Politik und Internationales Privatrecht [English: Politics and Private International Law]

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The first German conference for Young Scholars of Private International Law, which was held at the University of Bonn in spring 2017, provides the topical content for this volume. The articles are dedicated to the various possibilities and aspects of this interaction between private international law and politics as well as to the advantages and disadvantages of this interplay. “Traditional” policy instruments of private international and international procedural law are discussed, such as the public policy exception and international mandatory rules (*loi de police*). The focus is on topics such as human rights violations, immission and data protection, and international economic sanctions. Furthermore, more “modern” tendencies, such as the use of private international law by the EU and the European Court of Justice, are also discussed.

The content is in German, but abstracts are provided in English here:

“Presumed dead but still kicking” – does this also apply to traditional Private International Law?
Dagmar Coester-Waltjen

The opening address defines the concept of “traditional” private international law. Subsequently, it alludes to different possibilities politics have and had to influence several aspects of this area of law. Even the “classic” conflict of laws approach based on Savigny and others was never free from political and other substantive values, as seen in the discussion about international mandatory law and the use of the public policy exception. Moreover, the paper reviews past actual or

presumable “revolutions” of traditional private international law, especially the so-called “conflicts revolution” in the US and, lately, the European Union. The author is critical with the term “revolution”, as many aspects of said “revolutions” should better be regarded as a shy “reform” and further development of aspects already part of the traditional private international law. Finally, the paper concludes with an outlook on present or future challenges, such as questions of globalisation and mobility of enterprises and persons, technical innovations and the delocalisation and diversification of connecting factors.

Politics Behind the “ordre public transnational” (Focus ICC Arbitral Tribunal)
Iina Tornberg

This paper examines transnational public policy as a conflict of laws phenomenon in international commercial arbitration beyond the legal framework of nation-state centered private international law. Taking account of the fact that overriding mandatory rules and public policy rules can be considered as general instruments of private international law to pursue political goals, this paper analyzes the policies according to which international arbitrators accept them as transnational ordre public. The focus is on institutional arbitration of the ICC (International Chamber of Commerce) International Court of Arbitration. ICC cases that involve transnational and/or international public policy are discussed.

Between Unleashed Arbitral Tribunals and European Harmonisation: The Rome I Regulation and Arbitration
Masud Ulfat

According to prevailing legal opinion, the European Union exempts the qualitatively and quantitatively highly significant field of commercial arbitration from its harmonisation efforts. Free from the constraints that the Rome I Regulation prescribes, arbitral tribunals are supposed to be only subject to the will of the parties when determining the applicable law. This finding is surprising given the express goals of the Rome I Regulation, namely the furtherance of legal certainty in the internal market and the enforcement of mandatory rules, in particular mandatory consumer protection laws. In light of these aims, the prevailing opinion’s liberal stance on the applicability of the Rome I Regulation in arbitral proceedings seems at least counterintuitive, which is why the article reassesses whether arbitral tribunals are truly as unbound as prevailing doctrine

holds. In doing so, apart from analysing the Rome I Regulation with a view to its genesis and its position within the wider framework of EU law, the article will pay particular attention to the policy considerations underlying the Rome I Regulation.

The Applicable Law in Arbitration Proceedings – A *responsio*
Reinmar Wolff

Sect. 1051 German Code of Civil Procedure (ZPO) concisely determines the rules under which the arbitral tribunal shall decide on substance. The article discusses two unwritten limits to the law thus defined that are often postulated, namely the Rome I Regulation and transnational public policy. The Rome I Regulation does not apply in arbitral proceedings since it depends on the chosen dispute resolution mechanism if and which law applies. The law explicitly allows for arbitral decisions on the basis of non-state regulations or even ex aequo et bono. It thereby demonstrates that arbitration is not comprehensively bound by law. There are no gaps in protection, and be it only because the arbitral award is subject to a public policy examination before enforcement. Consistent application throughout the Union would be out of reach for the Rome I Regulation in any event if for no other reason than the fact that it is superseded by the European Convention in arbitral proceedings. Similarly, transnational public policy – which is little selective – does not restrict the applicable law in arbitral proceedings, as the implication would otherwise be that the arbitral tribunal is being called upon to defend something like the international trade order by applying transnational public policy. The party agreement, as the only source of the arbitral tribunal's power, is no good for this purpose. The arbitral tribunal is rather no more required to test the applicable law for public policy violations under sect. 1051 ZPO than the state court has to test its lex fori. Sufficient protection is again accomplished by the subsequent review of the arbitral award for public policy violation on the recognition level. In contrast to current political tendencies, arbitration ultimately requires more courage to be free, including when determining the applicable law.

