROPOSAL: CURRENT STATE AND EVALUATION

I. REFORM PROCESS

The reform process was initiated with the Proposal of the European Commission of 30 June 2016[4]. The main focus of this first draft was on the procedure in matters of parental responsibility, namely the optimization of the child return procedure and the clarification of the provisions regarding the hearing of children. In addition, emphasis was put on the abolishment of the procedure of exequatur in all matters governed by Brussels II bis Regulation. The latest proposal of the Council of the European Union of 12 December 2018[5] is based on this first draft but contains several additional provisions, especially regarding the recognition of private divorces.

II. MATRIMONIAL MATTERS

In regard to matrimonial matters, the status quo was left mostly unchanged by the proposal. The current proposal neither contains a definition of "marriage" nor changes in regard to international jurisdiction in matrimonial matters. Therefore, the uncertainty regarding the treatment of same-sex marriages remains as do the known deficiencies in regard to the jurisdiction rules. In particular, the lack of harmonized residual jurisdiction rules and the remaining limitations to the party autonomy of the spouses warrant further optimization. The recast proposal, however, does contain provisions intended to deal with the consequences of the ruling in the *Sahyouni* case[6] concerning the recognition of private divorces. Art. 55 Brussels II bis Recast Proposal provides that "authentic instruments and agreements on legal separation and divorce which have binding legal effect in the Member State of origin shall be recognized in other Member States without any special procedure being required", thus establishing the mutual recognition of certain types of non-judicial divorces that have been officially documented or registered, such as the ones that were recently introduced in France. Correspondingly, Art. 56b Brussels II bis Recast Proposal contains a limited number of grounds for refusal of recognition and enforcement referring to public policy and irreconcilability with earlier decisions, authentic instruments or agreements between the same parties, provided that they themselves fulfill the conditions necessary for their recognition in the respective State. The additional requirement in Art. 55a Brussel II bis Recast Proposal, which provides that the authentic instrument or agreement must have been formally drawn up or registered in a Member State assuming jurisdiction under Chapter II of the Recast Proposal, ensures that such course of action has no impact on the international jurisdiction rules. The proposal, however, neither contains a general definition of the term "divorce" nor provisions that would apply to non-judicial divorces conducted without any official documentation or registration.

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[4] Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM (2016) 411 final, 2016/0190 (CNS).

[5] Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) - General approach, ST 15401 2018 INIT, 2016/0190 (CNS).

[6] CJEU 20.12.2017, C-372/16 (Sahyouni).

III. MATTERS OF PARENTAL RESPONSIBILITY

Most provisions in the latest recast proposal concern matters of parental responsibility.

In this regard, the proposal has solved one of the more diverse controversies by defining the term "child" in its Art. 2 (1) (e) Brussels II bis Recast Proposal: the term "child" means any person below the age of 18 years. This definition is intended to bring about harmonization with the corresponding criteria in the 1996 Hague Child Protection Convention[7] and the 2000 Hague International Adult Protection Convention[8]. Simultaneously, this definition contradicts the opinion favored by most German courts, i.e. that child within the meaning of the Regulation is a person who has not yet reached the age of majority according to the applicable law governing its legal capacity.

Moreover, the proposal now contains specific standards for the hearing of the child that need to be met for the decision to be recognized in other Member States. Since the proposal now explicitly refers to the individual capability of the particular child to form its views as main requirement for such a hearing, there will no longer be room for differing practices in Member States that only allow for such hearings, if the child has reached a certain age.

The international jurisdiction rules, however, were only subject to punctual changes with the exception that there is now a much broader possibility for choice of court agreements in matters of parental responsibility. Art. 10a Brussels II bis Recast Proposal allows such agreements in all matters of parental responsibility and has added the former habitual residence of the child to the list of substantial connections which determine the Member States whose courts may be chosen. Furthermore, it is now possible to establish the court's jurisdiction by mutually accepting its jurisdiction even after it has been seized.

Other changes regarding international jurisdiction in matters of parental responsibility concern the requirements that must be fulfilled to allow a transfer of jurisdiction in a particular case to a court of another Member State. According to Art. 12 Brussels II bis Recast Proposal, this transfer is now limited to cases of exceptional circumstances and requires that the other court is better placed to assess the best interest of the child in the particular case. These requirements ensure that the differentiated system of jurisdiction rules may not be circumvented by a broad application of this exception. Moreover, they provide that only the interests of the child may justify such a transfer.

