Multiple defendants and territorial intellectual property rights: Painer revisits Roche through Freeport

Our colleague Dr. Mireille van Eechoud, currently of double affiliation as an Associate Professor at the Institute for Information Law, Universiteit van Amsterdam and a Visiting Scholar at the University of Cambridge Centre for Intellectual Property and Information Law, was kind to share with us her views on the Painer case (Case C-145/10) and its relation to the preceding EU Court of Justice case law on the matter. Here is her full opinion:

> *Could the CJEU's new stance on art. 6(1) Brussels Regulation 44/2001 be explained by the fact that the Court is very activist of late in shaping areas of copyright law which were not considered harmonized – of which the Painer case is itself an example? Or has the Court taken to heart the criticism unleashed by its Roche judgment on multiple defendants jurisdiction? The Advocate General certainly seemed to, citing among others the position of the European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP). Whatever the reason, the Painer judgment from 1 December 2011 (Case C-145/10) signals a departure from the strict formalist-territorial approach to jurisdiction in intellectual property matters. The Court says that joining defendants under art. 6(1) Brussels Regulation is not precluded 'solely because actions against several defendants for substantially identical copyright infringements are brought on national legal grounds which vary according to the Member States concerned'.*
>
> *In the case at hand, a freelance photographer from Austria claimed infringement of her copyright in portrait photos. She had made a series of portrait photos of a 6 year old girl at a nursery. The girl was later abducted and spent 8 unspeakably horrible years in captivity. The photographer gave prints of the portrait photos to the parents and police. Some of them were subsequently released by Austrian authorities in the context of the search. The girl's eventual escape was a major news item across Europe. Lacking current photos, the defendant newspapers published the old portrait photos. The photographer had not been asked for permission, nor credited.*

The photographer brought various actions in Austrian courts. In these disputes the question whether there was copyright in the photos, or some other right, and what the scope of such protection is under German and Austrian law was hotly debated. The proceedings which led to a preliminary reference were against five newspapers: one established in Austria, the other four in Germany. The Austrian newspaper was only distributed in Austria; the German newspapers had primary distribution in Germany with additional distribution in Austria.

So could the Austrian court assume jurisdiction for the infringements in Germany and Austria, with the Austrian newspaper as anchor-defendant under article 6 Brussels Regulation? The provision allows a plaintiff to consolidate actions against different defendants resident in the EU in one domestic court, 'provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'. Previously, in the much criticized case C-539/03 – Roche Nederland v. Primus, the Court ruled that a close connection requires a same situation of law and of fact. When claims concern the infringement of territorially distinct patent rights (as granted under the European Patent Convention), for that reason alone there can be no risk of irreconcilable judgments because there is no 'same situation of law'.

In Painer, the Court seems to abandon that reading. The fact that the claims against the defendants concern infringement of the territorially distinct copyrights for Germany and Austria does not of itself preclude the possibility of consolidating them on the basis of article 6 Brussels Regulation. This is the more so, the Court adds, if the applicable laws in question are very similar. The referring Austrian court had concluded that was the case: German and Austrian copyright and related rights law share essentially the regimes for photographs (which is partly due to EU harmonization).

Oddly enough, and unlike the Advocate General, the Court does not refer to its Roche judgment. Rather, it builds its reasoning primarily on Freeport *(case C 98/06). There the Court stated that the fact that claims against defendants have different legal bases (e.g. in contract and tort) does not preclude application of art. 6 per se. The more obvious parallel in intellectual property matters isof course in situations where say the claim against one defendant is based in copyright infringement, and the claim against the co-defendant in contract*

(breach of a distribution agreement for example). I am not so sure that Freeport is easily applied to cases where infringement of copyright in different countries is at stake.

In Roche, A European Patent had been granted through the European Patent Office, which resulted in a bundle of patents for the plaintiff, each equivalent to a national patent for each of the countries applied for. The subsistence and scope of these national patents is very similar across European Patent Convention states. The criticism of (among others) CLIP is that in cases where national intellectual property rights have been unified or harmonized to a great degree, it is artificial to bar a plaintiff from joining claims merely because formally speaking different territorial rights are involved (see the CLIP position).

The defendants in Roche were all part of the same parent company, and basically sold the same allegedly infringing products in their respective local markets. Yet because each defendant acted locally (albeit under the direction of the parent), allegedly infringing the local patent, the Court did not accept there was a same situation of law and fact. In Painer, it is not clear whether there is any connection between the defendants. They may have acted similarly from the perspective of the plaintiff: each published photographs she made, over a similar period and as illustration of news about roughly the same matter. But I don't see how that qualifies as a 'same situation of fact' for art. 6 purposes. Surely, the fact that persons behave in similar ways with respect to a (potentially) copyrighted image does not make the claims closely connected?

The answer to that question is in the Court's observation that 'It is, in addition, for the referring court to assess, in the light of all the elements of the case, whether there is a connection between the different claims brought before it, that is to say a risk of irreconcilable judgments if those claims were determined separately. For that purpose, the fact that defendants against whom a copyright holder alleges substantially identical infringements of his copyright did or did not act independently may be relevant [my italics].' I would argue that whether or not the co-defendants acted independently is in cases like these not a potentially relevant factor, but a crucial factor. If not, in this case our Austrian photographer could sue before Austrian courts any of the German publishers for distributing newspapers with the photos in Germany, because a completely different unrelated paper based in Austria happened to have printed the same

photo. There has to be some relationship between the defendants, or at least between the anchor-defendant and the co-defendants. If not, all that is left is the foreseeability escape the Court articulated in Freeport.

Another article on Spider-in-the-Web doctrine after Roche ruling

Matthias Rößler's article "The Court of Jurisdiction for Joint Parties in International Patent Disputes" published in the *International Review of Industrial Property and Copyright Law (IIC)* Number 4, 2007, pp. 380-400, discusses a recently much debated issue related to the enforcement of international patent disputes against multiple defendants. The abstract of the article states:

> The paper discusses the development – and decline? – of the so-called "Spider-in-the-Web" rulings relating to the simplified filing of lawsuits against several cooperating companies in proceedings for the infringement of respective national patents in Europe. It shows the efforts and arguments that have been used in order to be able to apply Art. 6(1) of Council Regulation No. 44/2001 in cross-border patent disputes, and explains how the much-awaited *Roche* decision of the European Court of Justice brought clarity to the issue, yet not a globally viable solution.

The article is accessible on-line via the Beck-Online site.

Here are some of the previous references to the related issues posted here previously: Court Limits Extraterritoriality of Federal Patent Law, U.S. Federal Courts and Foreign Patents: Recent Decisions Affecting the Global Harmonization of Patent Law, CLIP papers on Intellectual Property in Brussels I and Rome I Regulations, Last Issue of Revue Critique de Droit International Privé, Patent Litigation in the EU – German Case Note on "GAT" and "Roche", Is Cross-Border Relief in European Patent Litigation at an End?, Jurisdiction over Defences and Connected Claims, Jurisdiction over European Patent Disputes, and the European Payment Procedure Order.

Patent Litigation in the EU – German Case Note on “GAT” and “Roche”

A recently published and very interesting case note by *Jens Adolphsen* (Gießen) deals critically with the two recent and much discussed ECJ decisions on patent litigation – "GAT" and "Roche" – by arguing both decisions illustrated that effective infringement proceedings in intellectual property matters are not possible on the basis of the Brussels I Regulation.

