Views and News from the 8th Journal of Private International Law Conference 2019 in Munich

From 12 to 14 September 2019, the Journal of Private International Law held its 8th Conference at the University of Munich, perfectly hosted and organized by our Munich-based colleague Anatol Dutta. Nearly 150 colleagues gathered from all over the world, amongst them many of the Conflictoflaws.net editors.

This was the perfect occasion to meet for us for dinner on the first evening. Some of our editors had never met personally before, and all of those present could exchange views and news on PIL as well as on the blog.

The bottom line of the meeting certainly was: onwards and upwards with our blog – it is worth it! The PIL community will have many occasions to get together in the near future, inter alia in Aarhus in May 2020. We will keep you posted!

For now, however, we are presenting to you our views and news from the Munich conference. The following short observations should give you some impressions of the fantastic panels and presentations. These are not meant to be a comprehensive conference report, all the more so, because there is one in the pipeline for the blog by Christiane von Bary, Research Fellow with Anatol.

Here we go:

Plenary Sessions (Friday)

Matthias Weller

The first of the plenary sessions was opened by Matthias Lehmann, University of Bonn, Germany. He presented on the complex relations between “Regulation, Global Governance and Private International Law” with a view to: “Squaring the Triangle”. First of all, Lehmann explained the respective peculiarities of each of the poles of this triangle: PIL as an area of law that, as a reaction to cross-border

legal relationships, is primarily rights-driven, based on a notion of equivalence of the selected laws, ideally resulting in multilateral connecting factors. And regulatory law as a reaction to public interests, managed by administrative agencies under a principally unilateral approach by territorially limited administrative acts or mandatory rules. Finally, both areas of law working together to achieve global governance of the respective subject-matters such as e.g. securities antitrust, data protection, environmental or cultural property protection law. Indeed, in all of these areas, the public-private divide is increasingly blurred (see also e.g. Burkhard Hess, The Private-Public Law Divide in International Dispute Resolution, Collected Courses of the Hague Academy of International Law 388, Boston 2018, http://dx.doi.org/10.1163/1875-8096_pplrdc_ej.9789004361201.C02). Lehmann then referred to central techniques of private international law to deal with regulatory rules such as e.g. Articles 3(3) and (4) or 9 of the Rome I Regulation and Article 14(2) of the Rome II Regulation. He also referred to Currie's governmental interest analysis and Ehrenzweig's local data theory, to a certain extent reflected by e.g. Article 17 Rome II Regulation. Lehmann pleaded in favour of overcoming (more strongly) the "public law taboo". As a consequence, a more sophisticated approach for the application of public law in cross-border settings would be needed, as Lehmann further explained, e.g., by making use of auto-limitations or by creating parallel connecting factors for public and private law aspects of the respective subject-matter. Lehmann presented Article 6(3) of the Rome II Regulation for antitrust matters as an example. All of that should be coordinated to serve the public interest. Under such an approach, the question may of course arise as to what extent notions of private enforcement come into play (on this aspect see e.g. Hannah Buxbaum, Regulation and Private Enforcement in a Global Economy: Strategies for Managing Conflict, Collected Courses of the Academy 399, Boston 2019, https://conflictoflaws.de/2019/out-now-hannah-l-buxbaum-public-regulation-and-private-enforcement-in-a-global-economy-strategies-for-managing-conflict/).

In the following session, Ralf Michaels, Hamburg, and Verónica Ruiz Abou-Nigm, Edinburgh, posed the question "Is Private International Law International?". The presenters envisaged a kind of "invisible college" along the lines of Oscar Schachter, The Invisible College of International Lawyers, 72 Nw. U. L. Rev. 217 (1977 – 1978), perhaps in contrast to the somewhat disillusioned "Divisible College of International Lawyers" by Anthea Roberts, Is International Law

International?, Oxford University Press 2017, Chapter 1 – another contribution to which the presenters made reference. Against this background, the "Private International Law for Laypersons Project" (PILL) was explained, on the premise that any non-PIL lawyer counts as a layperson in this sense. Within the project, interviews with PIL lawyers were conducted, including questions like "what belongs to PIL" or "what is the question of PIL". All of that and more should result in (re-) building a truly international community, after phases of division and "parochialization" during the conflicts revolution in the USA, as well as later in EU PIL. Such a community may meaningfully devote itself to both a deep analysis of foundations as well as to working on practical solutions for cross-border settings. Otherwise, it was suggested, diplomatic conferences such those at The Hague on PIL projects and its preparatory works would suffer too much from a lack of common language for successful discourse and negotiation. The audience was pleased to be informed that a conference like the one on which this post is reporting may well count as an almost ideal "invisible college".

