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REPORT ON THE GERMAN GOOD PRACTICES

(drafted by Mirjam Jasmin Escher and Josef Wittmann)

Presentation

The German Exchange Seminar was the second National Exchange Seminar organised within the *EUFam's Project*. It was hosted by Heidelberg University. The event was intended to evaluate the state of implementation of EU legal instruments on Family Law (Brussels IIa, Rome III, Maintenance and the Successions Regulation as well as the Hague Maintenance Protocol) and their interplay with the relevant international conventions. The objective of the National Exchange Seminar was to identify problems in the implementation process and to work on solutions to improve the effectiveness of the European instruments.

Two expert speakers for each legal instrument were invited to briefly introduce the topics from both an academic and a practice view point. They addressed crucial issues and possible solutions that then were discussed among the participants. The open discussions were conducted by selected invitees (precisely: 16 academics, 10 practitioners, 3 judges, 1 state officer, 1 expert from Austria and 1 guest from Italy).

The Successions Regulation held a special position as it has recently been implemented and not yet been applied frequently by the courts. Therefore, the Regulation was only presented by one expert speaker. Nonetheless, the discussion on the Successions Regulation was equally fruitful. The attending Austrian experts also gave an insight into the practice in Austria.

The following report outlines the critical issues that were addressed. While the names of the participants are not given, their professional status is provided, so that their remarks can be put into context.

1. Brussels IIa Regulation[1]

1.1. ALTERNATIVE BASES OF JURISDICTION

Article 3 of the Brussels IIa Regulation offers a broad range of alternative bases of jurisdiction. In conjunction with the court first seized rule (Article 19 of the Regulation), this approach appears to be very claimant friendly, encourages forum shopping and even incites a so-called „rush to court". Beyond these practical implications, Article 3 also contrasts with the corresponding provisions in the Brussels I Regulation that limit the claimant's choice of forum.

Therefore, the proposed solution of establishing a hierarchical set of jurisdictions in the Brussels IIa Regulation was widely approved by both academics and practitioners. And while the precise content of such a jurisdiction rule was not exhaustively discussed, the participants widely agreed that the common habitual residence of the spouses should be the prior connecting factor.

1.2. RESIDUAL JURISDICTION

Article 7 of the Brussels IIa Regulation currently refers to the national rules on international jurisdiction if no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5 of the Regulation. Regarding this, two fundamental concerns were raised:

- First, the national rules do not always effectively ensure access to court for spouses although they may have a close connection with the Member State in question. This may lead to situations where no jurisdiction in the EU or in a third State is provided to deal with an application for divorce, legal separation or marriage annulment.

- Second, some academics warned that the grounds of jurisdiction in Member States could be very wide as well, so that the European Union might provide access to its courts even if there is almost no connection to its Member States.

Therefore, it was proposed to replace Article 7 of the Brussels IIa Regulation by establishing a *forum necessitates* in EU Member States that requires that proceedings cannot reasonably be conducted or would be impossible in a third State and that the dispute has a sufficient connection with the Member State of the court seized. This proposal would counteract extensive rules of jurisdiction in Member States, but also ensure court access for spouses who

[1] Regulation (EC) No 2201/2003, „Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000".

live in a third state but retain strong links with a certain Member State (e.g. of which they are nationals or in which they were habitually resident for a certain period).

1.3. LIS PENDENS

Another subject of discussion was the issue of parallel proceedings. In particular, Article 19 Sec. 1, 2 of the Brussels IIa Regulation provides that, if proceedings are brought before courts of different Member States and concern the same parties (or the same child), the court second seized shall, of its own motion, stay its proceedings until the jurisdiction of the court first seized is established.

Some practitioners criticised that in some cases parties seize courts but then delay the proceedings before that same court. This behaviour might be encouraged by the already mentioned "rush to court"[2], which means that a party, who might be open to an extrajudicial resolution, would file a suit anyway in order to secure a more favourable jurisdiction.

Among the solutions proposed was an amendment to Article 19 of the Brussels IIa Regulation requiring the party that first filed the suit to actively pursue the court proceeding. In case that party delays the proceeding for at least six weeks, the court first seized shall decline jurisdiction in favour of the court second seized. Another suggestion was to treat separation proceedings and divorce proceedings as independent proceedings so that a separation proceeding in one state does not hinder a divorce proceeding in another state.

