Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2021: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)“ features the following articles:

A. Dickinson: **Realignment of the Planets – Brexit and European Private International Law**

At 11pm (GMT) on 31 December 2020, the United Kingdom moved out of its orbit of the European Union’s legal system, with the end of the transition period in its Withdrawal Agreement and the conclusion of the new Trade and Cooperation Agreement. This article examines the impact of this realignment on private international law, for civil and commercial matters, within the legal systems of the UK, the EU and third countries with whom the UK and the EU had established relationships before their separation. It approaches that subject from three perspectives. First, in describing the rules that will now be applied by UK courts to situations connected to the remaining EU Member States. Secondly, by examining more briefly the significance for the EU and its Member States of the change in the UK’s status from Member State to third country. Thirdly, by considering the impact on the UK’s and the EU’s relationships with third countries, with particular reference to the 2007 Lugano Convention and Hague Choice of Court Convention. The principal focus will be on questions of jurisdiction, the recognition and enforcement of judgments and choice of law for contract and tort.

S. Zwirlein-Forschner: **Road Tolls in Conflict of Laws and International Jurisdiction – a Cross-Border Journey between the European Regulations**

Charging tolls for road use has recently undergone a renaissance in Europe – mainly for reasons of equivalence and climate protection. The payment of such

road tolls can be organized either under public or under private law. If a person resident in Germany refuses to pay a toll which is subject to foreign private law, the toll creditor can sue the debtor for payment at its general place of jurisdiction in Germany. From the perspective of international private law, such claim for payment of a foreign toll raises a number of complex problems to be examined in this article.

T. Pfeiffer: **Effects of adoption and succession laws in US-German cases – the example of Texas**

The article discusses how adoption and succession laws are intertwined in cases of adoptions of German children by US-parents in post WW2-cases, when Germany still had a contract based system of adoptions. Addressing the laws of Texas as an example, the author demonstrates that, so far, the legal effects of these adoptions have not been analysed completely in the available case law and legal writing. In particular, the article sets forth that, in relation to adoption contracts, Texan conflicts law (like the law of other US States) refers to the law of the adoption state so that the doctrine of a so-called hidden renvoi is irrelevant. Furthermore, in this respect, the renvoi is a partial one only in these cases: Under Texan conflicts law, the reference to the laws of the adoption state is relevant only for the status of being adopted, not for the effects of adoption, e.g. the question to whom the adopted is related; the latter issue is governed by the law of the domicile of the child, which is identical to the adoptive parents' domicile, at least if this is also the adoptive family's domicile after the adoption.

Furthermore, the author discusses matters of succession and argues: According to the ECJ's Mahnkopf decision, a right of inheritance of the adopted child in relation to the biological parents under the laws applicable to the effects of the adoption, as provided for in Texas, has to be characterised as a succession rule, at least if that law provides for a mere right of inheritance, whereas all legal family relations to the biological family are cut off. As a consequence, such a "nude" inheritance right cannot suffice as a basis of succession under German succession laws. Even if one saw that differently, Texan succession conflicts law, for the purpose of succession, would refer to the law of the domicile of the deceased for movables and to the law of the situs for real property. Additionally, even if the Texas right of inheritance in relation to the biological parents constituted a family

relationship, this cannot serve as a basis for a compulsory share right.

W. Voß: **Qualifying Direct Legal Claims and culpa in contrahendo under European Civil Procedure Law**

Legal institutions at the interface between contract and tort, such as the culpa in contrahendo or direct claims arising out of contractual chains, typically elude a clear, uniform classification even within the liability system of substantive national law. Even more so, qualifying them adequately and predictably under European civil procedure law poses a challenge that the European Court of Justice (ECJ) has not yet resolved across the board. In two preliminary rulings, the ECJ now had the opportunity to sharpen the borderline between contractual and noncontractual disputes in the system of jurisdiction under the Brussels I bis Regulation, thus defining the scope of jurisdiction of the place of performance of a contractual obligation and, at the same time, of jurisdiction over consumer contracts. However, instead of ensuring legal clarity in this respect, the two decisions rendered by the ECJ further fragment the autonomous concept of contract under international civil procedural law.

