

Latest Issue of RabelsZ: Vol. 79 No 3 (2015)

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

Dagmar Coester-Waltjen, *Himmel und Hölle: Einige Überlegungen zur internationalen Zuständigkeit* (Heaven and Hell: Some Reflections on International Jurisdiction)

Jurisdictional rules differ all over the world. Plaintiffs might consider jurisdictional practices in one legal system as “heaven”, whereas defendants will fear exactly these rules like “hell”. Due to increasing global interconnectedness that results from increasing cross-border trade, from the mobility of people, and the global reach of the internet, there is a need for international consensus on matters of jurisdiction on several levels. The first level concerns the question whether a complete set of acceptable grounds of jurisdiction (direct grounds of jurisdictions) can be developed for a binding instrument. On the second level the question arises as to tolerable heads of jurisdiction (only) for the purpose of recognition and enforcement of foreign judgments (indirect grounds of jurisdiction). And finally the jurisdiction of the courts that recognize and enforce the foreign judgment is at issue. The Hague Conference on Private International Law has resumed its work on the so-called judgment project and it is working on all three levels although direct grounds of jurisdiction will be tackled only after a certain agreement will have been reached on jurisdictional issues concerning recognition and enforcement of judgments. However, on all three levels the inclusion and the role of the doctrine of forum non conveniens will be an important and most decisive issue.

The doctrine of forum non conveniens has its origin in the common law world, but has spread around the globe in recent decades. Today it can be found also in jurisdictions which traditionally apply strict jurisdictional rules. The very essence of the doctrine is a margin of discretion the competent court may apply in staying or rejecting litigation. This applies if in the given situation the court addressed seems to be a “not convenient” forum and there is another more

appropriate forum. The particulars of the doctrine as well as the standards of the test (inconvenient, clearly inconvenient, more appropriate) and the determinative considerations vary.

By contrast, it has been said that the European rules on jurisdiction are and have to be strict rules in order to guarantee certainty and predictability. However, a close look at these jurisdictional systems in European regulations reveal some weakness of the strict rules on the one hand and also the fact that even in these systems a non-convenience substitute has been developed. There are rules which allow courts to deny jurisdiction by way of interpreting a jurisdictional rule restrictively in the light of specific circumstances of the case at hand. There are other rules which give judges a limited power to decline (or in case of a forum necessitatis even to attract) jurisdiction outside the normal rules. In this situation forum non conveniens-type considerations are at issue. In so far the acceptability of the doctrine of forum non conveniens in a global instrument concerning jurisdiction even for continental-European legal systems and the EU as such does not seem unthinkable any more.

This applies especially as far as direct jurisdiction is concerned. Globalization of the markets and of societies as well as the delocalisation of the connecting factors ask for wide jurisdictional rules which may have to be restricted with regard to the specific and limited circumstances of the precise facts of a case.

Concerns about “access to justice”, “the right to a lawful judge”, non-discriminatory decisions, predictability and certainty of the jurisdictional system can be rebutted if the terms and conditions of a rule on forum non conveniens are framed accordingly: A presumption that honours the plaintiff’s choice of court may only be rebutted, if the defendant proves that the interests of both parties and the end of justice justify a stay or denial of the proceedings. He will have to prove in addition that there is an alternative appropriate forum which guarantees a lawful procedure and a possibility for the plaintiff to enforce his right when granted by this alternative court. Much will depend on the phrasing of the rule, but there are models for orientation.

When it comes to indirect jurisdiction the doctrine of forum non conveniens for constitutional reasons plays an important role in the United States. It seems unlikely that an agreement on the international level will be reached without coping with this issue. However, forum non conveniens may have a very limited

role on this level only. Due to the fact that in so far practical difficulties for the original forum in adjudicating the case are not at issue any more, the essential issue will be whether the interests of the defendant have been treated in accordance with the rule of law. This could be argued under the head of “ordre public”, but it seems preferable to define the limits of such exception expressly.

Finally, the jurisdictional rules of the courts recognizing and enforcing foreign judgments are of pivotal importance. Without the possibility of enforcement a right may be theoretical and illusionary only. Therefore, in order to guarantee practical and effective rights, a legal system must not refrain from enforcing a judgment according to the doctrine of forum non conveniens if and so far as this judgment has to be recognized in this system. Thus, on the third stage of jurisdictional issue the doctrine of forum non conveniens should not play any role at all.

Rolf Wagner, *EU-Kompetenz in der justiziellen Zusammenarbeit in Zivilsachen - Resümée und Ausblick nach mehr als fünfzehn Jahren* (EU Legislative Powers Regarding Judicial Cooperation in Civil Matters)

Since the entry into force of the Amsterdam Treaty in 1999, the European Union has been empowered to cooperate in the area of civil matters. As this power has now existed for more than fifteen years, it seems appropriate to take stock of developments. In addition to asking whether initial legal uncertainties regarding the interpretation of the power of judicial cooperation in civil matters have been resolved over the course of time, the present article also considers what new problems may have emerged.