Further limitations concern the jurisdiction for provisional measures in urgent cases. According to Art. 14 Brussels II bis Recast Proposal, such measures may now only be taken by the courts of the Member States in respect of children who are present or in respect of a child's property that is located in that particular State.

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[7] Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, drafted by the Hague Conference on Private International Law and concluded at The Hague on 19 October 1996.

[8] Convention on the international protection of adults, drafted by the Hague Conference on Private International Law and concluded at The Hague on 13 January 2000.

While most of these changes were deemed to be improvements of the international jurisdiction rules, most participants criticized that there are still no residual jurisdiction rules that do not refer to national law.

IV. ABOLISHMENT OF EXEQUATUR

Due to the abolishment of the procedure of exequatur, declarations of enforceability are no longer required. While enforcement is still governed by national law, there are now some harmonized provisions in regard to certain aspects of the enforcement procedure that must be abided by in all Member States.

V. LIS PENDENS RULES

Since the current proposal contains no changes in regard to the *lis pendens* rules, there are still no such rules in regard to proceedings in non-Member States. While the abolishment of the procedure of exequatur is a step into the right direction of harmonizing the provisions in both Brussels Regulations, there is no reasonable explanation as to why the *lis pendens* rules have not been harmonized as well. The lack of such provisions in the Brussels II bis Regulation and the Maintenance Regulation has been repeatedly criticized by scholars and practitioners alike.

In conclusion, the Brussels II bis Recast Proposal is to be considered a step into the right direction. Nevertheless, there is still need for further improvement.

D. ROME III REGULATION: DIVORCE, LEGAL SEPARATION OR MARRIAGE ANNULMENT

Generally, the participants agreed that the Rome III Regulation[9] is a very important instrument to provide legal certainty in regard to the applicable law to divorce and legal separation. At the same time, however, certain deficiencies detrimental to this goal have been identified in the 17 Member States partaking in the enhanced cooperation.

I. APPLICABILITY TO PRIVATE DIVORCES

Especially the ruling in the *Sahyouni* case[10], according to which the Rome III Regulation solely covers divorces pronounced by a national court or public authority or under the supervision of a public authority, has created a vast number of uncertainties. Already the validity of the ruling itself may be disputed due to the fact that the Brussels II bis and the Rome III Regulation serve different purposes and therefore warrant a differentiated interpretation. But even its defenders must concede that the negative effects of the decision need to be remedied by additional provisions in order to fulfill the goal of the Regulation, i.e. to provide citizens with appropriate outcomes in terms of legal certainty, predictability and flexibility and to discourage forum shopping. Since there are now certain types of divorces to which the Regulation does not apply, there is a manifest need for a clear definition from which one can infer whether or not a particular form of divorce falls under the Regulation. The criteria presented by the court do not achieve this, since there is no indication as to which kind of supervision by a public authority is needed for a divorce in order to be covered by the Regulation. In this regard, it is still unclear whether the involvement of the respective authority has to be a constitutive requirement for the divorce to take effect and which particular acts of supervision must be performed. Since the non-judicial divorces in France and Greece as well as certain types of divorces in Spain and Italy are performed with declaratory participation of public authorities only, this distinction is crucial for the applicable conflict of laws rules. Accordingly, disputes will most certainly arise in each Member State for every particular form of divorce which does not result from a judicial decision, unless either a clear definition is provided or the scope of the Regulation is extended to all types of divorces. Due to the fact that the national conflict of laws rules of the Member States vary widely, only the latter solution would save the parties from having to seize their particular court of choice as quickly as possible in order to secure themselves the application of the law most suited for their purposes. This alone is already sufficient reason to explicitly include all forms of divorces into the scope of the Rome III Regulation. It would also correspond with the provisions in the Brussels II bis Recast Proposal which ensure the recognition of such non-judicial divorces. While these provisions naturally have to be limited to divorces with at least some degree of participation by the public authorities due to the fact that the recognition is designed for documented or registered events, there is no need for such limitation when determining the applicable law.

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[9] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343, 29.12.2010, p. 10–16.

[10] CJEU 20.12.2017, C-372/16 (Sahyouni/Mamisch).