Adolphsen starts his annotation by an analysis of the ECJ's reasoning in "GAT". Here the ECJ has held that,

> *[a]rticle 16 (4) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters […] is to be interpreted as meaning that the rule of exclusive jurisdiction laid down therein concerns all proceedings relating to the registration or validity of a patent, irrespective of whether the issue is raised by way of an action or a plea in objection.*

This leads to the result that the continuation of infringement actions with an indirect examination of the validity of the patent is inadmissible since this "would undermine the binding nature of the rule of jurisdiction laid down in Article 16 (4) of the Convention". (ECJ, para. 26).

This approach is criticised by *Adolphsen* – who favours a restrictive interpretation of Art. 16 (4) Brussels Convention – for obstructing an effective protection by patent.

Secondly, *Adolphsen* attends to the "Roche" decision where the ECJ has held that,

> *[a]rticle 6 (1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [..] must be*

> *interpreted as meaning that it does not apply in European patent infringement proceedings involving a number of companies established in various Contracting States in respect of acts committed in one or more of those States even where those companies, which belong to the same group, may have acted in an identical or similar manner in accordance with a common policy elaborated by one of them.*

Adolphsen agrees with the ECJ regarding the first question referred for a preliminary ruling. Here, the ECJ has held that,

> *[…] in the case of European patent infringement proceedings involving a number of companies established in various Contracting States in respect of acts committed in one or more of those States, the existence of the same situation of fact cannot be inferred, since the defendants are different and the infringements they are accused of, committed in different Contracting States, are not the same.*

Adolphsen points out that the negation of a connection in this context makes allowance for the fact that national patents of a European patent are subject only to the national law of the State they have been granted for.

However, *Adophsen* criticises the point of view adopted by the ECJ with regard to the second question. Here the ECJ declined a connection even if companies are involved which belong to the same group and have acted in an identical or similar manner in accordance with a common policy elaborated by one of them.

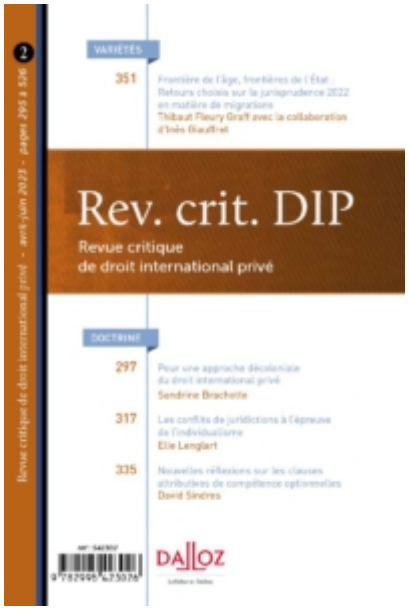
The ECJ laid – according to the author – too much weight on the existence of the same situation of fact and law and adopted therefore an approach far too formalistic.

This criticism leads *Adolphsen* to questioning fundamentally whether it was appropriate to transfer the meaning of "closely connected" – which has now been incorporated into Art. 6 (1) and Art. 28 (3) Brussels I Regulation – from Art. 22 (3) to Art. 6 (1) Brussels Convention since both provisions are based on different considerations and goals.

The full annotation can be found in IPRax 2006, 15 et seq.

Revue Critique de droit international privé – issue 2023/2

The second issue of the *Revue critique de droit International privé* of 2023 was released in August. It contains four articles and several case notes.



The first part of the issue features the doctrinal work of two young authors, who confront PIL techniques with contemporary developments in social sciences.

The first article *Pour une approche décoloniale du droit international privé* (A Decolonial Approach to Private International Law) is authored by Dr Sandrine Brachotte (Université Saint-Louis & Université de Lille). Following her doctoral work on *The Conflict of Laws and Non-secular Worldviews: A Proposal for Inclusion* (see presentation over at EAPIL), Dr Brachotte discusses colonial studies' implications for PIL scholarship. She examines how plural normativities challenge the traditional conception of conflict of laws and then outlines the potential form of a decolonial PIL. An English translation of the article is available on the website of the editor. Its abstract reads as follows:

> *This article presents the decolonial approach to private international law, which has recently entered the list of pressing topics for the discipline, not only in colonised countries but also in Europe. In France, the subject may not yet be addressed as such, but it at least appeared in a Ph. D. thesis defended at the Sciences Po Paris Law School in May 2022, entitled "The Conflict of Laws and*

Non-secular Worldviews: A Proposal for Inclusion". This thesis argues for an alternative theorisation of the notions of party autonomy, recognition, and international jurisdiction to make them more inclusive of non-occidental worldviews. After having offered a description of the decolonial approach and the current enterprise of decolonisation of private international law, this contribution summarises the essential points of the Ph. D. thesis in this respect and identifies the broader questions that it raises for private international law, especially as regards the notions of "law", "foreign" and "conflict".

Dr Élie Lenglart (Université Paris II Panthéon Assas) signed the second article on *Les conflits de juridictions à l'épreuve de l'individualisme* (Conflicts of Jurisdiction and Individualism). Dr Lenglart prolongs the reflection of his doctoral work on *La théorie générale des conflits de lois à l'épreuve de l'individualisme* (*The General Theory of Conflicts of Laws Confronted with Individualism)* in the field of conflicts of jurisdiction. He shows how the rules on jurisdiction and circulation of foreign judgments have been progressively liberalized, the satisfaction of individual interest becoming the gravity centre of PIL. The abstract reads as follows :

Individualism is one the characteristic features of modern legal theories. The emergence of the individualistic approach is profoundly linked to a special perception and evaluation of the reality based of the superiority of the individual. This conception has had decisive consequences in private international law. The impact of this tendency should not be underestimated. Its influence is noticeable in the first place on the determination of international competency of French jurisdictions, both via the provision of available courts to individuals and via the individuals' propensity to extend their choices of jurisdictions based on their personal interests. It also influences the recognition and enforcement of foreign judgments by imposing the legal recognition of individual statuses under extremely liberal conditions, reorganizing in turn the whole system around the individual.

In the third article, Prof. David Sindres (Université d'Angers) shares some *Nouvelles réflexions sur les clauses attributives de compétence optionnelles* (New Reflections on Optional Jurisdiction Clauses). He successively discusses the principles and conditions of liceity of both the jurisdiction clauses of optional application and the clauses that establish an option between designated

jurisdictions under Brussel 1 recast (from a French law perspective).

The fourth article is dedicated to a selective account of French and European developments in immigration law. Prof. Thibaut Fleury Graff (Université Versailles Saint-Quentin-en-Yvelines) and Inès Giauffret (Ph. D. candidate at Université Versailles Saint-Quentin-en-Yvelines) discuss recent case law on the "age border" (cases about the appreciation of minority and the rights of detained minors) and the "state border" (cases about measures of placement in waiting zones, detention, and expulsion in French law) in a tensed international context.

The full table of contents is available here.

Previous issues of the Revue Critique (from 2010 to 2022) are available on Cairn.

A conference to honor Professor Linda Silberman at NYU

This week a conference took place to honor Professor Linda Silberman at New York University (NYU). She is currently the Clarence D. Ashley Professor of Law Emerita at NYU. The full program is available here.