1.4. CONFLICT OF EU COURTS IN CHILD ABDUCTION CASES

A major concern that arose during the discussion on the Brussels IIa Regulation was the conflict of EU courts in child abduction cases. In general, the Hague Child Abduction Convention[3] continues to apply between EU Member States. However, in certain specific cases the Brussels II a Regulation provides for an additional procedure of obtaining the return of an abducted child: If a court of the EU Member State to which the child has been abducted refuses the return of the child on the grounds set out in Article 13 of the Hague Child Abduction Convention, the Brussels IIa Regulation allows parallel proceedings concerning custody rights in the state of the (former) habitual residence of the child. If such custody proceedings result in a return order in favour of the parent left behind – which is accompanied by a certificate pursuant to Article 42 of the Regulation – this decision shall be immediately

[2] See p. 3.
[3] Convention on the Civil Aspects of International Child Abduction of 1980.

enforceable in other EU Member States without any further procedure regarding registration for enforcement or declaration of enforceability (Article 11 Sec.s 6-8 Brussels II a Regulation).[4]

While some academics praised the additional proceeding for providing a second chance to ensure the return of an abducted child, some practitioners raised concerns that this so-called „two-track-system" is only infrequently used and largely ineffective. According to them a certificate pursuant to Article 42 of the Brussels IIa Regulation is rarely issued, most likely because the hearing of the child (necessary according to Articles 11 Sec. 2 and 42 Sec. 2 lit. a) of the Brussels IIa Regulation) causes considerable difficulties. It requires the court to either take action under the Evidence Regulation[5] or to informally cooperate with the child welfare officers in the state to which the child has been abducted. However, even if the hearing of the child has been properly conducted and an Article 42-certificate has been issued, court orders to return the child are rarely enforced, despite the fact that under the Brussels IIa Regulation they are automatically enforceable without the need for exequatur. To put it briefly, the mechanism laid down in Article 11 Sec.s 6-8 of the Brussels II a Regulation was considered an ineffective procedure that involves additional costs and even causes further instability for the child by lengthening the ongoing proceedings. It was therefore suggested to align the provisions in the Brussels IIa Regulation regarding child abduction with the Hague Child Abduction Convention and in particular, to establish a concentration of jurisdiction in favour of the courts of the EU Member State to which the child has been abducted. In accordance with the principle of "mutual trust" it can be assumed that if the return of the child has been refused by a court in any Member State, then the Hague Child Abduction Convention has been applied correctly.

1.5. RECOGNITION AND ENFORCEMENT

It was also discussed whether the exequatur procedure should be abolished in all matters of parental responsibility. While this would enhance the free circulation of decisions and thereby reduce additional costs and delays for parents and their children involved in cross-border proceedings, both academics and practitioners agreed that a higher degree of harmonisation must be reached before fully eliminating the exequatur procedure.

One very sensible issue hereby is the child's right to be heard in proceedings regarding parental responsibility. In Germany the hearing of the child is set up as a fundamental procedural principle. This ensues from the right to due legal process (Article 103 II of the German Constitution), the child's human dignity (Article 1 I) and its general right of personality (Article 2 II). Therefore, a child at the age of three or older has to be heard before deciding

[4] See also the brochure "International Child-related Proceedings" of the German Federal Office of Justice, p. 14, available at: https://www.bundesjustizamt.de/EN/SharedDocs/Public/HKUE/Broschure.pdf?__blob=publicationFile&v=9.
[5] Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

which parent is granted custody. This prerequisite is part of the German ordre public. Exceptions are only made, if the hearing of the child does serious harm to the child's mental health.

Before eliminating the exequatur, it is therefore urgently necessary to develop European standards on the hearing of the child. These standards should include age limits indicating at what age a hearing of the child is indispensable to grant custody to a parent.

1.6. JUDICIAL COOPERATION

The discussion on the Brussel IIa Regulation also brought up severe deficits regarding the placement of a child in another Member State. A decision to do so requires cooperation between the deciding courts and authorities of the Member States. In particular, Article 56 provides that, before a court in one Member State can order the placement of a child in another Member State, it shall first consult the central authority or another authority having jurisdiction in the latter State where public authority intervention in that Member State is required for domestic cases of child placement.[6]

The participating state officer criticised the lack of respect for that procedure under Article 56 of the Brussels IIa Regulation. His criticism was joined by numerous practitioners who claimed that in many cases the required consultation process is not followed at all or the authorisation/consent is only obtained when the decision regarding the placement of the child has already been rendered. Another main point of criticism was that it is simply not clear which data should be provided and how the consultation should be conducted.