Máire Ní Shúilleabháin, Dublin, presented on "Habitual Residence in Private International Law: Core Elements and Contextual Variability". According to her analysis of the respective EU instruments and the case law, the term "habitual residence" strongly depends on its context, and these contextual elements are not sufficiently taken into consideration, which in turn leads to "mechanical" and irrational results. As an example, she referred to the English case of *Marinos v. Marinos* [2007] EWHC 2047 (see e.g. https://www.familylawweek.co.uk/site.aspx?i=ed907) a divorce proceeding under the Brussels II bis Regulation between a Greek husband and an English wife in which the question arose whether there could be two places of habitual residence. Shúilleabháin then identified a set of "context dependent elements" of the notion of habitual residence such as e.g. exclusivity, voluntariness, absence of any habitual residence etc., that should be applied as appears appropriate in differing normative contexts (e.g. divorce, child abduction, succession etc.).

Finally, Dicky Tsang, Hong Kong, gave a fascinating presentation about an ongoing empirical review of Chinese court practice in respect of choice of law. The underlying assumption of the project is, as was explained by the presenter, that Chinese courts do not apply foreign law, at least as long as there is no agreement on the choice of foreign law by the parties. Tsang introduced the audience to the respective steps of Chinese legislation on PIL over the years and

could indeed show that not more than around 1.3% of all the cases reviewed with a foreign element so far applied foreign law and, to date, all of these cases relied on a choice of law agreement. Tsang called for improvement and considered new guiding principles by the Supreme People's Court of China (SPC), which are guidelines for interpretation of an authoritative character. Such guidelines could bring about a more appropriate interpretation of openly-worded connecting factors such as e.g. the characteristic performance or the closest connection.

Giesela Rühl

The first of the Friday afternoon plenary sessions was devoted to an unprecedented and largely unexplored topic: Women in Private International Law. In fact, while gender issues have been studied widely in other disciplines, there is a striking gap in the private international law literature. Is this because the field has been predominantly shaped by men (in both scholarship, jurisprudence and practice)? Or is this because private international law, as a discipline, does not need a gender / feminist perspective, because it is, traditionally, understood to be neutral and detached from substantive policies and values?

The impressive panel of five female private international law scholars – Roxana Banu (University of Western Ontario, Canada), Mary Keyes (Griffith University, Queensland, Australia), Horatia Muir Watt (Ecole de droit Sciences-po, Paris, France), Yuko Nishitani (Kyoto University, Japan) and Marta Pertegás Sender (University of Antwerp, Belgium, and University of Maastricht, The Netherlands) – set out to answer these and related questions. And, in so doing, they did a remarkable job in demonstrating that private international law is not – and has never been – gender neutral. Roxana Banu and Mary Keyes, for example, showed how gender archetypes shaped traditional private international law, notably in the use of connecting factors in family law. And Horatia Muir Watt, Yuko Nishitani and Marta Pertegás Sender demonstrated how a feminist perspective, including through critical theory, can shed new light on private international law and help to better understand our discipline.

After the session attendants agreed that they had just witnessed something very special, something that might well one day be remembered as the birthdate of gender studies / feminist legal theory in private international law. In any event, the panel made clear that gender and feminist issues belong on the agenda of private international law. It is, therefore, to be hoped that after this conference

scholars from across the board (women and men) will jump on the bandwagon to embark on a challenging journey that promises unexpected and fascinating insights into an old discipline.

Saloni Khanderia

The second of the Friday afternoon sessions comprised of a mixed range of contemporary issues that have been attracting considerable attention among policy-makers at the transnational level. The first two discussions chiefly concerned the challenges involved in the recognition and enforcement of foreign judgments in other jurisdictions. Adeline Chong from the Singapore Management University asserted that there were certain commonalities in the rules on the subject among the member countries, in which divergences were in terms of interpretation rather than principle. While there some other significant differences, namely the requirement of reciprocity and the status of foreign non-monetary judgments, she argued that the harmonisation of conflict-of-law rules on the recognition and enforcement of foreign judgments among the ASEAN countries was feasible. In doing so, Chong illustrated the application of the rules in Indonesia, Thailand, Singapore, Malaysia, Laos, Myanmar and India, to name a few.