II. APPLICABILITY TO SAME-SEX-MARRIAGES

Further uncertainty results from the fact that the Rome III Regulation does not provide any express provision on the question of whether it covers same-sex marriages. While the existence of Art. 13 Rome III Regulation is often seen as an indication that such marriages are indeed covered, some argue that the term "marriage" in the Rome III Regulation needs to be interpreted in the same manner as in the Brussels II bis Regulation under which it was common opinion that same-sex marriages are not included. Yet others contend that the applicability of Rome III Regulation to same-sex marriages should be determined by the respective national legislation. Irrespective of which opinion is ultimately chosen, it is clear that there is great need for an express provision in the Regulation in order to provide the intended legal certainty. Due to the fact that harmonized conflict of laws rules are required to minimize the incentive for forum shopping, it would be preferable to include same-sex marriages into the scope of the Regulation and to apply Art. 13 Rome III Regulation in regard to Member States who do not recognize these kinds of marriages.

III. LIMITATIONS REGARDING THE CHOICE OF LAW

Pursuant to Art. 5 Rome III Regulation, spouses may only choose between the following laws: the law of the State both spouses are habitually resident in, the law of the State both spouses were last habitually resident in (provided that one of them still is habitually resident there), the law of the State of nationality of either spouse and the law of the forum. While all of these are reasonable options, one has to ask why other options were not included.

For example, Art. 22 (1) (a) of the Matrimonial Property Regimes Regulation includes the option to choose the law of the State only one of the spouses is habitually resident in. Since the requirement of an agreement between the spouses in regard to the applicable law ensures that both parties indeed want the application of the chosen law, there is no apparent need for denying them this option in regard to their divorce, especially since the questions of matrimonial property law are much more complex than those regarding the requirements for divorce. Therefore, this option should also be included in Art. 5 (1) Rome III Regulation.

Further consideration is warranted as well when it comes to the formal requirements for such choice of law agreements. While Art. 7 (1) Rome III Regulation only requires an agreement in writing which is dated and signed by both spouses, this may not guarantee that both spouses actually comprehend what consequences this agreement will entail. Therefore, it may be preferable to require pre-agreement counseling, given that the comparison of different divorce regimes and their respective provisions is far too complex for laypersons lacking a legal background.

IV. APPLICABLE LAW IN THE ABSENCE OF A CHOICE BY THE PARTIES

According to Art. 8 Rome III Regulation, divorce and legal separation shall be subject to the law of the State where both spouses are habitually resident at the time the court is seized, failing that, to the law of the State where the spouses were last habitually resident, provided that the period of residence did not end more than one year before the court was seized and one of them still is resident there when the court is seized, and, failing that, to the law of the State of which both spouses are nationals of when

the court is seized. If all of this fails, the law of the State where the court is seized is to be applied.

Since such provisions do not require an agreement between the parties, they need to be designed in such manner that none of the parties may decide the applicable law on their own. This requirement, however, is not fulfilled by the current provisions, since there are at least three situations in which such manipulation is currently possible:

First, it must be noted that every spouse currently has the ability to singlehandedly change the applicable law to the law of their shared nationality or the *lex fori* by establishing a new habitual residence in another Member State for at least a year. Unless the temporal limitation in Art. 8 (b) Rome III Regulation is removed, the other spouse has no means to prevent this. This removal would also simplify proceedings since it would no longer be necessary to determine the exact time at which the last shared habitual residence has ended.

Further room for manipulation is opened by the fact that only the nationality both spouses share at the time the court is seized is covered by the current provisions. Therefore, it would be possible for a spouse with more than one nationality to give up the shared nationality in order to change the applicable law. This, too, could not be prevented by the other spouse, unless one would include the nationality the spouses had last shared, provided that one of them still has this nationality when the court is seized.

Lastly, the reference to the law of the State where the court is seized always provides that one of the spouses might be able to determine the applicable law simply by seizing a particular court. Since Art. 3 (1) Brussels II bis Regulation provides several alternative places with jurisdiction, including the habitual residence of the applicant, there could be ample opportunity to influence the applicable law in such manner. In order to prevent this from happening, the reference to the State of the forum may need to be removed and replaced by a more invariable criterion. However, since this criterion needs to cover all remaining cases, it would have to be relatively broad as well. A possible solution would be to apply the law of the State both spouses are otherwise most closely connected with.