It was therefore recommended to establish uniform guidelines on direct judicial communications in order to clarify the tasks of the authorities involved, especially regarding the information that shall be exchanged.

2. Rome III Regulation[7]

2.1. VALIDITY OF A CHOICE OF LAW-AGREEMENT

The possibility of the spouses to choose the applicable law is a core element of the Rome III Regulation. According to Recital 18, choosing the applicable law by common agreement should hereby be without prejudice to the rights of, and equal opportunities for, the two spouses. The question was raised whether this already constitutes a prerequisite for the validity of such an agreement that directly derives from the Regulation or whether the fairness

[6] See also the Practice Guide for the application of the Brussels IIa Regulation of the European Commission, p. 83 et seq.
[7] 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.

of a choice of law agreement is subject to the national law that was chosen. In accordance with Article 6 of the Rome III Regulation, a majority of participants stated that the material validity of a choice of law-agreement is determined solely by the law which would govern the subject if the agreement or term was valid. This shall include the fairness of the agreement cited in Recital 18. One of the arguments raised for this approach was that, when the parties choose a specific national law, they also agree on the provisions regarding the validity of a choice of law clause. However, concerns have been expressed that this link between the choice of law-agreement of the parties and the provisions on the validity of that agreement can only be made if the parties are fully informed about these provisions. This led to the question of the informed choice of law.[8] In Germany the informed choice of law is ensured by § 17 Sec. 1 of the German Notarisation Act (BeurkG) which requires the notary to inform the parties of a choice of law-agreement about questions of effectiveness, and clarify that no party is being prejudiced.[9] However, practitioners claimed, that this necessary counselling of the parties is not provided in all Member States. Further efforts were therefore demanded to raise awareness of that issue in the Member States.

2.2. CHOICE OF COURT-AGREEMENT

In order to align the forum and the applicable law, parties usually combine a choice of law-agreement with a clause conferring jurisdiction on the courts of the Member State whose law shall apply. This practice ensures an authentic interpretation of the law and avoids additional costs and delays caused by the application of foreign law. Therefore, as the Rome III Regulation allows a choice of law-agreement, it is inevitable to establish the possibility for the spouses to choose the competent court in the Brussels IIa Regulation.

2.3. THE ONE-YEAR-PERIOD IN ARTICLE 8 LIT. b) OF THE ROME III REGULATION

Subsequently to Article 8 lit. a) of the Rome III Regulation, Article 8 lit. b) of the Regulation provides that the law of the state shall apply 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**, in so far as one of the spouses still resides in that State at the time the court is seized. Some participants criticized this legal concept, stating that in case a couple was habitually resident in a state for more than 20 or 30 years, it seems not adequate to deny the application of the law of that state just because one spouse left that state for slightly more than one year. Therefore, it was proposed to make the length of residence during the marriage a deciding factor in determining the applicable law. Others argued for a more flexible approach by allowing the courts to alternatively apply the law of the country with "which the matter is most closely connected".

[8] The „informed choice of law" is also a principle set out in Recital 18 of the Rome III Regulation.
[9] The German requirement of the notarial certificate of an agreement on the law applicable to divorce and legal separation derives from § 46d Sec. 1 of the Introductory Act to the German Civil Code (EGBGB).

3. Maintenance Regulation

3.1. ARTICLE 3 LIT. B) MAINTENANCE REGULATION[10] AND PUBLIC AUTHORITIES

This problem was identified as a central issue by the attending state officer as well as the presentations concerning European Maintenance Law. In practice, maintenance claims in cross-border cases are regularly enforced by state authorities. The authorities receive the claims through *cessio legis* from the original creditor and proceed against the maintenance debtor in an action for recourse. Hereby the question arises whether public authorities can rely on the jurisdiction of the court at the creditor's habitual residence as provided in Article 3 lit. b) of the Maintenance Regulation or whether Article 3 lit. b) of the Regulation is a special protective provision only the creditor himself can rely on.

According to a court decision of the District Court Stuttgart[11], a later assignment of the maintenance claim to a legal entity such as a public authority is irrelevant. Otherwise a problematic situation could occur in which different courts have jurisdiction for the maintenance claims between two parties depending on whether these claims have already been assigned to a third party or not (split jurisdiction). The participating practitioners joined that view and referred to the legal equalisation of natural persons and public authorities through Recital 14. The academic speaker and participating researchers took a different stance on this topic. Although they agreed that it would be adequate to allow a public authority the reference to Article 3 lit. b) of the Maintenance Regulation, they found that the Regulation explicitly answers this question in Recital 14 and Article 64 Sec. 1: There the term "creditor" explicitly includes public authorities, but only for the purpose of an application for the recognition or enforcement of a decision, not regarding Article 3 lit. b) of the Regulation. Therefore, some academics found that the Regulation – *de lege lata* – does not permit a different interpretation. Nevertheless, they proposed a revision of the Regulation to allow a public authority the reference to Article 3 lit. b) of the Maintenance Regulation if the original creditor could have filed the claim at the same place.