C. Thomale: **International jurisdiction for rights in rem in immovable property: co-ownership agreements**

The CJEU decision reviewed in this case note, in its essence, concerns the scope of the international jurisdictional venue for immovable property under Art. 24 No. 1 Brussels Ia-Regulation with regard to co-ownership agreements. The note lays out the reasons given by the court. It then moves on to apply these reasons to the Austrian facts, from which the preliminary ruling originated. Finally, some rational weaknesses of the Court’s reasoning are pointed out while sketching out a new approach to determining the fundamental purpose of Art. 24 No. 1 Brussels Ia-Regulation.

F. Rieländer: **Solving the riddle of “limping” legal parentage: “Pater est” presumption vs. Acknowledgment of paternity before birth**

In its judgment of 5/5/2020, the Kammergericht Berlin (Higher Regional Court of Berlin) addressed one of the main outstanding issues of German private international law of filiation. When children are born out of wedlock, but within close temporal relation to a divorce, the competing connecting factors provided for in Art. 19 (1) EGBGB (Introductory Act to the German Civil Code) are apt to create mutually inconsistent results in respect of the allocation of legal parentage. While it is firmly established that parenthood of the (former) husband, assigned at the time of birth by force of law, takes priority over any subsequently established filiation by a voluntary act of recognition, the Kammergericht held that where legal parentage is simultaneously allocated to the husband by one of the alternatively applicable laws and to a third person by way of recognition of paternity before birth according to a competing law, the (domestic) law of the state of the child's habitual residence takes precedence. Though the judgment is well argued, it remains to be seen whether the controversial line of reasoning submitted by the Kammergericht will stand up to a review by the Bundesgerichtshof (German Federal Court of Justice). Nonetheless, the decision arguably ought to be upheld in any event. In circumstances such as those in the instant case, where divorce proceedings had commenced, recognition of legal parentage by a third person with the consent of the child's mother and her husband is to be treated as a contestation of paternity for the purposes of Art. 20 EGBGB. Thus, according to domestic law, which was applicable to the contestation of paternity since the child's habitual residence was situated in Germany, any possible legal ties between the child and the foreign husband of its mother were eliminated by a recognition of parentage by a German citizen despite suspicions of misuse. All in all, the judgment demonstrates once again the need for a comprehensive reform of German private international law of filiation.

Mark Makowsky: **The attribution of a specific asset to the heir in the European Succession Certificate**

According to Art. 63 (2) lit. b and Art. 68 lit. l of the European Succession Regulation, the European Certificate of Succession (ECS) may be used to demonstrate the attribution of a specific asset to the heir and shall contain, if applicable, the list of assets for any given heir. In the case at hand the ECS, which was issued by the Austrian probate court and submitted to the German land registry, assigned land plot situated in Germany solely to one of the co-heirs. The

Higher Regional Court of Munich found, that the ECS lacked the presumption of accuracy, because the applicable Austrian inheritance law provides for universal succession and does not stipulate an immediate separation and allocation of the estate. Contrary to the court's reasoning, however, Austrian inheritance law does allow singular succession of a co-heir, if (1) the co-heirs agree on the distribution of the estate before the probate court orders the devolution of property and (2) the court's devolution order refers to this agreement. The presumption of accuracy of the ECS with respect to the attribution of specific assets is therefore not excluded by legal reasons. In the specific case, however, the entry in the land register was not based on the ECS, but on the devolution order of the Austrian probate court, which does not include a reference to a previous agreement of the co-heirs on the distribution of the estate. As a consequence, the devolution order proves that the land plot has become joint property of the community of heirs and that the ECS is therefore inaccurate.