V. PROVISIONS FOR PERSONS WITH MORE THAN ONE NATIONALITY

Recital 22 Rome III Regulation states that the question of how to deal with cases of multiple nationality should be left to national law. This, however, does not provide much legal certainty and could lead to disadvantages for one of the spouses in relation to the other. Harmonized provisions in the Regulation are needed in order to prevent this. Given the different aims of the references to nationality in regard to choice of law agreements and in regard to the applicable law in absence of such agreement, the provisions that are to be added should also differentiate between these situations. Since a choice of law agreement already provides that both parties have agreed upon the applicable law, there is no reason to prevent the parties from choosing the law of either of their nationalities, regardless of whether or not the respective party has actually exercised this nationality. In the absence of such choice of law, however, the parties cannot opt for one of their nationalities. Therefore, only objective elements may indicate which of the States the spouse is most closely

connected with. Hence, it should be the effective nationality that is decisive under Art. 8 (c) Rome III Regulation if one of the spouses has multiple nationalities. In neither case should there be any provision which always prefers the nationality of the *forum* State since this would be contrary to the purpose of Art. 8 Rome III Regulation, i.e. to refer the spouses to the law of the State they are most closely connected with.

VI. INTERPRETATION OF ART. 10 ROME III REGULATION

The second alternative of Art. 10 Rome III Regulation provides that where the law applicable pursuant to Art. 5 or 8 does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the forum shall apply. It is often discussed whether this requires that the respective law leads to discriminating results in the particular case or only requires the law to contain discriminating provisions regardless of the actual outcome in the particular case. While the legislative history of the provision indeed indicates that it was intended to apply to discrimination on an abstract level, such interpretation could lead to disadvantages even for the spouse the provision was intended to protect. For example, in cases in which a *Talaq* was declared and the wife wanted to be divorced, there would only be unnecessary inconveniences for the wife, if she was forced to undergo actual divorce proceedings in order to achieve her wish. Such interpretation of the provision would be in conflict with the principle of proportionality.

De lege ferenda, however, this provision should be abolished, since it provides no advantages compared to the *ordre public* clause in Art. 12 Rome III Regulation, causes uncertainty in regard to its interpretation and discriminates unnecessarily between legal systems that principally are to be treated equally.

VII. MAIN FINDINGS

In conclusion, it has been confirmed that the Rome III Regulation needs to be improved in several ways in order to effectively fulfill its goal under all circumstances. Additionally it would need to be applied in all or at least in more Member States in order to effectively reduce the incentive for forum shopping, since there are many Member States who currently would not apply the Regulation, if their courts had been seized.

E. MAINTENANCE REGULATION AND 2007 HAGUE MAINTENANCE PROTOCOL

The discussions regarding the European Maintenance Regulation[11] and the 2007 Hague Maintenance Protocol[12] were mostly dominated by the controversial ruling of the CJEU regarding the lack of actual consequences for breaching the *lis pendens* rules[13] and the practical complications resulting from it.

The participants agreed that *lis pendens* rules need to be effective in order to discourage the respective other party to boycott the pending proceedings by subsequently seizing a court that is known to disregard these provisions. Since due to the provisions of the Regulation und the ruling of the CJEU there currently is no way to refuse the recognition of a decision of a court second seized that has been rendered in violation of *lis pendens* rules, there appears to be no effective deterrent against such practices. In order to change this, either a new ground for refusal of recognition must be created for this purpose or there need to be at least other sanctions that can be applied, if the *lis pendens* rules are knowingly disregarded.

It has been, however, also noted that many violations of the *lis pendens* rules do not occur intentionally but because of lacking knowledge of proceedings in other Member States or of the relevant provisions. During the discussions about how such violations may be prevented, the participating liaison judge explained that international networks of liaison judges could indeed provide further information in regard to proceedings that are pending in another State. It is part of their job to act as a broker for information and to initiate communication between courts in different Member States. This, however, would require there to be such liaison judges in that other State, which is not always the case. If there was no liaison judge in that other State, he could only contact the respective ministry or embassy in order to gain more information.

Since such networks could indeed significantly help with providing the information required for the correct coordination of parallel proceedings, many participants have expressed the wish that the existing networks should be extended further in order to provide that each Member State has sufficient liaison judges to provide such assistance in more cases. It was also agreed that it would be a good idea to inform more judges about these services. The participating liaison judge confirmed that the existing networks had not yet received the attention they deserved due to the fact that there is still no normative framework for liaison judges. This would need to be rectified in order to let more people know about them and to provide more transparency in regard to their work.

During the discussion, an academic proposed that domestic decisions should always prevail over decisions from other Member States, rendered in breach of the *lis pendens* rules. He found it to be problematic that, due to the principle of priority,

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[11] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10.01.2009, p. 1–79.