3.2. ABOLITION OF THE EXEQUATUR PROCEDURE

One of the most important innovations of the Maintenance Regulations was the abolition of the exequatur procedure. This important modification has not yet been fully implemented in Germany due to the transitional provision in Article 75 Sec. 2 lit. b) of the Maintenance Regulation. An exequatur procedure pursuant to Article 23 et seq. of the Maintenance Regulation is thereafter still necessary for decisions given after June 18th, 2011 if the

[10] 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.
[11] AG Stuttgart v. 4.9.2013 – 28 F 1133/13, DEF20130904.

proceedings were instituted before that date (irrespective of the time period for which maintenance is claimed).[12] Consequently, it was stressed during the discussion that exequatur procedures are still an important topic.

Hereby it was highlighted that the regulation nonetheless secures fast and effective enforcement despite the necessity of an exequatur procedure. In addition, the expert practitioner for the Maintenance Regulation pointed out that even though the abolition of the exequatur procedure leads to simplification and acceleration of the proceedings, procedure and translation costs are another obstacle to be considered. The review of Annex I and II as well as Article 47 of the Maintenance Regulation might be necessary to overcome those additional difficulties.

4. Hague Maintenance Protocol[13]

4.1. Relationship between the Hague Maintenance Protocol and the Hague Maintenance Convention of 1973[14]

Practitioners addressed the topic of the relationship between the Hague Maintenance Protocol and the Hague Maintenance Convention of 1973 if non-member states are involved. The Hague Maintenance Protocol hereby does not contain an explicit provision that clarifies whether the Hague Maintenance Convention is applicable in relation to non-Member States. The prevailing view in literature including attending academics refers to Article 18 of the Hague Maintenance Protocol. They argue that in relation to non-member States the Hague Maintenance Convention of 1973 has to be applied as the provision's wording renders the Hague Maintenance Protocol applicable only between Contracting States.[15] Others argued that the intention to include third states in the scope of the Hague Maintenance Protocol was expressed in the drafting materials. Therefore, its application should not be dismissed prematurely.

As this is only relevant in relation to Japan, Albania, Switzerland and Turkey and the two regulatory instruments often shared the same result, they have been applied side by side by German courts. In such a case the second instance court of Stuttgart established jurisdiction by referring to Article 3 Hague Maintenance Protocol as well as Article 4 Hague Maintenance Convention of 1973.[16] It thereby avoided addressing the long debated relationship between both sets of rules. The same approach was displayed by the German Federal Court applying Article 5

[12] See also OLG Nürnberg, Beschluss vom –10.07.2014 – 7 UF 694/14, DES20140710; BGH v. 23.9.2015 – XII ZB 234/15, DET20150923; OLG Karlsruhe v. 27.1.2014 – 8 W 61/13, DES20140127.
[13] Protocol on the Law Applicable to Maintenance Obligations (Concluded 23 November 2007).
[14] Convention on the Law Applicable to Maintenance Obligations (Concluded 2 October 1973).
[15] Article 18 Hague Maintenance Protocol of 2007: "**As between the Contracting States**, this Protocol replaces the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations [...]".
[16] Oberlandesgericht Stuttgart, Beschluss vom 17.01.2014 – 17 WF 229/13, DES20140117.

Hague Maintenance Protocol as well as Article 8 Hague Maintenance Convention of 1973 to an issue.[17] Therefore, the discussion still needs final settlement.

In addition, the Austrian expert explained that Austria is discussing this problem from a slightly different perspective: As Austria is not member of the Maintenance Convention of 1973, the Convention of 1956[18] would apply in relation to non-Member States. This Convention, however, only governs maintenance claims of children up to the age of 21. The thereby emerging regulatory void concerning maintenance issues in relation to third states has still to be clarified in Austria.

4.2. Article 5 of the Hague Maintenance Protocol and the closer connection

Article 5 Hague Maintenance Protocol stipulates a special rule regarding maintenance obligations between spouses, ex-spouses or parties to a marriage which has been annulled. According to the provision, Article 3 of the Protocol shall not apply if one party objects and the law of another State (in particular the State of their last common habitual residence) has a closer connection with the marriage. In such a case the law of that other State shall apply.