R. Hüßtege: **Internet research versus expert opinion**

German courts have to determine the applicable foreign law by virtue of their authority. The sources of knowledge they rely on are based on their discretionary powers. In most cases, however, their own internet research will not be sufficient to meet the high demands that discretion demands. As a general rule, courts will therefore continue to have to seek expert opinions from a national or foreign scientific institute in order to take sufficient account of legal practice abroad.

A.R. Markus: **Cross-Border Attachment of Bank Accounts in Switzerland and the European Account Preservation Order**

On 18 January 2017 the Regulation on European Account Preservation Order (EAPO Regulation) came into force. It allows the creditor to place a security in a bank account so that enforcement can be carried out from an existing title or a title yet to be created. The provisions of the abovementioned Regulation stand beside existing national provisions with a similar purpose. As a non-EU member state, Switzerland does not fall within the scope of application of the EAPO Regulation and the provisional distraint of bank accounts is thus exclusively governed by national law. The present article illustrates in detail the attachment

procedure under the Swiss Debt Enforcement and Bankruptcy Law. Comparative reference is made to the provisions of the EAPO Regulation. Finally, the recognition and enforcement of foreign interim measures, which is often crucial in cross-border cases, will be addressed. The article shows that there are considerable differences between the instruments provided by the Swiss law and those provided by the EU law.

J. Ungerer: **English public policy against foreign limitation periods**

Significantly different from the EU conflict-of-laws regime of the Rome I and II Regulations, the British autonomous regime provides for a special public policy exception in the Foreign Limitation Periods Act 1984, whose design and application are critically examined in this paper. When English courts employ this Act, which could become particularly relevant after the Brexit transition period, the public policy exception not only has a lower threshold and lets undue hardship suffice, it also leads to the applicability of English limitation law and thereby splits the governing law. The paper analyses the relevant case law and reviews the recent example of Roberts v Soldiers [2020] EWHC 994, in which the three-years limitation period of the applicable German law was found to cause undue hardship.

E. Jayme: **Forced sales of art works belonging to the Jewish art dealer René Gimpel in France during the Nazi-period of German occupation – The Court of Appeal of Paris (Sept. 30, 2020) orders the restitution of three paintings by André Derain from French public museums to the heirs of René Gimpel**

The heirs of the famous French art dealer René Gimpel brought an action in France asking for the restitution of three paintings by André Derain from French public museums. René Gimpel was of Jewish origin and lost his art works – by forced sales or by expropriation – during the German occupation of France; he died in a concentration camp. The court based its decision in favor of the plaintiffs on the "Ordonnance n. 45-770 du 21 avril 1945" which followed the London Inter-Allied Declaration of Dispossession Committed in Territories Under Enemy Occupation Control (January 5th 1943).

M. Wietzorek: **First Experience with the Monegasque Law on Private International Law of 2017**

This essay presents the Monegasque Law concerning Private International Law of 2017, including a selection of related court decisions already handed down by the Monegasque courts. Followed by a note on the application of Monegasque law in a decision of the Regional Court of Munich I of December 2019, it ends with a short summary.

CJEU on the EU-third State child abduction proceedings under article 10 of the Brussels IIA Regulation

This post was written by Vito Bumbaca, PhD candidate/ Assistant Lecturer, University of Geneva

The EAPIL blog has also published a post on this topic, click here.

Introduction:

The Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels IIA Regulation) still applies to the United Kingdom in EU cross-border proceedings dealing with parental responsibility and/ or child civil abduction commenced prior to the 31 December 2020 (date when 'Brexit' entered into force). Moreover, the Court of Justice of the European Union (CJEU) is entitled to exercise its jurisdiction over such proceedings involving the UK.