[12] Convention on the international recovery of child support and other forms of family maintenance, drafted by the Hague Conference on Private International Law and concluded at The Hague on 23 November 2007.

[13] CJEU 16.01.2019, C-386/17 (Liberato/Grigorescu).

domestic decisions might need to be set aside because of prior decisions originating from other Member States.

F. MATRIMONIAL PROPERTY REGIMES REGULATION AND REGULATION ON PROPERTY CONSEQUENCES OF REGISTERED PARTNERSHIPS

Since the new Matrimonial Property Regimes Regulation[14] contains several provisions that significantly change the legal framework German scholars and practitioners have been used to, this Regulation was subject to many discussions, although it has only been applicable since 29 January 2019. More precisely, it is applicable to all proceedings initiated on or after and to all marriages or choice of law agreements concluded after that date. Similar to the Rome III Regulation it only applies to 18 Member States that partake in the enhanced cooperation.

I. APPLICATION TO SAME-SEX MARRIAGES

As in the Brussels II bis and Rome III Regulation, the Regulation does not contain any binding definition of the term "marriage". Instead Recital 17 explicitly refers to the respective definition in the national laws of the Member States. This raises the question of which national law may decide what is to be considered a marriage, since there is no clarification in this regard. While there are some scholars referring to the law according to which the supposed marriage had been concluded, the leading opinion in Germany favors the *lex fori*.

Under German law, the Regulation is explicitly declared applicable in Art. 17b (4) Introductory Act to the Civil Code (EGBGB). Registered partnerships, who chose convert their partnership into a same sex-marriage under German law, would therefore also switch to the application of the Matrimonial Property Regimes Regulation instead of the Regulation of Property Consequences of Registered Partnerships[15] that would have been applied up to then. This German approach is not without risk for the parties, since the Regulation may refer to the law of a State which does not recognize same-sex marriages and therefore might not provide any claims in regard to the property of the partners.

II. INTERNATIONAL JURISDICTION FOR PROPERTY CLAIMS DURING DIVORCE PROCEEDINGS IN SAME-SEX MARRIAGES

Another source of uncertainty in regard to same-sex marriages is the question of how to determine international jurisdiction for property claims that are exercised during their divorce proceedings. Since the Brussels II bis Regulation does not cover same-sex marriages according to the general opinion, Art. 5 Matrimonial Property Regimes Regulation could not be applied either, since such would have required the applicability of the Brussels II bis Regulation. In order to provide the court that is tasked with conducting the divorce with international jurisdiction in regard to the property claims, the jurisdiction rule under Art. 5 Regulation on Property Consequences of Registered Partnerships could be applied by means of analogy.

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[14] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183, 8.7.2016, p. 1–29.

[15] Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183, 8.7.2016, p. 30–56.

III. CONSEQUENCES OF THE *MAHNKOPF* DECISION

The main discussions were focussed on the consequences of the ruling in the *Mahnkopf* case[16] in which the CJEU had decided that the allocation of the accrued gains in the event of the death of one of the spouses in § 1371 German Civil Code (BGB) was to be qualified as falling under the provisions of the Succession Regulation, although the prevailing opinion in Germany had been that it was to be qualified as belonging to the statute that governs the matrimonial property regime. There are, however, references to "main purpose" and "principally concern" in the reasoning of the court which indicate that it has been aware that these claims could serve more than one purpose. Due to this possibility, it may be considered to apply § 1371 BGB in both cases, if German law either governs the matrimonial property regime or the succession. The participants agreed that the ruling of the CJEU had not yet solved all problems in that regard and that further consideration in regard to the possibility of alternate qualifications is required. It would be indeed unfortunate, if the addition of an international element to a relation could result in completely different property consequences.

IV. INTERPLAY BETWEEN DIFFERENT JURISDICTION RULES OF THE REGULATION

Although it is indeed practical that the Regulation provides joint jurisdiction for property claims arising in connection with succession or divorce proceedings under Art. 4 and 5 Matrimonial Property Regimes Regulation, these provisions may also lead to significant problems due to the fact, that the Regulation does not contain any express provision regarding the relation between its different jurisdiction rules. For example, if one of the spouses died during divorce proceedings in which the property claims had been included, it would have to be decided whether or not the court that had been seized remained competent to decide on the property claims although the divorce proceedings had ended with the death of the spouse. A similar problem would arise, if the property claims had been brought before a court whose jurisdiction was based on Art. 6 Matrimonial Property Regimes Regulation and the other party subsequently filed for divorce before another court. In each case one would have to decide whether the court initially seized would retain its jurisdiction or lose it to the other court that is tasked with the corresponding succession or divorce proceedings. During the discussion regarding these options it was found that the tried and tested principle of the *perpetuatio fori* could help the parties, since it would spare them to restart proceedings before another court and would ensure that the findings during the already pending proceedings would not be lost due to the subsequent occurrences. Most scholars in Germany however favored the other approach. Either way this question requires further clarification by adding an express provision in this regard.