Practitioners claimed that in some cases problems regarding the interpretation of the term *"closer connection"* might occur. Therefore, the question was raised whether Article 5 of the Hague Maintenance Protocol is really needed.

While some academics acknowledged that Article 5 Hague Maintenance Protocol might lead to a certain degree of uncertainty, they found that the provision constitutes a reasonable rule nonetheless. In cases a couple was habitually resident in a state for several years and after divorce one spouse leaves for another country, the "remaining" spouse holds some continuity interest regarding the law applicable to maintenance claims. Of course, these cases must be assessed differently in child maintenance cases, where the debtor usually bears the risk of a changing habitual residence of the minor creditor.

4.3. Adaption problems and neglected substitution

Finally, the participants discussed the alignment of differing legal instruments in the national law systems regarding maintenance payments. One practitioner brought up the example of a parent paying maintenance under Polish law to a minor who also received child benefits under German law (German "Kindergeld"). As child benefits are considered state benefits in Poland which do not interfere with maintenance obligations, the Polish court did not take into account the German child benefits when calculating the maintenance payments in Poland.

[17] Bundesgerichtshof, Urteil vom 26.06.2013 – XII ZR 133/11, DET20130626.
[18] Convention on the Recovery Abroad of Maintenance.

However, in Germany, child benefits are treated as a part of the child's income and consequently have to be subtracted from maintenance obligations. Any other approach would violate the purpose of the German law.

In the discussion the issue was identified as a typical case for a so-called substitution in Private International Law. According to that, the Polish court would have been obliged to take into account the legal principle of the German "Kindergeld" and adapt the maintenance claims under Polish law. However, in practice it might be difficult to give the judge a proper understanding of the complicated legal principle of "substitution". Therefore, to avoid legal uncertainties, it might be preferable to draft a special provision that allows the alignment of national legal instruments which follow differing principles.

5. Successions Regulation[19]

5.1. HABITUAL RESIDENCE AND SUCCESSIONS REGULATION

In the expert presentation regarding the Successions Regulation the problematic scenario of a pensioner being moved to a favourable legal system by the potential heirs to choose its law was addressed. In the discussion Thailand was presented as a popular destination for such endeavours as care services are relatively low-priced there. The question was raised whether such an undesirable relocation of a person for the sole reason of the choice of a better law can be circumvented.

Academics as well as the speaker pointed out that cases in which the pensioner still has the capacity to draft a will, can be solved by way of last will. If this is not the case anymore, the rule in Article 21 Sec. 2 of the Successions Regulation might help. Article 21 Sec. 2 of the Regulation stipulates that the law of the habitual residence (for example Thailand) is not applicable if the deceased was more closely connected with another State at the time of death. In this context, Recital 25 gives the example of the deceased having moved to the state of his habitual residence recently before his death. The question that arises here is what "recently" means exactly.

Additionally, the opinion was presented that the habitual residence has a voluntative element, which prevents the habitual residence from changing after a person has lost the capacity to draft a will. But such a voluntative element was discussed and rejected during the drafting stage of the regulation. It would complicate the establishment of a habitual residence as it might necessitate a medical inquiry and raises doubts whether disabled persons are able to have a habitual residence at all. Therefore, it is crucial to raise the awareness for this problem and to advise on an

[19] Regulation (EU) No 650/2012 of the European Parliament and 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.

early solution of the problem through choice of law. It might be necessary to start an information campaign on this issue.

This initial case additionally started a general debate concerning the term "habitual residence" in the Successions Regulation. It was common opinion of both academics and practitioners that a different interpretation is necessary for each regulation. In this respect Recital 23 offers an interpretation aid calling for an "overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death".

5.2. EUROPEAN CERTIFICATE OF SUCCESSION

It is a typical German problem that the inheritance of a spouse can be increased by the surviving spouse if he/she opts for the resolution of the matrimonial property regime according to the rules of succession. It is highly debated in Germany whether this supplementary quarter can be considered a part of the inheritance.

Before the implementation of the Successions Regulation the prevailing opinion in Germany did not classify it as part of successions law, but of matrimonial property law.

In the discussion it was concluded that the classification of this phenomenon in Private International Law is an unsolved issue and that it is nonetheless necessary to include this supplementary quarter in the European Certificate of Succession. The European Court of Justice will have to settle this dispute eventually.