Anyone who has had the privilege of taking Linda Silberman's classes would agree with me that she is an outstanding scholar and professor. Someone who takes the art of teaching to another level, a very kind and brilliant person who truly enjoys building the legal minds of the lawyers and academics of the future. In my view, nothing in the academic world compares to taking the "international litigation" class with her. Thus, this is more than a well-deserved event.

The conference flyer indicates the following:

"When Professor Linda Silberman came to NYU in 1971, she was the *first woman* hired for the NYU Law tenure-track faculty. In 1977, she became the *first tenured female professor on the NYU Law faculty*. Although she took emerita status in September 2022, she continues as the Co-Director of the NYU Center on Transnational Litigation, Arbitration, and Commercial Law. For over 30 years, Professor Silberman taught hundreds of first-year students Civil Procedure and she is the co-author of a leading Civil Procedure casebook that starts with her name. Throughout her career, Professor Silberman also taught Conflict of Laws and in the past twenty-five years branched out to teach Comparative Procedure, Transnational Litigation, and International Arbitration. Professor Silberman is a prolific scholar and her articles have been cited by numerous courts in the United States, including the Supreme Court, and also by foreign courts. Professor Silberman has been active in the American Law Institute as an Advisor on various ALI projects, including serving as a co-Reporter on a project on the recognition of foreign country judgments. She has also been a member of numerous U.S. State Department delegations to the Hague Conference on Private International Law. In 2021, Professor Silberman gave the general course on Private International Law at the Hague Academy of International Law."

Below I include some of the publications of Professor Silberman (an exhaustive list is available here):

Books

- Civil Procedure: Theory and Practice (Wolters Kluwer 6th ed., 2022; 5th ed., 2017; 4th ed., 2013; 3d ed., 2009; 2d ed., 2006; 1st ed., 2001) (with Allan R. Stein, Tobias Barrington Wolff and Aaron D. Simowitz)
- Recognition and Enforcement of Foreign Judgments (Edward Elgar Publishing, 2017) (ed. with Franco Ferrari)
- Civil Litigation in Comparative Context (West Academic Publishing 2d ed., 2017; 1st ed., 2007) (with Oscar G. Chase, Helen Hershkoff, John Sorabji, Rolf Stürner et al.)
- Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute (American Law Institute, 2006) (with Andreas F. Lowenfeld)
- The Hague Convention on Jurisdiction and Judgments: Records of the

Conference held at New York University School of Law on the Proposed Convention (Juris, 2001) (ed. with Andreas F. Lowenfeld)

Articles

- "Nonparty Jurisdiction," 55 Vand. J. Transnat'l L. 433 (2022) (with Aaron D. Simowitz)
- "Introductory Note to Monasky v. Taglieri (U.S. Sup. Ct.)," 59 Int'l Legal Materials 873 (2020)
- "Misappropriation on a Global Scale: Extraterritoriality and Applicable Law in Transborder Trade Secrecy Cases," 8 Cybaris Intell. Prop. L. Rev. 265 (2018) (with Rochelle C. Dreyfuss)
- "Lessons for the USA from the Hague Principles," 22 Uniform L. Rev. 422 (2017)
- "The Transnational Case in Conflict of Laws: Two Suggestions for the New Restatement Third of Conflict of Laws—Judicial Jurisdiction over Foreign Defendants and Party Autonomy in International Contracts," 27 Duke J. Compar. & Int'l L. 405 (2017) (with Nathan D. Yaffe)
- "The US Approach to Recognition and Enforcement of Awards After Set-Asides: The Impact of the Pemex Decision," 40 Fordham Int'l L.J. 799 (2017) (with Nathan Yaffe)
- "Recognition and Enforcement of Foreign Judgments and Awards: What Hath Daimler Wrought?" 91 N.Y.U. L. Rev. 344 (2016)(with Aaron Simowitz)
- "The End of Another Era: Reflections on Daimler and Its Implications for Judicial Jurisdiction in the United States," 19 Lewis & Clark L. Rev. 675 (2015)
- "Limits to Party Autonomy at the Post-Award Stage," in Limits to Party Autonomy in International Commercial Arbitration (Juris 2016)(with Maxi Scherer)
- "United States Supreme Court Hague Abduction Decisions: Developing a Global Jurisprudence," 9 J. Comp. L. 49 (2014);
- "The Need for a Federal Statutory Approach to the Recognition and Enforcement of Foreign County Judgments," 26th Sokol Colloquium (2014)
- "Civil Procedure Meets International Arbitration: A Tribute to Hans Smit," 23 Am Rev. Int. Arb. 439 (2012)

- “Goodyear and Nicastro: Observations from a Transnational and Comparative Perspective,” 63 S.Ct. L. Rev. 591 (2011)
- “Morrison v. National Australia Bank: Implications for Global Securities Class Actions,” 12 YB. Priv. Int. L. (2011 “The Role of Choice-of-Law in National Class Actions,” 156 U. Pa. L. Rev. 2001 (2008).

* photo credited to NYU

Matters Relating to a Contract – The Saga Continues (with AG Szpunar’s Opinion on Case C-265/21, AB et al v Z EF)

With Case C?265/21, the CJEU is bound to add another chapter to the never-ending story of accurately describing the scope of the head of special jurisdiction for contracts in what is today Art. 7(1) Brussels Ia. The Opinion by AG Szpunar, which was published last week, might give readers an indication of what to expect.

The case arises out of an action for a declaration that the claimants are the owners of 20 works of art, which are currently in their possession. While the claimants argue that they have bought the pieces from their (step)mother, who had bought them from their two creators (the parents of the defendant), the defendant, a German domiciliary, claims that her parents had only temporarily stored the works in the gallery of the claimants’ (step)mother in Liège, Belgium. The case was dismissed in the first instance for lack of international jurisdiction as the Belgian court found itself unable to establish a contractual connection linking the claimants to the defendant.

On the claimants' appeal, who argue that the claim should nonetheless be qualified as contractual in light of the two sales contracts (between the defendant's parents and the claimants' (step)mother and between their (step)mother and themselves), with both relevant places of performance being located in Belgium, the Cour d'appel de Bruxelles referred the following questions to the CJEU:

> *1. Must the concept of 'matters relating to a contract', within the meaning of Article 5(1) of Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('the Brussels I Regulation'):*
>
> *a. be interpreted as requiring the establishment of a legal obligation freely assumed by one person towards another, which forms the basis of the applicant's action, and is that the position even if the obligation was not freely assumed by the defendant and/or towards the applicant?*
>
> *b. If the answer is in the affirmative, what must the degree of connection between the legal obligation freely assumed and the applicant and/or the defendant be?*
>
> *2. Does the concept of 'action' on which the applicant 'relies', like the criterion used to distinguish whether an action comes under the concept of matters relating to a contract, within the meaning of Article 5(1) of the Brussels I Regulation, or under 'matters relating to tort, delict or quasi-delict', within the meaning of Article 5(3) of that regulation (C-59/19, paragraph 32), entail verification of whether the interpretation of the legal obligation freely assumed seems to be indispensable for the purpose of assessing the basis of the action?*
>
> *3. Does the legal action whereby an applicant seeks a declaration that he or she is the owner of an asset in his or her possession in reliance on a double contract of sale, the first entered into by the original joint owner of that asset (the spouse of the defendant, who is also an original joint owner) with the person who sold the asset to the applicant, and the second between the latter two parties, come within the concept of matters relating to a contract within the meaning of Article 5(1) of the Brussels I Regulation?*
>
> *a. Is the answer different if the defendant relies on the fact that the first contract was not a contract of sale but a contract of deposit?*

b. If one of those situations comes within the concept of matters relating to a contract, which contract must be taken into consideration for the purpose of determining the place of the obligation which serves as the basis of the claim?