V. CHOICE OF LAW AGREEMENTS BY IMPLICATION

Unlike the Rome I, Rome II and Succession Regulation, the Matrimonial Property Regimes Regulation does not contain any provision which explicitly states that choice of law agreements in its scope of application may also be concluded by implication

[16] CJEU 01.03.2018, C-558/16 (Mahnkopf).

instead of express declaration. While some argue that this could indicate that such should not be allowed under this Regulation, others refer to the legislative history of the provision and argue that such limitation had initially been intended but had subsequently been removed from the draft. Since there is no sufficient indication to the contrary, the participants agreed that one should regard the choice of law under this Regulation the same way as under the other Regulations.

VI. DETERMINATION OF THE FIRST COMMON HABITUAL RESIDENCE AFTER THE CONCLUSION OF THE MARRIAGE

Another source for uncertainty is the new criterion in Art. 26 (1) (a) Matrimonial Property Regimes Regulation that refers to the first common habitual residence of the spouses after the marriage without actually defining the relevant point in time. In this regard, the Regulation only states in Recital 49, that the first habitual residence should be the one during the time shortly after the marriage. This could either refer to a fixed time limit such as three months or to a variable time span that depends on the intentions of the spouses in regard to their following settlement at the time the marriage is concluded. Due to the fact that the establishment of such first common habitual residence retroactively determines the applicable law to all occurrences since the conclusion of the marriage, it would be reasonable to allow only a small measure of time to pass between the marriage and the relevant time for the establishment of the first habitual residence in order to provide legal certainty as soon as possible. Either way a clarification is required in the Regulation.

VII. MAIN FINDINGS

Despite these problems, the participants agreed that the regulation does constitute a step into the right direction and an improvement in regard to legal certainty compared to the previous tangle of differing national conflict of laws rules.

G. SUCCESSION REGULATION

The new Succession Regulation[17] was subject to more than one presentation due to the significant changes it entails both for German private international law and for the notarial practice.

Although only few cases have yet been decided before German courts, there are several practitioners in the field of succession law who have to deal with the provisions of the Regulation in their daily practice. Especially for notaries the new provisions entail the challenge to provide counsel and to design the testamentary provisions in such a way that the respective expectations of the clients are met, although there are still several uncertainties that have not yet been decided by the courts.

Due to the shift towards the concept of habitual residence as the new criterion for the determination of international jurisdiction and applicable law, there are much more cases in which shifts in the applicable law might occur, which increases the need for expert advice when testating to provide for all possible developments.

Simultaneously the Regulation has, however, provided much legal certainty by establishing uniform provisions for all Member States and by providing additional freedom with regard to ability to choose the applicable law. Also the Regulation has simplified the proceedings, since it prevents the initiation of multiple proceedings in different Member States and introduces the European Certificate of Succession, a document that has to be recognized in all Member States.

In regard to the specific provisions of the Regulation the participants primarily discussed problems of determining habitual residence under the Regulation and the consequences of various controversial CJEU rulings.

I. HABITUAL RESIDENCE

It is generally acknowledged that the concept of habitual residence under the Succession Regulation, which is further explained in Recitals 23 and 24, may differ from the similar concepts in other Regulations due to the specific goals of these Regulations. Habitual residence under the Succession Regulation is determined on the basis of factual elements instead of subjective intentions. The criteria that are to be taken into account should reveal the place the deceased was most closely connected with. Due to the lack of further specification, significant difficulties arise in ambiguous cases. Such will, with all probability, occupy the courts repeatedly. Further problems arise from the fact that many practitioners do not know all criteria that should be taken into account when determining one´s habitual residence. In some cases only certain aspects that are easily identified (like the place of official residence) have been considered. This may lead to wrong results. In order to compensate this, dubious cases should be brought before the CJEU, to allow the court to establish further criteria that can then serve as guidelines.