The decision of the High Court of England and Wales (Family Division, 6 November 2020, EWHC 2971 (Fam)), received at the CJEU on 16 November 2020 for an urgent preliminary ruling (pursuant to article 19(3)(b) of the Treaty of the European Union, art. 267 of the Treaty of the Functioning of the European Union, and art. 107 of the Rules of Procedure of the Court of Justice), and the CJEU judgment (*SS v. MCP*, C-603/20, 24 march 2021) are taken as reference in this analysis.

Question for a CJEU urgent preliminary ruling:

'Does Article 10 of [Regulation No 2201/2003] retain jurisdiction, without limit of time, in a Member State if a child habitually resident in that Member State was wrongfully removed to (or retained in) a non-Member State where she, following such removal (or retention), in due course became habitually resident?'

Contents of the EWHC (Family Division) judgment:

This judgment involved an Indian unmarried couple with a British daughter, born in England (2017), aged more than three (almost four at the time of the CJEU proceedings). Both parents held parental responsibility over their daughter, the father being mentioned as such in the birth certificate. The mother and the child left England for India, where the child has lived continuously since 2019. The father applied before the courts of England and Wales seeking an order for the return of the child and a ruling on access rights. The mother contested the UK jurisdiction (EWHC 2971, § 19).

The father claimed that his consent towards the child's relocation to India was temporary for specific purposes, mainly to visit the maternal grandmother (§ 6). The mother contended that the father was abusive towards her and the child and, on that basis, they moved to India (§ 8). Consequentially, she had requested an order (Form C100 'permission to change jurisdiction of the child', § 13). allowing the child's continuous stay in India. Accordingly, the mother wanted their daughter to remain in India with her maternal grandmother, but also to spend time in England after the end of the pandemics.

In the framework of article 8, Brussels IIA, the Family Division of the Court of England and Wales held that the habitual residence assessment should be fact-based. The parental intentions are not determinative and, in many circumstances, habitual residence is established against the wishes of the persons concerned by

the proceedings. The Court further maintained, as general principles, that habitual residence should be stable in nature, not permanent, to be distinguished from mere temporary presence. It concluded that, apart from British citizenship, the child did not have factual connections with the UK. Therefore, according to the Court, the child was habitually resident in India at the time of the proceedings concerning access rights initiated in England (§ 16).

The Family Division extended its analysis towards article 12(3) of the Regulation concerning the prorogation of jurisdiction in respect of child arrangements, including contact rights. For the Court, there was no express parental agreement towards the UK jurisdiction, as a prerogative for the exercise of such jurisdiction, at the time of the father's application. It was stated that the mother's application before the UK courts seeking the child's habitual residence declaration in India could not be used as an element conducive to the settlement of a parental agreement (§ 32).

Lastly, the Court referred to article 10 of Brussels IIA in the context of child abduction while dealing with the return application filed by the father. In practice, the said provision applies to cross-border proceedings involving the EU26 (excluding Denmark and the United Kingdom (for proceedings initiated after 31 December 2020)). Accordingly, article 10 governs the 'competing jurisdiction' between two Member States. The courts of the Member State prior to wrongful removal/ retention should decline jurisdiction over parental responsibility issues when: the change of the child's habitual residence takes place in another Member State; there is proof of acquiescence or ultra-annual inaction of the left-behind parent, holding custody, since the awareness of the abduction. In these circumstances, the child's return would not be ordered in principle as, otherwise provided, the original jurisdiction would be exercised indefinitely (§ 37).

In absence of jurisdiction under Brussels IIA, as well as under the Family Law Act 1986 for the purposes of inherent jurisdiction (§ 45), the High Court referred the above question to the CJEU.

CJEU reasoning:

The Luxembourg Court confirmed that article 10, Brussels IIA, governs intra-EU cross-border proceedings. The latter provision states that jurisdiction over

parental responsibility issues should be transferred to the courts where the child has acquired a new habitual residence and one of the alternative conditions set out in the said provision is satisfied (*SS v. MCP*, C-603/20, § 39). In particular, the Court observed that article 10 provides a special ground of jurisdiction, which should operate in coordination with article 8 as a ground of general jurisdiction over parental responsibility (§ 43, 45).