In a related vein, Nadia de Araujo and Marcelo De Nardi from PUC-Rio / UNISINOS Brazil, focused their discussion on the significance of the Hague Judgments Project on the development of the Brazilian law on the recognising and enforcement of foreign judgments. Based on a survey conducted by De Araujo and De Nardi among arbitrators, judges and academics, the study depicted the broad ranging benefits for the jurisdiction in ratifying the Hague Conference's Draft Convention on the Recognition and Enforcement of Civil and Commercial Judgments after its coming into effect. The third presentation in the session pertained to the Control of Foreign Direct Investments and Private International Law where Peter Mankowski from the University of Hamburg drew attention to the implications of the Rome Regulation (EU) 2019/452 for the screening of FDI into the Union. The fourth and last presentation of the Plenary session in the afternoon by Gerald Mäsch from the University of Münster was devoted to the complexities in the ascertainment of the applicable law to a Decentralised Autonomous Organisation.

Rui Dias

As was already discussed by *Saloni Khanderia*, the third presentation in the session pertained to the Control of Foreign Direct Investments (FDI) and Private International Law. The following lines add some additional thoughts to this session where Peter Mankowski from the University of Hamburg drew attention to Regulation (EU) 2019/452, on the basis of which the notion of FDI was defined (see Art. 2 pt. (1)). While in the past FDIs were widely welcome, with many host States even supporting FDIs through substantial subsidisation of private foreign investors, we seem to be witnessing a change in perspective with the growing presence and importance of State funds, state owned enterprises and enterprises instrumentalised for State purposes. Needless to say, trade wars and political antagonisms play an important role in this context. That is why some counter reactions are taking place, in the form of a rising level of control, namely in regards to key industries and strategic industries of host States.

After giving a concise but broad panorama of existing control regimes in national laws, Professor Mankowski addressed Regulation (EU) 2019/452 as a European framework setting a uniform screening template, even though the content of this screening will hinge on national laws. The last part of the presentation analysed the subject from the perspective of PIL, noting how FDI control law is typically a case of internationally mandatory laws, as defined in Art. 9(1) of the Rome I Regulation. Whereas there seems to be a clear case for the application of a Member State's own *lois de police* as a host State, according to Art. 9(2), the application of other State's law is more doubtful, given Art. 9(3) of the Rome I Regulation, where questions arise in the determination of the place of performance, particularly in share deals, as well as in the assessment of the fulfilment of the illegality requirement, after an actual interdiction is in place.

The fourth and last presentation of the Plenary session in the afternoon, by Gerald Mäsch from the University of Münster, was devoted to the complexities in the ascertainment of the applicable law to a DAO, an abbreviation for Decentralised Autonomous Organisation. Professor Mäsch explained how a DAO literally lived in the ether, meaning on the blockchain of Ethereum, one of bitcoin's rival crypto currencies. Interested investors sent digital coins to the fund and voted on whether money should be put in a given project, so that funds would flow automatically to that project after the approval of a proposal.

The fact that decision-making took place in cyberspace, totally decentralized, under no corporate structure, where governance rules were automated and

enforced using software, in particular smart contract code, raises difficult localization issues, and thus puzzle even the most skilful private international lawyers. In fact, it is not clear which law should be applicable to ae DAO: an exercise of characterization might lead us to identify a partnership, a company (but where is the seat or the place of incorporation of this ethereal entity?), or even a contract (even though Art. 1 (2) f of the Rome I Regulation might leave it out of its scope of application). If for the actual, original DAO a trust company was incorporated in Switzerland, not every future DAO will have the same specifics, which leaves us all with the defying question: are there law-free corners in cyber space?

Parallel Sessions (Thursday and Saturday)

On Thursday as well as on Saturday, there was a large number of parallel sessions, and we collected the following selected views and news:

