The Fourth Private International Law Conference for Young Scholars in Vienna

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On February 23rd and 24th, 2023, young scholars came together at the Sigmund Freud University, Vienna, to discuss different views on private international law under the theme of "Deference to the foreign – empty phrase or guiding principle of private international law?". Continuing the success of the previous three German-Speaking Conferences of Young Scholars in PIL from previous years in Bonn, Würzburg and Hamburg, this year's conference was hosted in Austria by Martina Melcher and Florian Heindler who organized the event together with Andreas Engel, Katharina Kaesling, Ben Köhler, Bettina Rentsch, Susanna Roßbach and Johannes Ungerer.

As keynote speaker, ***Professor Horatia Muir Watt (Sciences Po Paris)*** borrowed from the often-used metaphor of the "dismal swamp" to present an "ecosophical" approach to private international law. For this purpose, she engaged anthropological and philosophical insights of Western and indigenous origin on the meaning of law and the regulatory functions of private international law in particular.

Vanessa Grifo (University of Heidelberg) presented possible insights from the theory of the post-migrant society for international family law. Based on sociological accounts of "post-migrant" identities, *Grifo* discussed that a person's cultural identity can form "hybrid" solidarity to different legal systems and oppose the collective national identity of the country of immigration. While previously, according to *Kegel*, connecting factors were understood to build upon certain generally neutral conflict-of-laws interests, cultural identity is becoming a relevant aspect of party interests, which she demonstrated with the help of different recent judgement of the German Federal Court of Justice. This paradigm, *Grifo* argued, shows a shift from the system of the traditional German understanding of connecting factors following Kegel.

Victoria Garin (European University Institute, Florence) examined the connection between private international law and the concept of Relativism. The basis of her analysis is the contemporary private international law attempting to coordinate conflicting regulatory claims of several legal systems. *Garin* identified extraterritoriality, difference and equivalence as assumptions used in private international law to solve this conflict. These assumptions, *Garin* argued, are premised on Relativism in its forms as descriptive and normative theory. Through the lens of Relativism a critical examination of private international law, especially regarding current developments in literature, was made. *Garin* explained to what extent the criticism of Relativism can be applied to private international law theory.

Dr Shahar Avraham-Giller (Hebrew University Jerusalem) presented two seemingly contradictory developments in private international law. First *Avraham-Giller* pointed out, that legal questions are increasingly restrictively categorised as procedural questions in the EU and in common law states which leads to a broader application of foreign law as the *lex causae*. The application of the *lex fori* to procedural questions can itself be understood as an overriding mandatory provision of the forum. On the other hand, as *Avraham-Giller* projected, an increased recourse of courts to the means of other overriding mandatory provisions to safeguard national public interests can be observed. In her opinion, these seemingly contradictory developments can be explained as an answer to the development of a more "private" understanding of civil proceedings, seeking primarily peaceful settlement of private disputes, while enforcing other values and public goals through mandatory overriding provisions at the same time.

Raphael Dummermuth (University of Fribourg) then shed light on deference to the foreign in the context of the interpretation of the Lugano Convention. First, he addressed the question of the implementation of the objective of taking into account the case law of the ECJ by non-EU courts, as stated in Art. 1(1) Protocol 2 Lugano Convention. The application of the Lugano Convention, he pointed out, requires a double consideration of the foreign: the court must consider standards or judgments that are outside the Lugano Convention and in doing so apply a foreign methodology. Nonetheless, the one-sided duty of consideration is limited where the results of interpretation are decisively based on principles of EU law. He came to the conclusion, that precedent effect should therefore only be given to

results that are justifiable within the scope of the classical methodology.

The first day of the conference closed with a panel discussion between ***Professor Dietmar Czernich, Professor Georg Kodek*** *and* ***Dr Judith Schacherreiter*** on deference to the foreign in private international legal practice and international civil procedure. The discussants shared numerous insights: from the appointment of expert opinions on foreign law, to deference to the foreign in international commercial arbitration and the practice of legal advice.

Selina Mack (LMU Munich) opened the second day of the conference examining the *ordre public* in the field of succession law using the example of the right to a compulsory portion in Austria and Germany. *Mack* began by comparing similar regulations in Germany and Austria with the so-called family provision in England. She then contrasted a decision of the Supreme Court of Austria (OGH) with a decision of the German Federal Court of Justice (BGH), both of which deal with the *ordre public* according to Art. 35 of the European Inheritance Regulation when applying English law. The *ordre public* clause under Art. 35 is to be applied restrictively. While the OGH did not consider the *ordre public* to be infringed, the BGH, on the other hand, assumed an infringement. *Mack* concluded that this is a fundamental disrespect of the foreign by the BGH.