4. Must Article 4 of Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) be interpreted as applying to the situation referred to by the third question referred for a preliminary ruling and, if so, which contract must be taken into consideration?

After quickly dismissing the fourth question (which the Cour d'appel might indeed have referred somewhat prematurely at this stage), the Opinion (which is not available in English), starts with a comprehensive review of the Court's case law on the interpretation of what is now Art. 7(1) Brussels Ia. It culminates in the following summary (references ommitted; own emphasis):

65. Eu égard aux considérations qui précédent, il y a lieu de constater, en premier lieu, que la jurisprudence de la Cour relative à l'interprétation de la notion de « matière contractuelle », au sens de l'article 5, point 1, du règlement nº 44/2001, ne saurait être considérée comme uniforme, ce qui explique les difficultés rencontrées par les juridictions nationales pour déterminer, encore aujourd'hui, si les litiges relèvent ou non de cette matière.

66. En effet, initialement, la Cour s'est orientée vers une interprétation restrictive de la notion de « matière contractuelle », en considérant que seuls les litiges trouvant leur origine dans un contrat entre les parties au litige relevaient de cette matière. Dans le cadre de cette interprétation, la Cour s'est référée, essentiellement, à l'objectif de prévisibilité et de sécurité juridique de la convention de Bruxelles ou du règlement nº 44/2001.

67. La Cour s'est ensuite orientée vers une interprétation plus large de la notion de « matière contractuelle », en considérant qu'un litige relève de cette notion lorsque le demandeur fonde l'action qu'il dirige contre le défendeur sur une obligation juridique librement consentie par une personne envers une autre. C'est dans l'arrêt Engler que la Cour a, pour la première fois, indiqué clairement qu'elle n'interprète « pas [l'article 5, point 1, du règlement nº 44/2001] de manière étroite ». C'est ensuite dans les arrêts Kareda et flightright, confirmés dans la jurisprudence ultérieure, qu'elle a abandonné définitivement l'interprétation restrictive de cette disposition fondée sur

l'approche « personnaliste » de la matière contractuelle, issue de l'arrêt Handte, pour adopter une interprétation plus large.

68. En second lieu, il ressort de cette interprétation plus large que l'action d'un demandeur, même introduite contre un tiers, doit être qualifiée de « contractuelle », au sens de l'article 5, point 1, du règlement no 44/2001, dès lors qu'elle se fonde sur une obligation juridique consentie par une personne à l'égard d'une autre. ***Par conséquent, la circonstance que, en l'espèce, les deux parties au litige ne sont pas directement liées par un contrat ne saurait remettre en cause la qualification de cette action comme relevant de la « matière contractuelle ».*** *En effet, seul importe le fait que l'obligation juridique dont se prévalent les requérants au principal soit née d'un contrat, entendu comme un accord entre deux personnes, ou d'une relation juridique qui peut être assimilée à un contrat dans la mesure où elle crée des « liens étroits de même type que ceux qui s'établissent entre les parties à un contrat ».*

69. Dans le cadre de cette interprétation plus large, il ressort des arrêts Kareda et flightright que la Cour s'est référée non seulement à l'objectif de prévisibilité et de sécurité juridique mais également à celui de proximité et de bonne administration de la justice.

70. Ainsi, lorsque l'obligation contractuelle sur laquelle est fondée l'action du demandeur a été identifiée, il y a lieu de déterminer s'il existe un lien de rattachement particulièrement étroit entre la demande et la juridiction qui peut être appelée à en connaître, ou si l'application de l'article 5, point 1, du règlement nº 44/2001 permet de faciliter la bonne administration de la justice. À mon sens, il y a donc lieu de veiller au respect de l'équilibre entre l'objectif de prévisibilité et de sécurité juridique et celui de proximité et de bonne administration de la justice de ce règlement.

…

75. Eu égard aux considérations qui précèdent, je propose de répondre à la première question préjudicielle que ***l'article 5, point 1, du règlement nº 44/2001 doit être interprété en ce sens que son application présuppose la détermination d'une obligation juridique librement consentie par une personne à l'égard d'une autre et sur laquelle se fonde l'action du***

> ***demandeur, même lorsque cette obligation ne lie pas directement les parties au litige****. Dans l'interprétation de cette disposition, la juridiction nationale doit veiller au respect de l'équilibre entre l'objectif de prévisibilité et de sécurité juridique et celui de proximité et de bonne administration de la justice.*

On this basis, AG Szpunar proceeds to point out, in response to the second question (which he reformulates for that purpose), that nothing in the Court's decision in *Wikingerhof* requires the national court to examine the contractual obligation in question or the content of the contract (paras. 76–80).

As to the third question, AG Szpunar reiterates that he understands the claim to be contractual in nature as it is ultimately based on an obligation freely entered into, even though the particular contract does not bind the two parties to the dispute (para. 83). Out of the two contracts, the AG deems the first one (the contract between the defendant's parents and the claimants' (step)mother) to be decisive for jurisdictional purposes "la source originale des droits et obligations litigieux." (para. 84).

Second Issue of 2021's Revue Critique de Droit International Privé

The last issue of the Revue Critique de Droit International Privé has been released. It contains eight articles and several case notes.

The editorial (authored by Horatia Muir Watt, Dominique Bureau and Sabine Corneloup) and five of the articles deal with the reserved share (réserve héréditaire) in international successions. These five articles are authored by: Paul

Lagarde (« Une ultime (?) bataille de la réserve héréditaire »), Cécile Pérez (« Quelques observations relatives à la réserve héréditaire dans le projet de loi confortant le respect des principes de la République »), Diane Le Grand de Belleroche (« Contre le retour du droit de prélèvement en droit français : une vue de la pratique du droit international »), Suzel Ramaciotti (« Le prélèvement compensatoire du projet d'article 913 du code civil à l'épreuve des exigences européennes et constitutionnelles »), and Nathalie Joubert (« Droit de prélèvement, réserve héréditaire, protection des héritiers contre les discriminations, quelle méthode ? »).

The sixth article, authored by Christelle Chalas and Horatia Muir Watt deals with the international jurisdiction of courts in matters relating to the environnemental responsibility of multinational companies.

In the seventh article, Vincent Richard presents the recast of the regulation on the service of judicial and extrajudicial documents.

The eighth article, by Christine Budzikiewicz, discusses the reform of international adoption law in Germany.

A full table of contents is available here.