Chloé Lignier and **Anton Geier**, *Die Verstärkte Zusammenarbeit in der Europäischen Union - Politischer Hintergrund, Bestandsaufnahme und Zukunftsperspektiven* (Enhanced Cooperation in the European Union - Political Background, Current Status and Future Perspectives)

The legislative instrument of enhanced cooperation allows member states to create a common legal regime in a given field, which applies only to those member states that voluntarily subject themselves to it. While the concept of having different levels of integration (“differentiated integration”) as such is not new to EU law, the instrument of enhanced cooperation stands out through its

broad scope of application and its elaborate institutional entrenchment.

The history of differentiated integration in the EU illustrates the basic conflict between effective integration on the one hand and preserving the sovereignty of the member states on the other hand. In this context, the two principal competing political ideals aspiring to resolve this conflict are often labelled as “Europe à la carte” on the one hand and “multi-speed Europe” on the other hand. Both ideals - to a varying degree - manifest themselves in the rules on enhanced cooperation introduced with the treaties of Amsterdam and Nice.

After having been neglected by the European legislator for a long time, we can now witness the first practical implementations of enhanced cooperation in the fields of divorce law, patents and the financial transaction tax. The ideas of differentiated integration and the instrument of enhanced cooperation remain highly controversial. Some see it as the only means for overcoming the integrational standstill in an ever more complex and heterogenic Union. Others fear that enhanced cooperation will sow division among the member states and foster political and legal alienation between them.

Ultimately, an analysis of the rules on enhanced cooperation in the treaties and the latest examples of its implementation gives rise to optimism. It reveals a promising potential of the instrument of enhanced cooperation for achieving effective integration in the EU, while duly observing the legitimate interests of all member states, be they participating or not. At the same time, the European legislator should wield its new sword with caution if it wishes to preserve the solidarity among the member states and the coherence of EU law. It cannot be denied that specific projects of enhanced cooperation can come into conflict with other EU interests such as the coherence and effectiveness of the internal market. As regards the political coherence of the EU, the provisions on sincere cooperation do allow for political inclusion and wisely oblige the participating member states to confer with the non-participants at every stage. The extent to which the member states act in this spirit of constructiveness and cooperation will decide over the fate of enhanced cooperation as either a king’s road or a dead end of European legal integration.

Marieke Oderkerk, *The Need for a Methodological Framework for Comparative Legal Research - Sense and Nonsense of “Methodological Pluralism” in*

Comparative Law

The paper has presented a framework for comparative legal research indicating the various methodological issues that have to be considered in the various stages of a research project. Its significance is twofold. In the first place it brings order into the existing methodological knowledge in the field such that the various methods and techniques can be understood and assessed within the correct context, automatically unveiling existing lacunae. Secondly, and probably most importantly, the framework shows that there is indeed one framework which contains - at the moment at least, for certain parts of it - clear guidelines and principles that can guide comparatists conducting any type of comparative legal research in any field of the law.

Dieter Martiny, *Die Haager Principles on Choice of Law in International Commercial Contracts - Eine weitere Verankerung der Parteiautonomie* (The Hague Principles on Choice of Law in International Commercial Contracts: Buttressing Party Autonomy)

The Hague Conference on Private International Law has recently drawn up "Principles on Choice of Law in International Commercial Contracts". An innovative feature of these Principles, which are accompanied by an explanatory Commentary, is that unlike an international convention they are non-binding. The Principles were drafted by a Working Group, which commenced in 2010, and by a Special Commission of November 2012. The instrument was approved by the Council on General Affairs and Policy in March 2015.

The Principles' relatively few black-letter rules (12 articles and a preamble) seek to encourage choice of law in international commercial transactions. They contain clarifications and innovations on choice of law, particularly for jurisdictions where party autonomy is not accepted or is accepted only in a restrictive manner. The Principles try to achieve universal application and also to influence existing regional instruments such as the Rome I Regulation of the European Union and the OAS Mexico Convention.

Developing the Principles was a demanding task since they apply not only to courts but also to arbitral tribunals. Since party autonomy is the centrepiece of the Hague Principles, freedom of choice is granted basically without restriction.

The Principles clarify important issues for agreements on choice of law. A reference to “law” also includes generally accepted “rules of law”. The latter refers to principles developed by international organisations or international conventions. This approach is also applicable to courts. Under the Hague Principles the parties’ choice of law is severable from the main contract. Express and tacit choices are accepted. There is no requirement as to the formal validity of a choice of law. An innovative solution also tries to find an agreement on choice of law in the case of a battle of the forms. Not only are international mandatory rules of the forum respected but under certain circumstances mandatory provisions from other sources are also taken into account. The extent to which overriding mandatory rules and public policy are applied or taken into account, however, is ultimately a matter not for the non-binding Principles themselves but for other rules.

The Hague Principles declare themselves to be an international code of current best practice with respect to the recognition of party autonomy in choice of law in international commercial contracts. Their acceptance in international practice will show how far the expectations of The Hague will be met.