[17] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, p. 107–134.

II. DISTINCTION BETWEEN "AGREEMENT AS TO SUCCESSION" AND "JOINT WILL"

Due to the fact that German succession law contains its own concept of joint will which differs from the concept under the Succession Regulation, there are many discussions amongst German scholars and practitioners regarding the question of under which circumstances a joint will according to German law is to be considered a joint will under the Succession Regulation or an agreement as to succession. The main distinction appears to be some degree of binding effect of the declarations in an agreement as to succession, whereas a joint will under the Succession Regulation only requires that the will has been drawn up by two or more persons. Therefore it may even be possible that both categories are not exclusively distinct from each other. In regard to the details there were, however, still unresolved controversies. In either case this is a source of uncertainty that needs to be dealt with. Similar problems arise in other Member States who have their own version of a joint will.

III. LEGACIES BY VINDICATION

As a result of the ruling in the *Kubicka* case[18] it is now certain that foreign legacies by vindication, although not known under German law, have to be recognized in Germany as such and that they may not be reduced to legacies by damnation. Therefore, the beneficiary of such legacy by vindication regarding immoveable property may, provided that he has the necessary documents, immediately request the rectification of the land registry instead of having to demand the conveyance of the property.

IV. PROBLEMS REGARDING THE INTERPRETATION OF ART. 13 SUCCESSION REGULATION

In view of the limited jurisdiction provided by Art. 13 Succession Regulation it is discussed at which time the declaration of the waiver of succession takes effect in the context of possible deadlines for declaring the waiver. Since Art. 13 Succession Regulation explicitly speaks of the jurisdiction to receive such declarations, it would be plausible that the effects of the declaration arise already when the declaration is received by the court that is competent under Art. 13 Succession Regulation. The delivery to the court that conducts the main proceedings is not required. Ensuring the delivery seems to be the responsibility of the court that has received the declaration. There are however still differing opinions in this regard.

V. FURTHER PROBLEMS

In addition to these more controversial disputes, several other questions were discussed. Especially the consequences of the *Oberle* decision[19] were assessed. Only authorities that have jurisdiction according to the Regulation may issue certificates of succession. That applies, according to the *Oberle* decision, to the issuing of national certificates as well.

Another discussion concerned the problems that may arise from the prevalence of international treaties according to Art. 75 (1) Succession Regulation.

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[18] CJEU 12.10.2017, C-218/16 (Kubicka).

[19] CJEU 21.06.2018, C-20/17 (Oberle).

Finally there were discussions in regard to what information may be included into the European Certificate of Succession, specifically in regard to information that is not relevant under the law that governs the succession (e.g. information about specific assets that belong to the estate).

H. PUBLIC DOCUMENTS REGULATION

The presentation regarding the Public Documents Regulation[20] primarily focussed on the advantages of this Regulation and the need to make it known to more citizens.

The Regulation is directly applicable in all Member States since 16 February 2019, regardless of the date of the documents concerned. However, there have not been many cases yet in which it was applied.

The purpose of the Regulation is to provide an easy way for persons who live in a Member State to present certain types of public documents before the public authorities in other Member States without unnecessary costs or inconveniences. This applies to documents that are needed to establish important facts in regard to a person, such as birth, death, being alive, one´s name, one´s nationality and the other facts listed in Art. 2 (1) Public Documents Regulation. A complete list of the respective documents for each Member State is contained in their notifications according to Art. 24 (1) (b) Public Documents Regulation. These notifications are available via the e-justice-website[21].

While the initial proposal would also have covered entries from the land registry or from the trade register and other documents that do not directly concern personal information, the scope of the regulation had subsequently been reduced to personal information.

Corresponding provisions for the implementation in Germany are contained in the German Act for the facilitation of free movement of citizens of the European Union and for the revision of certain aspects of international adoption law[22]. Central authority for Germany is the Federal Office of Justice (Bundesamt für Justiz).

The most important provision of the Regulation in Art. 4 Public Documents Regulation provides for the abolishment of the requirement of legalization. It states that "Public documents covered by the Regulation and their certified copies shall be exempt from all forms of legalisation and similar formality". However, there is still the possibility to choose to conduct such legalization, although it is not required anymore.

When applicable, the Regulation prevails over the 1961 Hague Apostille Convention[23]. However, there are still many applications for apostilles. In order to raise awareness for the new provisions, the Central Authorities are pointing out to everyone who requests an apostille although the respective authority belongs to a Member State, that such legalization is no longer required.