How Does the ECJ Constitutionalize the European PIL and International Civil Procedure? Tendencies and Consequences
Dominik Düsterhaus

Politics and law naturally coincide in the deliberations of the highest courts, both

at national and international levels. Assessing the relationship of politics and private international law in the EU thus requires us to look at how the Court of Justice of the European Union as the supreme interpreter deals with the matter. In doing so, this contribution portrays three complementary avenues of what may be called the judicial constitutionalisation of EU private international law, i.e. the implementation of principles and values of EU integration by means of a purposive interpretation of the unified private international law rules. It is submitted that, in order to avoid uncertainty such an endeavour should be accompanied by an intensified dialogue with national courts via the preliminary ruling procedure.

Proceedings in a Foreign forum derogatum, Damages in a Domestic forum prorogatum – Fair Balancing of Interests or Unjustified Intrusion into Foreign Sovereignty?
Jennifer Antomo

Parties to international commercial contracts often agree on the exclusive jurisdiction of a certain state's courts. However, such international choice of court agreements are not always respected by the parties. Remedies, such as anti-suit injunctions, do not always protect the party relying on the agreement from the consequences of being sued in a derogated forum. The article examines its possibility to claim damages for the breach of an international choice of court agreement.

Private International Law and Human Rights – Questions of Conflict of Laws Regarding the Liability for "Infringements of Human Rights"
Friederike Pförtner

The main conflict between private international law (PIL) and the enforcement of human rights through civil litigation consists in the existence of the principle of equality of all the jurisdictions in the world on the one hand and the efforts of some states to create their own human rights due diligence rules for domestic corporations on the other hand. Basically, the principle of equality of jurisdictions has to be strictly defended. Otherwise, PIL is in danger of being excessively used or even misused for policy purposes. However, due to the importance of the state's duty to protect human rights an exception of the principle of equality of jurisdictions might be indicated either by creating a special conflict of laws' rule or by using mandatory rules or even if there is no other way by referring to the

public policy exception. Thus, the standards for liability of a corporation's home state can be applied in the particular case concerned. Nevertheless, in the highly controversial issue of transnational violations of human rights the means of PIL mentioned above have to be used very carefully and only in extreme cases.

Cross-Border Immissions in the Context of the Revised Hungarian Regulation for Private International Law

Réka Fuglinszky

This paper has a focus on cross-border nuisances from the perspective of the private international law legislation of an EU Member State with external Community borders. The new Hungarian Act XXVIII of 2017 on the Private International Law from 4 April 2017 gives rise to this essay. The article sketches the crucial questions and tendencies regarding jurisdiction (restriction of the exclusive venue of the forum rei sitae); applicable law (unity between injunctions and damage claims) and the problem of the effects of foreign administrative authorization of industrial complexes from the viewpoint of European and Hungarian PIL.

Long Live the Principle of Territoriality? The Significance of Private International Law for the Guarantee of Effective Data Protection

Martina Melcher

According to its Article 3, the new General Data Protection Regulation (GDPR) (EU) 2016/679 applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the EU as well as (under certain conditions) to the processing of personal data of data subjects who are in the EU by a controller or a processor not established in the EU. Given that the GDPR contains public and private law, Article 3 must be qualified not only as a rule of public international law, but also as a rule of private international law (PIL). Unfortunately, the PIL nature of Article 3 and its predecessor (Article 4 Data Protection Directive 95/46/EC) is often overlooked, thus (erroneously) limiting the impact of these rules to questions of public law. Besides this relative ignorance, Article 3 GDPR presents further challenges: First, as a special PIL rule it sits uneasily in the context of the general EU PIL Regulations, in particular Rome I and II, and the interaction with these regulations demands further attention. Second, its overly broad scope of application conflicts with the principle of comity. In view of these issues, it might be preferable to incorporate a general

(two-sided) PIL rule on data protection into the Rome Regulations. Such a rule could determine the law applicable by reference only to the place where the interests of the data subjects are affected. Concerns regarding potential violations of the EU fundamental right to data protection due to the application of foreign substantive law could be effectively addressed by public policy rules.

Economic Sanctions in Private International Law
Tamás Szabados

Economic sanctions are an instrument of foreign policy. They may, however, affect the legal – first of all contractual – relations between private parties. In such a case, the court or arbitral tribunal seised has to decide whether to give effect to the economic sanction. It is private international law that functions as a 'filter' or a 'valve' that transmits economic sanctions having a public-law origin to the realm of private law. The uniform application of economic sanctions would be desirable in court proceedings in order to ensure a uniform EU external policy approach and legal certainty for market players. Concerning EU sanctions, uniformity has been created through the application of EU Regulations as part of the law of the forum. Uniformity is, however, missing among the Member States when their courts have to decide whether to give effect to sanctions imposed by third states. When deciding about non-EU sanctions, private law and private international law cannot always exclude foreign-policy arguments.