5.3. APPLICABLE LAW AND LEGACIES

In Germany a legacy solely leads to a claim for transfer of the property ("Damnationslegat"), whereas in other countries (such as France, Italy and Poland) a legacy causes a direct change of ownership ("Vindikationslegat"). The problem was raised in the expert presentation whether such a direct transfer of property is subject to the rules of successions law or the national property law. Thus far, the dominant opinion in Germany stipulated that the "lex rei sitae" and thereby the property law should prevail. If the property is situated in Germany, the "Vindikationslegat" was therefore converted into a "Damnationslegat".

The Successions Regulation could bring a change to this opinion. Article 23 Sec. 2 lit. e of the Successions Regulation stipulates that the determined law shall govern the transfer of rights to the legatees. Therefore the successions law might prevail under the Regulation. But on the other hand, Article 1 Sec. 2 lit. l says that any recording in a register of rights in immovable or movable property and the effects of the recording are excluded from the scope of the Regulation. Lastly, Article 31 of the Successions Regulation could lead to a "Vindikationslegat" being converted into a "Damnationslegat" as it calls for an adaption of rights in rem under certain circumstances. But this application of Article 31 has to be rejected pursuant to its wording and to ensure an international harmony of court decisions.

During the discussion it was argued that successions law should be applicable and that the content of the property right should not be confused with the mode of its transfer.

CONCLUSIONS:

- In order to prevent a so-called „rush to court", the very claimant friendly Article 3 of the Brussels IIa Regulation offering a broad range of alternative bases of jurisdiction should be replaced by a hierarchical set of jurisdictions starting with the common habitual residence of the spouses.
- To counteract extensive rules of jurisdiction in Member States but as well to ensure access to court for spouses, the rule on residual jurisdiction in Article 7 of the Brussels IIa Regulation should be replaced by establishing a forum necessitates, requiring that proceedings cannot reasonably be conducted in a third State and that the dispute has a sufficient connection with the Member State of the court seized.
- As the current rule on lis pendens in the Brussels IIa Regulation (Article 19) does not sufficiently prevent a wilful delay of proceedings by one party, a special provision should be added, requiring the party that first filed the suit to actively pursue the court proceeding.
- An abolition of the exequatur procedure matters of parental responsibility requires a higher degree of harmonisation, e.g. with regards to the child's right to be heard in proceedings regarding parental responsibility.
- Regarding the judicial cooperation procedure under Article 56 of the Brussels IIa Regulation, it was recommended to establish uniform guidelines on direct judicial communications in order to clarify the tasks of the authorities involved.
- According to Recital 18 of the Rome III Regulation a choice of law-agreement by the spouses should be an informed choice. However, it was revealed that the necessary counselling of the parties is not ensured in all Member States. Therefore, further efforts should be made to raise awareness of that issue in the Member States.
- In order to align the forum and the applicable law, parties usually combine a choice of law-agreement with a clause conferring jurisdiction on the courts of the Member State whose law shall apply. Therefore, as the Rome III Regulation allows a choice of law–agreement, it is inevitable to establish the possibility for the spouses to choose the competent court in the Brussels IIa Regulation.
- In cases where the spouses were habitually resident in a state for more than 20 or 30 years, it seems not adequate to deny the application of the law of that state just because one spouse left that state for slightly more than one year (Article 8 lit. b) of the Rome III Regulation). Therefore a more flexible rule, which

allows the courts to alternatively apply the law of the country with "which the matter is most closely connected", should be adopted.

- The maintenance regulations are a coherent and logical system, struggling with problems concerning their implementation. Therefore, the problems have to be addressed on a practical or national rather than on an EU-regulatory level.
- Public bodies cannot rely on Article 3 lit. b) of the Maintenance Regulation de lege lata; it would be desirable to allow a public body the reference to Article 3 lit. b of the Maintenance Regulation in case the original creditor could have filed the claim at the same place.
- A provision in the Hague Maintenance Protocol clarifying the applicability of the Hague Maintenance Convention of 1973 with regard to non-member states would be desirable.
- Article 5 of the Hague Maintenance Protocol can lead to complicated constellations, but is justified.
- To ensure its consistent application a practical guide for the Hague Maintenance Protocol addressing the different member states would be desirable; further, a comprehensive case-database concerning maintenance law is necessary.
- Awareness must be raised for potential misuse of the habitual residence-rule arising after one loses the capacity to draft a will.
- The term "habitual residence" must be interpreted specifically for the Successions Regulation with the help of Recital 23.