Call for papers: Introducing the "European Family" Study on EU family law. 2020 Annual Conference of the French Association for European Studies

(AFEE) 11 and 12 June 2020 Polytechnic University of Hauts-de-France (Valenciennes)

Call for papers
Introducing the "European Family" Study on EU family law
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Polytechnic University of Hauts-de-France (Valenciennes)

Summary

Family law, with its civil law tradition, and strong roots in the national cultures of the Member States, does not normally fall within the scope of European law. However, it is no longer possible to argue that Family Law is outside European law entirely. There are many aspects of the family which are subject to European influence, to the point that the outlines of a "European family" are starting to emerge. Union law therefore contains a form of "special" family law which is shared between the Member States and supplements their national family laws. What are the sources and outlines of this special family law and what tools is the Union's legal order using to construct it? How should this movement towards the Europeanisation of the family be regarded with respect to a civil and sociological approach to the family and the political and legal integration of the Union? And what is the future for the European family law which is being created? All these questions require collective research as part of a multidisciplinary study (the institutional and substantive law of the Union, civil family law, international private law, comparative law, sociology, history, political sciences etc.) on how this special law of the family is gradually becoming part of the Union's legal order. A call for papers, supplemented by invitations to reputed speakers will bring researchers and practitioners from different disciplines together to throw new light on European family law. There will also be a competition for the best "Letter to the European family" involving proposing a European vision of the family, for junior researchers.

The Scientific Board

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• Dr. Marion Ho-Dac, Polytechnic University of Hauts-de-France marion.hodac@uphfr.fr

The Scientific Committee

• Pr. Elsa Bernard, University of Lille
• Dr. Marie Cresp, University of Bordeaux
• Pr. Marc Fallon, University of Louvain (UCLouvain)
• Pr. Geoffrey Willems, University of Louvain (UCLouvain)
• Dr. Marion Ho-Dac, Polytechnic University of Hauts-de-France (UPHF)
• Pr. Anastasia Illiopoulou, University of Créteil (UPEC)
• Pr. Sandrine Sana, University of Bordeaux, in delegation at University of French Polynesia

I. Argument

Firstly, the research is intended to highlight the European experience of Family Law and its substantive and private international law aspects. Union family law as a special law side-byside with the diversity of national family laws must then be identified. Secondly the existence of this special family law must be considered: its theoretical and political importance in the Union of today and its future in the Union of tomorrow. Will this special family law remain fragmented alongside the national laws of Member states or will it densify to offer European citizens and residents a common family law?

Two areas of study are recommended, which could be used as a benchmark by researchers by prioritising one of them in their papers.

1.UNDERSTANDING EU FAMILY LAW

As a rule, the family in its material dimension falls outside the scope of Union law because the civil law of the family is not subject to the European courts. Only the rules of international private law expressly enable European lawmakers to pass laws concerning “cross-border” family law (article 81 TFEU). These rules therefore exist for international separation matters and international property law of the family. However, over the years a development has gradually been seen and the basis for a substantive law of the family of a European origin has appeared.

1.1.Content

The aspects of European family law which are shared by the Member States therefore supplement the multiplicity of national laws. They play a role as a special law, which varies depending on its area of intervention (Freedom of Movements, European Civil Service, European Immigration Law, Social Law of the Union, International Private Law etc.).The aim is to present its content in a dynamic and comparative way, not only to gauge its extent and characteristics but also its degree of originality compared to the internal laws of the Member states.

1.2.Tools

The emergence of this special law of the Union, which is still fragmentary and dispersed, is the result of the combination of several factors which must be considered. There is a family dimension within Union law because it structures and regulates numerous aspects of the lives of people on a given territory. Thus the Union's traditional areas of competence in economic matters affect the lives of Europeans. This influence has increased with the rapid growth in the freedom of movement of people and more globally, the European Area of Freedom, Security and Justice as well as with the growing influence of fundamental rights through the case law of the European Court of Human Rights and the recent application of the union's Charter of Fundamental Rights. As a consequence, the tools used by the Union and its different players are contributing, day by day, to shaping the contours of this EU Family Law.

2. ASSESSING EU FAMILY LAW

European law only affects the family in a fragmented and dispersed way at the present time. European family law is therefore random, because its existence depends on the political choices made by the actors implementing European tools. It is also incomplete because it does not govern all the sociological and legal realities covering the concept and the law of the family. Finally, it is variable because its content differs depending on whether it concerns the family of a European citizen, of a citizen of a third-party state or of a worker, or the family considered from an international private law perspective, giving rise to questions about the relationship between the standards and methods inside the Union's legal order.

2.1. Significance

The question of significance is then raised i.e. the usefulness, the need but also

perhaps the effectiveness of this family law of the Union which is being constructed in the European area. Further clarification of the European conception of the family or families might also be required. The analysis of the significance of European family law will inevitably vary depending on which point of view is adopted: the point of view of national peoples, mobile European citizens, nationals of third-party states living in the Union or aspiring to live there, States or the Union …. Reconciling these points of view also enriches the considerations.

2.2. The future

The development of the family law of the Union in a quantitative (enlarging its area of intervention, relationships with States) and, perhaps above all, qualitative (coordination, harmonization, unification, rationalization, articulation) way would have a certain number of benefits. However, this development would inevitably come up against serious difficulties of a political and a technical nature. The research on the possible deepening of European family law would therefore be twofold: the prospective content of European family law, and its relationship with national family laws.

II. Methods of submission and publication

Legal researchers and practitioners interested in this research project are invited to send their contribution to the members of the Scientific Board (see email addresses above). Collective contributions from researchers in different specialities and/or from different legal cultures are particularly welcome.

Contributions must be in the form of a summary (a maximum of 10,000 characters, spaces included) written in French or English, presenting the chosen theme, the goals and interest of the contribution, the plan and main references (normative, bibliographic etc.) at the heart of the analysis. The contributions will be subject of a selection process by Scientific Committee after they have been anonymized by the Scientific Board.

The contribution may be accompanied by a quick presentation of the writer (maximum 3000 characters spaces included).

The papers will be published in the autumn of 2020.

Contributors are informed that written contributions must be written (in English or French) and sent to the members of the Scientific Board before the conference

on 11 and 12 June. Writers will, if they wish, have a short time after the conference in which to make slight adjustments to their original contributions to incorporate new aspects highlighted by other presentations or during the debates.

III. Timetable
Submission of contributions: by **13 January 2020**
Reply to contributors: week of **2 March 2020**
Delivery of the written contribution: **28 May 2020**
Conference dates: **11 and 12 June 2020**
Delivery of the final contribution: **22 June 2020**
Publication: **Autumn 2020**

IV. Junior researchers and the competition
Junior researchers are asked to examine the relationship between European law and the family from a new, critical and prospective stand point. The call for papers is therefore open to PhD students, doctors and post-docs under the same conditions.
There is also a competition for the best "Letter to the European Family", where a short text (maximum 6000 characters including spaces), beginning with "Dear European family" and giving a European vision of the family will be proposed. At a time when the direction European construction should take is constantly being questioned, considerations about the European family could offer a path for political renewal for Europe. The best i.e. the most convincing letter will be read at the end of the conference, and the letter will be published in the conference papers.

The letters received will be submitted to the Scientific Committee for selection after they have been anonymised by the Scientific Board.

The same timetable (see above) applies to contributions to the conference and the same "junior" researcher can submit a contribution as well as a letter.