According to the Court, when the child has established a new habitual residence in a third State, following abduction, by consequently abandoning his/ her former 'EU habitual residence', article 8 would not be applicable and article 10 should not be implemented (§ 46-50). This interpretation should also be considered in line with the coordinated activity sought between Brussels IIA and the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (§ 56).

Ultimately, the Court maintained that article 10 should be read in accordance with recital 12 of the Regulation, which provides that, as one of its fundamental objectives, parental responsibility issues should be decided by the courts that better suit the principle of factual proximity in the child's best interests (§ 58). Accordingly, the courts that are closest to the child's situation should exercise general jurisdiction over parental responsibility. To such an extent, article 10 represents a balance between the return procedure, avoiding benefits in favour of the abductor parent, and the evoked proximity principle, freezing jurisdiction at the place of habitual residence.

The Court further held that if the courts of the EU Member State were to retain jurisdiction unconditionally, in case of acquiescence and without any condition allowing for account to be taken concerning the child's welfare, such a situation would preclude child protection measures to be implemented in respect of the proximity principle founded on the child's best interests (§ 60). In addition, indefinite jurisdiction would also disregard the principle of prompt return advocated for in the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (§ 61).

The Court concluded that insofar as the child's habitual residence changes to a third State, which is thus competent over parental responsibility, and article 12 of the Regulation is not applicable, the EU courts seised of the matter should apply

the rules provided in the bilateral/multilateral instruments in force between the States in question or, on a subsidiary basis, the national Private International Law rules as indicated under article 14, Brussels IIA (§ 64).

Comment:

Considering the findings of fact, the CJEU reasoning and, prior to it, the EWHC judgment, are supported in that the daughter's habitual residence at the time of the parental *de facto* separation (EWHC 2971, § 6-10) was in India; and remained there at the relevant date of the father's application for return and access rights. If we assume, as implicitly reported in the decisions, that the child was aged less than one at the time of the first relocation from England to India, and that she lived more than two years (18 months between 2017-2018 and almost fully 2019-2020, (EWHC 2971, § 25)) within the maternal family environment in India, including prior to the wrongful act, her place of personal integration should be located in India at the above relevant date. Such a conclusion would respect the factual proximity principle enshrined in recital 12 of Brussels IIA, according to which habitual residence is founded on the child's best interests. Recital 12 constitutes a fundamental objective applicable to parental responsibility, including access rights, and child abduction proceedings. As a result, the courts of the EU26 should be bound by it as a consequence of the Brussels IIA direct implementation.

The CJEU has not dealt with specific decisive elements that, in the case under analysis, would determine the establishing of the child's habitual residence in India at a relevant time (the seisin under art. 8 and the period before abduction under art. 10 of the Regulation). Considering the very young age (*cf.* CJEU, *SS v. MCP*, C-603/20, § 33: 'developmentally sensitive age') of the daughter at the time of the relocation, the child's physical presence corresponding to the mother's and grandmother's one as the primary carers prior to the wrongful act (retention) and to the return application, as well as the Indian social and family environment at the time of the seisin, highlighted by the EWHC, should be considered determinative (*cf.* CJEU, *UD v. XB*, C-393/18, 17 October 2018, § 57) – the Family Division instead excluded the nationality of the child as a relevant factor. The regularity of the child's physical presence at an appreciable period should be taken into account, not as an element of *temporal* permanent character, but as an indicator of *factual* personal stability. In this regard, the child's presence in one Member State should not be artificially linked to a limited duration. That said, the

appreciable assessment period is relevant in name of predictability and legal certainty. In particular, the child's physical presence after the wrongful act should not be used as a factor to constitute an unlawful habitual residence (Opinion of Advocate General Rantos, 23 February 2021, § 68-69).