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[20] Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012, OJ L 200, 26.7.2016, p. 1–136.

[21] https://beta.e-justice.europa.eu/551/DE/public_documents.

[22] Gesetz zur Förderung der Freizügigkeit von EU-Bürgerinnen und -Bürger sowie zur Neuregelung verschiedener Aspekte des Internationalen Adoptionsrechts vom 31.1.2019, BGBl. I 2019, p. 54.

[23] Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, drafted by the Hague Conference on Private International Law and concluded at The Hague on 5 October 1961.

For further simplification of the procedure the Regulation provides multilingual standard forms[24] which may substitute the requirement of a translation for certain public documents according to Art. 6 Public Documents Regulation.

For the verification of the documents and for other immediate communication the Internal Market Information System (IMI)[25] shall be used according to Art. 13 Public Documents Regulation. The IMI registration, however, is still pending in many regions.

The verification process requires the official authority to have reasonable doubt in regard to the validity of a document. To further validate this impression, the authorities may access folders with reference documents that serve as basis for comparison with the document in question. If there are still doubts in regard to the validity of the document after this comparison the authority who had received the document may directly contact the issuing authority. This authority in turn is required to answer such requests during a short period of time such as five to ten working days. As far as it is known there have been no major problems with this procedure up to now.

[24] Available at https://beta.e-justice.europa.eu/551/DE/public_documents.

[25] Established by Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC (IMI Regulation), OJ L 316, 14.11.2012, p. 1–11.

I. CONCLUSION AND OUTLOOK

The presentations and discussions during the German Exchange Seminar showed that most provisions of the more early instruments of European international family and succession law are fairly well-known to German scholars and practitioners and applied without major difficulties, though some general issues remain which need to be resolved.

The most prominent of these issues concerns the treatment of private divorces and same-sex marriages. The participants found it to be desirable to provide explicit rules in the respective Regulations that prevent differing national concepts from affecting the consistency of international decision-making. Since such differences would mean that each relocation of such couples to another Member State would entail the risk of affecting their legal status, their freedom of movement might be hindered immensely until there are consistent rules in that regard. As a result it was concluded that the European instruments should focus more on the establishment of clear and uniform guidelines, especially in regard to such important definitions as "marriage" or "divorce".

Further issues of general importance were the lack of *lis pendens* rules regarding proceedings in non-Member States and the legal consequences of breaching *lis pendens* rules in general. In that regard the respective provisions were found to be lacking in effectivity.

Regarding the more recent instruments the participants noted increasing acquaintance and understanding, although there are many aspects that require further clarification to allow for uniform application.

Of these more recent instruments, especially the new Succession Regulation and the corresponding rulings of the CJEU were subject to intense debates in regard to the paradigm shift they entail for German succession law. In that regard especially the rulings *Mahnkopf*, *Oberle* and *Kubicka* gave reason for critical review regarding the consequences for German legal practitioners and the affected parties.

Particularly controversial was the interplay between the Succession Regulation and the Matrimonial Property Regimes Regulation in regard to the allocation of the accrued gains after the spouse's death, if the deceased had changed its habitual residence shortly before. In that regard it was found that the unreflecting implementation of the instructions laid down in the *Mahnkopf* decision could lead to unfair results, since the respective provision of German law in § 1371 BGB combines aspects of both regimes.

The Matrimonial Property Regimes Regulation also contains several other issues which need to be resolved in order to provide for uniform application. Especially such vague concepts as "first common habitual residence after the conclusion of the marriage" were found to be lacking the criteria needed for uniform application. Further discussions will show whether such should include fixed time limits or more flexible approaches with regard to the individual circumstances of each case.

Further problems were identified in regard to overlapping jurisdiction rules concerning proceedings that are governed by other instruments. While it was found that providing combined jurisdiction for all interrelated matters could indeed facilitate the

proceedings in general, it was also found that their application during proceedings that had already been initiated in accordance with other jurisdiction rules could lead to significant inconveniences for the parties.

Other difficulties arise from the fact that not all courts and practitioners have much expertise in regard to European private international law. In many cases there is a substantial need for expert advice by practitioners who do have such expertise. The existing networks of liaison judges were deemed to be an easy and quite effective way to provide conceivable solutions for problems one might encounter when applying the European instruments for the first time. Such advisory assistance and other methods of judicial cooperation were thus deemed to warrant more attention, making them aware to more practitioners.