Corporate Social Responsibility

Adeline Chong

This session dealt with a very timely topic given greater awareness on issues such as climate change and the exploitation of workers in developing countries. Three papers explored the relationship between private international law and corporate social responsibility (CSR). The first paper by Bastian Brunk of the University of Freiburg looked at “Private International Law for Corporate Social Responsibility” and focussed particularly on violations of human rights. Brunk discussed the modes by which the CSR agenda could be implemented (eg, by international soft law regulation) and grappled with issues arising from the fact that CSR is not a separate category in the conflict of laws. The second paper by Nguyen Thu Thuy of Nagoya University considered transnational corporations and environmental damages in Vietnam. Vietnamese law has provisions dealing with environmental pollution, but enforcement of the law is not robust. Vietnamese law also does not have any rules dealing with the piercing of the corporate veil which may enable local victims to sue non-Vietnamese parent companies. She suggested several ways in which the law could be reformed to ensure better protection for local residents against environmental pollution by transnational corporations. The last paper was by Eduardo Alvarez-Armas of Brunel Law School. He considered the significant case of *Lliuya v RWE* in which a Peruvian farmer sued RWE, a German

energy company, in Germany, claiming that RWE's contributions to global warming contributed to the melting of a glacial lake near his home. Alvarez-Armas highlighted the impact of Article 17 of the Rome II Regulation on climate change litigation, which may enable defendants to escape or reduce their liability. A lively discussion followed the papers raising thought-provoking questions such as the extent to which each of us, as fellow contributors to climate change, ought to be held responsible, and the proper balance to be struck between the rights of victims of climate change and the rights of energy corporations who are, after all, producing a necessary resource.

Child Abduction

Apostolos Anthimos

In one of the morning sessions, chaired by Prof. Nishitani, Kyoto University, Child Abduction was scrutinized from a different perspective by Prof. Lazic, Utrecht University & T.M.C. Asser Institute, and Dr. Jolly, South Asian University New Delhi. Prof. Lazic elaborated on the expected repercussions of the forthcoming Regulation 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction
(Brussels II bis Recast), whereas Dr. Jolly focussed on the situation in her jurisdiction, explaining the reasons why India has still not ratified the Hague Convention.

In the ensuing discussion, Prof. Beaumont expressed in an adamant fashion his reservations in regards to the added value of Chapter III (Articles 22-29) of the new Regulation. Practical aspects of the interdependence between relocation and child abduction were also debated, on the occasion of a very recent ruling of the Greek Supreme Court on the matter.

ADR

Apostolos Anthimos

The noon session, chaired by Prof. de Araujo, Pontifical Catholic University, Brazil, included four presentations on ADR issues. *Dr. Lederer,* Hogan Lovells, Munich, presented the recent efforts of the EU in the field of ODR. Dr. Meidanis, Meidanis Seremetakis & Associates, Athens, and Ms. Saito, Kobe University,

examined the issue of the recognition and enforcement of mediation settlement agreements in the EU and the Hague Judgments Convention respectively. Finally, Dr. Walker, Warwick University, focussed on the interrelationship between ADR & Hague Children's Conventions. In addition, she reported on the treatment of the subject matter from a UK perspective.

The nature of MSA (Mediated Settlement Agreements) monopolized the ensuing discussion. Interesting interventions and insightful views were voiced by Prof. Pertegás Sender, Maastricht University, and Prof. Hau, Munich University.

"Technology 1"

Ivana Kunda

Technology was one of the common denominators for the presentation in the last Thursday term for parallel sessions. Chaired by Prof. Matthias Weller, University of Bonn, this session touched upon three different technology-related topics. The first one, presented by the author of these lines, attempted to raise awareness about the lack of PIL in the EU Digital Single Market strategy. This being said, the development on the PIL plane are increasingly related to digital environment, and especially internet, which is intrinsically cross-border. Following the chair's question, the conclusion was that an integral approach is warranted particularly because the traditional connecting factors often lead to illogical results or are impossible to apply altogether. This has been confirmed also by Prof. Koji Takahashi, Doshisha University, who analysed in depth the issue of Blockchain-based crypto-assets from the PIL perspective. He discussed contractual issues, in particular difficulties related to characterisation and characteristic performance, and tort and quasi-delicts focusing on the constant problems of localisation. He was reluctant to accept localisation of the platform's by the owners' headquarters, as suggested from the audience in the course of discussion. Further, he pointed to the property-related dilemmas in the context of bankruptcy which came into spotlight due to the Tokyo District Court case *Mt. Gox*, and restitution claim subsequent to theft. Last speaker Dr. Marko Jovanovic, University of Belgrade, reopened the issue of online defamation, providing a fresh look at some policy aspects thereof. He rejected the link to the tortfeasor arguing that will result in statute shopping. He also addressed the pros and cons of the place where the damage occurs, place of the victim's habitual residence, and the centre of interest of the victim (borrowed it from the jurisdiction area, what is the

already practiced by the Dutch courts as prof. Aukje van Hoek, University of Amsterdam, commented). One of the points raised concerned also the role of the private acts of harmonisation, which the online platforms seem to be relying on.