Appel à communication
Connaissez-vous la « famille européenne » ?
Étude du droit de la famille de l'Union européenne
* * * *
Congrès annuel 2020 de l'Association Française d'Études Européennes (AFEE) 11

& 12 juin 2020
Université Polytechnique Hauts-de-France (Valenciennes)

Résumé
Le droit de la famille, dans sa dimension civiliste, fortement ancrée dans les cultures nationales des États membres, est une matière qui ne relève pas en principe du droit de l'Union européenne. Pourtant, il n'est plus possible d'affirmer que la matière échappe dans son entier au droit de l'Union. De nombreux aspects de la famille sont sous influence européenne, au point que l'on voit se dessiner les contours d'une « famille européenne ». En ce sens, le droit de l'Union contient une forme de « droit spécial » de la famille, partagé par les États membres, qui complète les droits nationaux de la famille.

Quels sont les sources et les contours de ce droit spécial de la famille et quels outils mobilise l'ordre juridique de l'Union pour le construire ? Comment apprécier ce mouvement d'européanisation de la famille au regard tant d'une approche civiliste et sociologique de la famille, que du sens de l'intégration politique et juridique de l'Union ? Et au-delà, quel avenir imaginer pour ce droit européen de la famille en construction ?

Autant de questions qui nécessitent un travail de recherche collective permettant de conduire une réflexion pluridisciplinaire (droit institutionnel et matériel de l'Union, droit civil de la famille, droit international privé, droit comparé, sociologie, histoire, sciences politiques…) sur l'élaboration progressive de ce droit spécial de la famille dans l'ordre juridique de l'Union.

Un **appel à communication**, complété par l'invitation de personnalités reconnues, permettra de réunir des chercheurs et praticiens d'horizons divers, porteurs d'éclairages renouvelés et innovants en droit européen de la famille. Un concours de la meilleure « Lettre à la famille européenne » consistant à proposer une vision européenne de la famille sera, par ailleurs, ouvert aux jeunes chercheurs.

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• Pr. Anastasia Illiopoulou, Université de Créteil (UPEC)
• Pr. Sandrine Sana, Université de Bordeaux, en délégation à l'Université de Polynésie française

I. Argumentaire

La recherche vise, dans un premier temps, à mettre en lumière l'acquis européen en matière de droit de la famille, dans ses aspects de droit matériel comme de droit international privé. Le droit de la famille de l'Union, comme droit spécial, à côté de la diversité des droits nationaux de la famille, doit ainsi être identifié. Dans un second temps, c'est l'essence d'un tel droit spécial de la famille qu'il faudra questionner : sa signification théorique et politique dans l'Union d'aujourd'hui, autant que son devenir dans l'Union de demain. Ce droit spécial de la famille a-t-il vocation à demeurer fragmentaire à côté des droits nationaux des États membres ou, au contraire, à se densifier pour offrir aux citoyens et résidents européens un droit commun de la famille ?

Deux axes de réflexion sont suggérés pour mener à bien la recherche ; ils pourraient utilement servir de repère pour les chercheurs proposant une communication, en mentionnant l'axe dans lequel ils entendent s'inscrire prioritairement.

1. Appréhender

le droit de la famille de l'Union La famille, dans sa dimension matérielle, échappe, en principe, au droit de l'Union dans la mesure où le droit civil de la famille ne relève pas des compétences européennes. Seules les règles de droit international privé permettent explicitement aujourd'hui au législateur de l'Union d'adopter des textes relatifs au droit de la famille « transfrontière » (article 81 TFUE). De telles règles existent ainsi en matière de désunion internationale et de droit patrimonial international de la famille. Pourtant, au fil des années, un constat s'est peu à peu imposé : les prémices d'un droit matériel de la famille, de source

européenne, sont apparues.

1.1. Contenu

Ces éléments de droit européen de la famille, partagés par les États membres, complètent ainsi la multiplicité des droits nationaux. Ils jouent le rôle d'un droit spécial, à géométrie variable selon ses domaines d'interventions (libertés de circulation, fonction publique de l'Union, droit européen de l'immigration, droit social de l'Union, droit international privé…). L'objectif est alors, dans une perspective dynamique et comparative, de présenter son contenu et de mesurer non seulement son étendue et ses caractéristiques, mais aussi son degré d'originalité par rapport aux droits internes des États membres.

1.2. Outils

L'apparition de ce droit spécial de l'Union, encore parcellaire et éclaté, s'explique par la combinaison de plusieurs facteurs qu'il est proposé d'étudier. Le droit de l'Union recèle en luimême une dimension familiale, en ce sens qu'il structure et règlemente de nombreux aspects de la vie des personnes sur un territoire donné. C'est ainsi, notamment, que les compétences traditionnelles de l'Union en matière économique ont rejailli sur la vie familiale des Européens. L'essor de la libre circulation des personnes et, plus globalement, de l'espace de liberté, de sécurité et de justice, n'a fait qu'accroître ce constat, de même que l'influence croissante des droits fondamentaux, à travers tant la jurisprudence de la Cour EDH que l'application plus récente de la Charte des droits fondamentaux de l'Union. Partant, les différents outils mis en œuvre par l'Union et ses différents acteurs contribuent, jour après jour, à façonner les contours de ce droit de la famille de l'Union.

2. Apprécier le droit de la famille de l'Union

La famille n'est, à ce jour, saisie par le droit de l'Union que de manière ponctuelle et fragmentée. Il en résulte que le droit européen de la famille est aléatoire : son existence dépend des choix politiques des acteurs mettant en œuvre les outils européens. Il est également incomplet puisqu'il ne régit pas l'intégralité des réalités sociologiques et juridiques que recouvrent respectivement la notion et le droit de la famille. Il est, enfin, à géométrie variable car le contenu donné à ce droit n'est pas le même selon qu'il s'agit de la famille du citoyen européen, du ressortissant d'État tiers ou du travailleur, ou encore de la famille appréhendée par les mécanismes de droit international privé… Il en résulte par là même un questionnement relatif à l'articulation des normes et des méthodes, en matière

familiale, au sein de l'ordre juridique de l'Union.

2.1. Sens

Dans ce contexte, se pose la question du sens, c'est-à-dire de l'utilité, du besoin mais aussi peut-être de l'efficience, de ce droit de la famille de l'Union en construction dans l'espace européen. Pour y répondre, il pourrait être nécessaire de préciser davantage la conception européenne de la famille ou des familles. L'analyse du sens du droit européen de la famille variera nécessairement selon le point de vue adopté : celui des peuples nationaux, des citoyens européens mobiles, des ressortissants d'États tiers vivant dans l'Union ou aspirant à y vivre, des États ou encore de l'Union… La question de la conciliation de ces points de vue s'ajoute alors à la réflexion.

2.2. Devenir

L'évolution future du droit de la famille de l'Union dans un sens quantitatif (élargissement de son domaine d'intervention, rapports avec les États), et peut-être surtout qualitatif (coordination, harmonisation, unification, rationalisation, articulation…) présenterait un certain nombre d'avantages. Dans le même temps, une telle tendance ne manquerait pas de se heurter à de sérieuses difficultés d'abord politiques, puis techniques. S'agissant d'un possible approfondissement du droit européen de famille, la recherche serait double : le contenu prospectif de la matière et son articulation avec les droits nationaux de la famille.