Again, in relation to the child's habitual residence determination in India, the child's best interests would also play a fundamental role. The father's alleged abuse, prior to the relocation, and his late filing for return, following the wrongful retention, should be considered decisive elements in excluding the English family environment as suitable for the child's best interests. This conclusion would lead us to retain India as the child-based appropriate environment for her protection both prior to the wrongful retention, for the return application, as well as at the seisin, for access rights.

In sum, we generally agree with the guidance provided by the CJEU in that factual proximity should be considered a fulfilling principle for the child's habitual residence and best interests determination in the context of child civil abduction. In this way, the CJEU has confirmed the principle encapsulated under recital 12, Brussels IIA, overcoming the current debate, which is conversely present under the Hague Convention 1980 where the child's best interests should not be assessed [comprehensively] for the return application (HCCH, Guide to Good Practice Child Abduction Convention: Part VI – Article 13(1)(b); a *contrario*, European Court of Human Rights, *Michnea v. Romania*, no. 10395/19, 7 October 2020). However, it is argued (partly disagreeing with the CJEU statement) that primary focus should be addressed to the mutable personal integration in a better suited social and family environment acquired within the period between the child's birth and the return application (*cf.* CJEU, *HR*, C-512/17, 28 June 2018, § 66; *L v. M*, 2019, EWHC 219 (Fam), § 46). The indefinite retention of jurisdiction, following abduction, should only be a secondary element for the transfer of jurisdiction in favour of the child's new place of settlement after the wrongful removal/ retention to a third State. In practice, it is submitted that if the child had moved to India due to forced removal/ retention by her mother, with no further personal integration established in India, or with it being maintained in England, founded on the child's best interests, the coordinated jurisdictional framework of articles 8 and 10 (and possibly article 12.4) of the Brussels IIA Regulation might have still been retained as applicable (*cf.* Opinion of Advocate General Rantos, § 58-59; as a comparative practice, see also *L v. M*, and to some extent Cour de

cassation, civile, Chambre civile 1, 17 janvier 2019, 18-23.849, 5°). That said, from now on the CJEU reasoning should be binding for the EU26 national courts. Therefore, article 10 shall only apply to intra-EU26 cross-border proceedings, unlike articles 8 and 12 governing EU26-third State scenarios.

Series of seminars on Multilevel, Multiparty and Multisector Cross-Border Litigation in Europe – Jean Monnet Module – Università degli Studi – Milan

From March 3 to May 13, 2021, the University of Milan will host a series of webinars dealing with **cross-border civil and commercial litigation** in Europe, as part of the three-year project funded by the European Union and named "*Jean Monnet Module on Multilevel, Multiparty and Multisector Cross-Border Litigation in Europe*".

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To register (for the entire program or only for some modules), please fill in and submit, **no later than Monday, March 1, 2021**, the registration form retrievable here.

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In preparation of the Conference on the HCCH 2019 Judgments Convention on 13/14 September 2021, planned to be taking place (if Covid-19 allows it) on campus of the University of Bonn, Germany, we are offering here a Repository of contributions to the HCCH 2019 Judgments Convention. Please email us if you miss something in it, and we will update …

Update of 16 February 2021: New entries are printed bold. Please also check the list of video recording of events on the Convention at the bottom, if you like.

Please also check the "official" bibliograghy of the HCCH for the instrument.