Tess Bens (MPI Luxembourg) examined methods of enforcing foreign judgments under the Brussels Ia Regulation. Said Regulation does not, in principle, harmonise enforcement law. She presented the enforcement mechanism as applying the enforcement law of the enforcing state by means of substitution or, insofar as the order or measure was unknown to the enforcement law, by means of transposition. Due to structural differences in the enforcement law of the Member States, as *Bens* outlines, practical problems can nevertheless arise. Especially since the abolition of the exequatur procedure in the case of insufficient concretisation of the enforcement order, the Brussels Ia Regulation does not provide a procedure. Finally, she discussed that these frictions might be mitigated by anticipating differences and requirements of the enforcing by the courts, nonetheless limited due to the difficulty of predictability.

Afterwards, the participants were able to discuss various topics in a small group for one hour in three parallel groups, each introduced by two impulse speeches.

The first group looked at the factor of nationality in private international law.

Stefano Dominelli (Università di Genova) introduced into the current debate on the connecting factor of nationality in matters concerning the personal status. In his opinion, it is debateable whether a shift towards the application of local law really strengthens deference to the foreign. ***Micheal Cremer (MPI Hamburg)*** looked at the handling of so-called golden passports in the EU. He pointed out, that European conflict of laws regularly does not take the purchased nationality into account, being in line with most of the theoretical approaches to the nationality principle.

The second group focused on the influence of political decisions on the application of foreign law. ***Dr Adrian Hemler (University of Konstanz)*** presented the concept of distributive justice as a reason for applying foreign law. He emphasised, that the difference between purely national and foreign constellations makes the application of foreign law necessary. In his presentation, ***Felix Aiwanger (LMU Munich)*** looked at different standards of control with regard to foreign law. He argued that legal systems that can be considered as reliable are subject to a simplified content review.

The third group discussed the treatment of foreign institutions in international family law. ***Dr Lukas Klever (JKU Linz)*** presented the recognition of decisions on personal status in cases of surrogacy carried out abroad. He discussed differences and possible weaknesses in the recognition under the Austrian conflict of laws and procedural law. ***Aron Johanson (LMU Munich)*** then provided a further perspective with a look at the institute of polygamy. He explained, that while in Germany a partial recognition can be possible, Sweden had switched to a regular refusal of recognition. Subsequently the question of a duty of recognition arising from the free movement of persons as soon as one member state recognises polygamy was asked.

Dr Tabea Bauermeister (University of Hamburg) devoted her presentation to the conflict of laws dimension of the claim for damages in Art. 22 of the European Commission’s proposal for a directive on corporate sustainability due diligence (CSDDD), paragraph 5 of which compels the member states to design it as an overriding mandatory provision. She outlined, that regulatory goals can also be achieved through mutual conflict-of-laws provisions. An example of this is the codification of international cartel offence law. *Bauermeister* concluded, that the use of mandatory overriding provisions instead of special conflict-of-laws provisions expresses a distrust of the foreign legislature’s competence or

willingness to regulate and therefore represents a disregard of the foreign.

Dr Sophia Schwemmer (Heidelberg University) then examined private enforcement under the CSDDD vis-à-vis third-state companies. She stated, that while third-state companies were included in the scope of application insofar as they are active in the EU internal market, the applicability of the CSDDD could normally not be achieved using the classic conflict-of-laws rules. The CSDDD resorts to an overriding mandatory provision for this purpose. However, *Schwemmer* concluded that a different approach, e.g. an extended right of choice of law for the injured party, was also imaginable and preferable.

As last speaker, ***Dr Lena Hornkohl (University of Vienna/Heidelberg University)*** addressed the effects of EU blocking regulations on private law. She stated that the application of EU blocking statutes as a reaction to extraterritorial third-country regulations can lead to almost irresolvable conflicts in private law relationships. *Hornkohl* then critically examined the ECJ case law that postulates the direct applicability of the Blocking Regulation in private law relationships. Binding private parties to the Blocking Regulation, she concluded, leads to the instrumentalisation of private law at the expense of private parties with the aim of enforcing foreign policy objectives.

A conference volume will be published by Mohr Siebeck Verlag later this year. The next PIL Young Researchers Conference will take place in Heidelberg in 2025.