II. Modalités de soumission et de publication

Les chercheurs et praticiens du droit intéressés par ce projet de recherche sont invités à envoyer leur proposition de contribution aux membres de la Direction scientifique (v. adresses e-mails mentionnées ci-dessus). Seront accueillies avec un intérêt particulier les contributions collectives proposées par deux ou trois chercheurs de spécialités et/ou de culture juridique différentes.

Les contributions prendront la forme d'un résumé (max. 10 000 caractères, espaces compris) rédigé en français ou en anglais, présentant le thème retenu, les objectifs et l'intérêt de la contribution, le plan envisagé et les principales références (normatives, bibliographiques…) au cœur de l'analyse.

Les contributions reçues feront l'objet d'une sélection par le Comité scientifique après avoir été anonymisées par la Direction scientifique.

L'envoi de la contribution pourra, à titre facultatif, être accompagné d'une rapide

présentation de leur auteur (max. 3 000 caractères espaces compris).

Les actes du colloque sont destinés à être publiés à l'automne 2020.

L'attention des contributeurs est attirée sur le fait que les **contributions écrites** devront être rédigées (en anglais ou en français) et envoyées aux membres de la Direction scientifique avant le congrès des 11 et 12 juin. Un bref délai sera laissé aux auteurs à l'issue du congrès pour, s'ils le souhaitent, apporter de légères modifications à leur contribution originale afin d'intégrer des éléments nouveaux mis en lumière par d'autres présentations ou lors des débats.

III. Calendrier

Date limite d'envoi des propositions de contribution : **13 janvier 2020**
Réponse aux intervenants : semaine du **2 mars 2020**
Remise de la contribution écrite : **28 mai 2020**
Dates du colloque : **11 et 12 juin 2020**
Remise des contributions finales : **22 juin 2020**
Publication : **automne 2020**

IV. Jeune doctrine et concours

La jeune doctrine est invitée à apporter un regard neuf, critique et prospectif sur les relations entre Union européenne et famille. L'appel à communication est ainsi ouvert, aux mêmes conditions (v. ci-dessus), aux doctorants, docteurs et post-doctorants.

Un concours de la meilleure « Lettre à la famille européenne » est également lancé. Il s'agit de proposer un texte court (max. 6000 signes, espaces compris) commençant par « *Chère famille européenne* », consistant à proposer une vision européenne de la famille. A l'heure où l'on ne cesse de s'interroger sur le sens de la construction européenne, penser la famille européenne pourrait offrir une voie de renouvellement politique pour l'Europe. Une lecture de la meilleure lettre, c'est-à-dire de la plus convaincante et originale, est prévue en clôture du colloque et la lettre sera publiée dans les actes du colloque.

Les lettres reçues seront soumises au processus de sélection par le Comité scientifique après avoir été anonymisées par la Direction scientifique.

Le même calendrier (v. ci-dessus) que pour les contributions au congrès s'applique et un même chercheur « jeune doctrine » peut proposer tout à la fois

une contribution et une lettre.

The complexity of the post Brexit era for English LLPs and foreign legal professionals in EU Member States: a French perspective

Written by Sophie Hunter, University of London (SOAS)

In light of the turmoil in the UK Parliament since the start of 2019, the only certain thing about Brexit is that everything is uncertain. The Law Society of England and Wales has warned that "if the UK's relationship with the rest of the EU were to change as the result of significant renegotiations, or the UK choosing to give up its membership, the effects would be felt throughout the legal profession." As a result of Brexit, British firms and professionals will no longer be subject to European directives anymore. This foreshadows a great deal of complexity. Since British legal entities occupy a central place within the European legal market, stakes are high for both British and European lawyers. A quick overview of the challenges faced by English LLPs in France and the Paris Bar demonstrates a high level of complexity that, is not and, should be considered more carefully by politicians.

Currently, 1872 foreign lawyers from 92 different citizenships are registered at the Paris Bar, according to a report by Dominic Jensen, 181 are British citizens, out of which 72 are registered under their original professional titles pursuant to the European Directive 98/5/CE (70 solicitors and 2 barristers). From 61 foreign legal entities established in France, the majority are English limited liability partnerships (LLP) which employ 1,600 lawyers. Some American law firms rely on the LLP structure as a strategy to establish themselves within the European legal market. According to the European Directive 98/5/CE, foreign legal entities of one Member State can be registered at the Bar of another Member State. The

consequences of Brexit will be radical. Because the UK will no longer be part of the EU, foreign legal entities subject to English Law and established in EU Member States will no longer be recognized by the Bar of the host state, and thus will no longer be entitled to do business within its jurisdictions. For the Paris Bar, stakes are high since no other European capital has experienced such an important implementation of British and American law firms.

With the deadline of Brexit looming closer, no one has raised the topic of foreign lawyers and the exercise of their right to practice in European jurisdictions, in spite of numerous calls from The Law Society of England and Wales. While the UK is advocating for mutual recognition of professional qualifications, the French Bar led by Florent Loyseu de Grandmaison has drafted a report outlining various ways to solve this problem. According to a new ordinance published in April 2018, a foreign legal consultant can register with the Paris Bar to practice international law and any other type of law he or she is registered for, with the exception of European law and the law of Member States. The main concern of LLPs will focus primarily on how to continue to practice in France with little disruptions. LLPs owned by English solicitors will need to establish French legal entities owned and managed according to French and European Law. Most likely, English LLPs established in France will benefit from a new legal structure called AARPI, which stands for French limited partnership and mirrors the structure of LLPs. However it is not fully implemented within French legislation yet.

In a tensed climate between the UK and the EU, the fate of foreign legal consultants and entities seem more than ever uncertain. The example of France demonstrates, first, a high degree of complexity in the legislation that prevents LLPs to easily transpose their structure into the jurisdiction post Brexit, and a lack of preparation from both LLPs and the host state to face the practical consequences of Brexit. The UK and EU Member States will need to show a great deal of flexibility to quickly adapt legislation to incorporate English LLPs within their jurisdictions. Therefore, the fear of The Law Society of England and Wales which has repeatedly warned the UK government of the consequences of a “no deal” seem justified. Regardless of whether Brexit is implemented or postponed on March 29, finding an appropriate answer to the dilemma faced by foreign legal professionals and LLPs across the continent should be a priority on the agenda.

Out now: Zeitschrift für Vergleichende Rechtswissenschaft

The most recent issue of the *Zeitschrift für Vergleichende Rechtswissenschaft* (German Journal of Comparative Law; Vol. 117 [2018], No. 4) features the following contributions:

Basel – Ein gebrochenes Versprechen?

Zur Entwicklung der Bankenregulierung in der Europäischen Union und in den Vereinigten Staaten

*Ann-Kathrin Kaufhold**

ZVglRWiss 117 (2018) 415-428

[Basel – a Promise Broken? – Regarding the Development of Banking Regulation in the European Union and the United States]

The Basel Committee on Banking Supervision was founded in order to harmonize prudential regulation of banks internationally. Today the Basel standards, in fact, strongly influence national banking regulation both in the European Union and in the United States. Yet, at the same time, European and US regulatory requirements for banks still differ substantially. Against this backdrop the article examines the success and failure of the Basel Committee and asks for the consequences of divergences in international banking regulation.