"Jurisdiction V"

Ekaterina Pannebakker

The last and actually fifth parallel session on Jurisdiction, chaired by Alexander Layton QC, started with an overview of the new PIL rules in Japan, South Korea and China, including the Japanese Civil procedure law of 2012, Korean Private International Law act of 2018, the Legal Assistance project in Japan and others. In her overview, Eonsuk Kim from Bunkyo Gakuin University, Tokyo, traced down the borrowings between these countries' PIL laws and – most interestingly – the influence of the uniform EU PIL rules on the developments of PIL in these countries. Thereafter, Alexander Layton QC, in his capacity as the chair of the session, presented the paper prepared by Dr. Ling Zhu from Hong Kong Polytechnic University, who could not attend the conference. Dr. Ling Zhu's contribution addressed the conflicts between the jurisdiction of the maritime Courts and the People's Courts in China. Finally, it was my own turn to zoom in on the nuances in the definition of the autonomous concept of 'habitual residence of the child' in the rules on jurisdiction in matters of parental responsibility of Brussels IIa.

The "Jurisdiction" Track of the Conference ("Jurisdiction I to V")

Tobias Lutzi

Many of the parallel sessions were held together by a common thread, allowing participants to put together a relatively coherent line of panels, if they so wished. This concept certainly worked very well as far as the "jurisdiction" track of the conference was concerned, which connected a series of five panels in total. They created highly stimulating discussions and a genuinely fruitful exchange of ideas between panelists and members of the audience, many of whom consequently found themselves in the same room more often than not.

The discussion was particularly lively in those panels that managed to bring together multiple papers engaging with the same or similar questions, such as the two panels on jurisdictions clauses (which offered theoretical analysis (Brooke

Marshall, who took a deep dive into the possible conceptual bases, and Elena Rodriguez Pineau), new angles (Sharar Avraham-Giller and Rui Dias, who addressed the particularities of intra-corporate litigation), and numerous national perspectives (Inez Lopes, Valesca Raizer, Tugce Nimet Yasar, and Biset Sena Gunes) or the panel on the Brussels Ia Regulation (combining a discussion of recent trends in its interpretation by the CJEU (Michiel Poesen, regarding Art 7(1), and Laura van Bochove, regarding Art 7(2)) with somewhat more basic questions as to its interplay with national law (my own paper).

Two further panels then added a large variety of additional aspects and ideas, including *inter alia* a discussion of the need for, and adequacy of, the so-called gateways for service-out jurisdiction in English law (Ardavan Arzandeh), the new Israeli legislation on international jurisdiction (Iris Canor), the apparent convergence of international discussions in Japan and Korea (Eonsuk Kim), the elusive concept of the habitual residence of the child in the Brussels IIa Regulation (Ekaterina Pannebakker), and the future work of the HCCH with regard to "direct" jurisdiction (Eva Jueptner; as opposed to "indirect" jurisdiction in the sense of the 2019 Convention).

It is hardly surprising that this wide panorama of international jurisdiction featured many cases and controversies that had also been discussed on this blog, including, for example, the Canadian Supreme Court's decision in *Haaretz.com v Goldhar* (https://conflictoflaws.de/2018/supreme-court-of-canada-israel-not-ontario-is-forum-conveniens-for-libel-proceedings/) (discussed by Stephen Pitel), the UK Supreme Court's decision in *Brownlie v Four Seasons* (https://conflictoflaws.de/2018/uksc-on-traditional-rules-of-jurisdiction-brownlie-v-four-seasons-holdings-incorporated/) (discussed by Ardavan Arzandeh) or the European Court of Justice's decisions in *Feniks* (https://conflictoflaws.de/2018/forcing-a-square-peg-into-a-round-hole-the-actio-pauliana-and-the-brussels-ia-regulation/) (discussed by Michiel Poesen) and *Schrems* (https://conflictoflaws.de/2018/fifty-shades-of-facebook-blue-ecj-renders-decision-on-consumer-jurisdiction-and-assigned-claims-in-case-c-49816-schrems-v-facebook/) (discussed by Laura van Bochove).

Outlook

The 8th Conference of the Journal of Private International Law again was a great

success, both scholarly as well as socially. The next conference in 2021 will be hosted by one of the blog's editors Adeline Chong in Singapore. We are looking forward to it!