Entwicklung und Vielfalt von Bank- und Finanzsystemen

*Reinhard H. Schmidt**

ZVglRWiss 117 (2018) 429-439

[Development and Diversity in Banking and the Financial Systems]

In its first part, the paper discusses the development of the banking systems and, more comprehensively, of the entire financial systems of Germany, Western Europe and other parts of the world under the aspect of diversity. In this discussion, the author distinguishes between, on the one hand, the diversity of the banking system of a given country or region and, on the other hand, that between countries or regions.

The overall finding is that banking and financial systems of different countries and regions differ more than it is generally expected. This raises the question addressed in the second part of the paper: Why do banking and financial systems differ so strongly or, in other words, why do we not observe a stronger convergence of these systems over time, and how can one assess the stunning degree of diversity of the banking and financial systems in different countries and regions? The author argues that from an economic policy perspective diversity of banking and financial systems not to be considered as a deficiency but rather a benefit.

National and International Banking Heterogeneity

*Axel Kind**

ZVglRWiss 117 (2018) 440-454

The costs of the Global Financial Crisis in terms of lost GDP growth have been higher in Europe than in the US. This is likely due to the outbreak of the European Sovereign Debt Crisis. To countervail its negative effects, the EU has made considerable efforts to initiate the European Banking Union with its ideal of a level playing field among credit institutions. In spite of these harmonization efforts, the level of heterogeneity of banks across member states in terms of their average performance, capital adequacy, and asset quality remains high. Banks in the Southern and Eastern European periphery are found to be less profitable and riskier than their counterparts in other regions of the EU. Given that such differences can be traced back, at least partially, to country-specific factors – economic, legal, and institutional conditions – applying the same prudential rules to all EU banks may fail to comply with the level-playing-field paradigm and

actually distort the competition among European banks. The European banking sector is characterized by a rich variety of governance structures – most notably the coexistence of shareholder banks and stakeholder banks. This abundance of governance systems should be viewed as valuable diversity rather than a sign of old-fashioned and outdated banking structures. In particular, the outperformance of cooperative and savings banks in several European countries – most notably in Germany – should induce regulators to reconsider the primate of shareholder banks and motivate further discussions about optimal governance structures in modern banking.

Differentiation and Convergence of Supervision in the European Banking Union

*Günter Franke**

ZVglRWiss 117 (2018) 455-477

Empirical evidence suggests that SME funding is more difficult in countries with weaker legal and economic conditions. In these countries, additional bank lending may generate higher social benefits. Operating under the same set of bank regulation, transitionally milder bank supervision in "weaker" countries might motivate banks to give more loans. This might reinforce economic growth, but also endanger financial stability. Depending on the objectives of regulation and supervision, transitional milder supervision might improve welfare. If such a policy is adopted, supervision should get stronger when legal and economic conditions improve. However, a deterioration in these conditions should not weaken supervision.

Die extraterritoriale Regulierung von international tätigen Banken

*Christoph Ohler**

ZVglRWiss 117 (2018) 478-491

[The Exterritorial Regulation of Internationally Operative Banks]

The contribution discusses the legal limits under public international law for states and the European Union when they regulate internationally operating banks. The business activity of such banks brings them in contact with many national legal orders. Once jurisdiction applies, they must comply with the prudential requirements of those states. In addition, the USA and the EU, in particular, claim the extraterritorial application of their supervisory laws in certain cases. Public international law, as it stands, does not prohibit the multiple regulatory burdens for the banks resulting from internationally concurrent regulatory powers. Neither the standards adopted by the Basel Committee on Banking Supervision nor the rules of the WTO or the principles under international customary law restrict significantly the jurisdiction of the states and the EU.

Das Zusammenspiel von Regulierung und Profitabilität im Bankensektor

*Johannes-Jörg Riegler**

ZVglRWiss 117 (2018) 492-504

[The Interaction of Regulation and Profitability in the Banking Sector]

The Association of German Public Banks (Bundesverband Öffentlicher Banken Deutschlands, VÖB) has quantified the relationship between regulation and profitability for Germany's top 17 banks since 2014. A sample bank which was formed as an aggregate of the institutions for the analysis shows the lack of profitability and the limits for the potential of accumulating and distributing profits, while the delta between profitability and capital costs complicates the access to the capital market. The finalisation of the Basel III reform package in December 2017 will impose additional regulatory requirements on banks.

The author warns of a loss of importance of the German and European banking industry in the face of international competition and pleads for a combination of necessary regulation and appropriate revenue opportunities for banks.

Konflikte bei der Durchsetzung des europäischen Kapitalmarktrechts – Koordinierungsbedarf zwischen Aufsichts- und Zivilrecht

*Dörte Poelzig**

ZVglRWiss 117 (2018) 505-525

[Conflicts in the Enforcement of European Capital Market Law – The Need for Coordination between Regulatory and Civil Law]

Recent European capital market law reforms have introduced a multitude of enforcement instruments, by both supervisory and civil law, all of which aim to enforce the law in accordance with the "effet utile", i.e. in an effective, dissuasive and proportionate way. Frequently, supervisory and civil enforcement are treated as issues detached from one another. However, this separate treatment leads to tensions that are detrimental to the effective enforcement of capital markets law. The following article examines the underlying conflicts and their solutions, illustrated by three examples: the access to supervisory information by private individuals, the different interpretation of capital markets law by supervisory agencies and civil law courts, and the risk of multiple sanctions for the same cause of action.

Die Herausforderung regulatorischer Vielfalt

*Joachim Hoeck und Hans Christian Röhl**

ZVglRWiss 117 (2018) 526-541

[The Challenges of Regulatory Diversity]

Regulatory variety results in a variety of different legal regimes and implementation practices. Whether being subjected to this regimes or applying it, one will have to develop strategies to cope with the resulting challenges. The papers tries to explore different legal instruments (standardization, recovery and resolution, subsidiarization and market access) and to show how instead of efforts to a harmonization a more and more divergent legal setting takes places and stresses the resulting problems.

Regulatorische Vielfalt aus der Perspektive einer Bank

*Mathias Otto**

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[Regulatory Diversity from a Banking Perspective]

The globalization of the financial industry as well as tightened regulation of the sector significantly increased the potential for cross-border regulatory conflicts. International bodies like the Basel Committee try to address such conflicts by improving cooperation between national authorities and in the meantime have evolved into global standard setters. This leads to unification of regulatory rules which, however, encounter different economic and social environments in the various countries. Moreover, national authorities applying these rules are accountable to their respective national governments and parliaments. As a result, practice will have to continue to deal with regulatory conflicts that are not resolvable as a matter of principle and therefore search for a practicable solution for the individual case at hand.

Komplexe Compliance bei Banken

Interne Organisation und Konzerngestaltung bei Geschäften im In- und Ausland

Rüdiger Wilhelmi*

ZVglRWiss 117 (2018) 557-571

[Complex Compliance in Banks – Internal Organisation and Corporation Organisation in Business Domestic and Abroad]

This contribution discusses which laws the compliance related to business domestically and abroad has to observe and whether it is possible to allocate and isolate compliance duties and risk connected with this business by internal organisation or the design of groups of companies. It concludes that with regard to banking compliance the separation principle in the law of groups of companies does not apply and it is only possible to allocate compliance duties but not to isolate compliance risk by the design of groups of companies.

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