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Recordings of Events Related to the HCCH 2019 Judgments Convention

HCCH	"22nd Diplomatic Session of the HCCH: The Adoption of the 2019 Judgments Convention", 2 July 2020 (short documentary video available here)
University of Bonn; HCCH	"Pre-Conference Video Roundtable on the HCCH 2019 Judgments Convention: Prospects for Judicial Cooperation in Civil and Commercial Matters between the EU and Third Countries", 29 October 2020 (full recording available here)

JPRI; HCCH; UNIDROIT; UNCITRAL	“2020 Judicial Policy Research Institute International Conference – International Commercial Litigation: Recent Developments and Future Challenges, Session 3: Recognition and Enforcement of Foreign Judgments”, 12 November 2020 (recording available here)
ASADIP; HCCH	“Conferencia Internacional: Convención HCCH 2019 sobre Reconocimiento y Ejecución de Sentencias Extranjeras”, 3 December 2020 (full recording available here and here)

Moser and McIlwrath: Negotiating International Commercial Contracts

Gustavo Moser and Michael McIlwrath have just published “Negotating International Commercial Contracts” (with Eleven publishers). More information is available on the publisher’s website.

The authors have kindly provided us with the follow summary:

The choices of law and forum are seldom negotiated in great depth, despite presenting far reaching implications, often more than what negotiators would generally consider or predict. Poorly negotiated clauses of law and forum might (and often do!) result in unwelcome surprises and costly mistakes. Negotiating these clauses has always been, and is likely to become even more, pivotal to a contract's 'well-being' going forward, particularly in light of Brexit and the pandemic

It is therefore a rather opportune time to consider a few key issues in the negotiation (prospective) and enforcement (actual) of choice of law and choice of jurisdiction clauses.

For example, what law applies to a defective choice of law clause or, in the absence of it, to the main contract, or, rather, to a (defective or otherwise) dispute resolution clause? In which court should I initiate legal proceedings and what are the main commercial risks and benefits of such choice.

It is also pertinent to rethink prospective choices: what is the optimal law(s) to my contract based on a pre-selected set of variables and preferences (e.g. approach given to contract interpretation, contract performance, mandatory rules or gap-fillers)? Are there any other contractual arrangements which might be of particular interest?What are the main difficulties to bear in mind when considering choice of law and choice of dispute resolution clauses?

The above and many more questions are raised and discussed in our recently published book Negotiating International Commercial Contracts: Practical Exercices *(Eleven 2020) The 80+ exercises, with inspiration from real-life scenarios, invite the readers to understand the importance of these clauses. The book further aims to provide guidance to anyone involved in contract negotiation as to how they may more effectively make informed and commercially sensible choices in their deals.*

UK notifies that it considers the Brussels and Rome Convention to no longer apply to it

Steve Peers (University of Essex) has just published a series of Brexit-related documents on Twitter, two of which appear to confirm that by leaving the European Union, the UK also (believes to have) ceased to be a party to the 1968 Brussels Convention and the 1980 Rome Convention – which many have argued might revive between the UK and those EU Member States who are parties to them.

The two letters, sent by the UK Government to the Council of the EU, both contain the following paragraph:

> *The Government of the United Kingdom hereby notifies the Secretary-General of the Council of the European Union that it considers that the [Brussels Convention] / [Rome Convention] ceased to apply to the United Kingdom and Gibraltar from 1 January 2021, as a consequence of the United Kingdom ceasing to be a Member State of the European Union and of the end of the Transition Period.*

Book published on access to and knowledge of foreign law – in search of suitable cooperation instruments

COLLECTION COLLOQUES VOLUME 46

Études de droit international privé comparé
Colloque du 28 novembre 2019

La connaissance du droit étranger À la recherche d'instruments de coopération adaptés

Sous la direction de Gustavo Cerqueira et Nicolas Nord
Préface: Hélène Gaudemet-Tallon

SOCIÉTÉ DE LÉGISLATION COMPARÉE
CIEC COMMISSION INTERNATIONALE DE L'ÉTAT CIVIL
UNIMES
CHROME
université de Strasbourg
Centre de droit privé fondamental | CDPF Université de Strasbourg

Gustavo Cerqueira, Nicolas Nord (dir.), *La connaissance du droit étranger: À la recherche d'instruments de coopération adaptés. Études de droit international privé comparé,* Préface : Hélène Gaudemet-Tallon, Paris : Société de législation comparée, coll. "Colloques", vol. 46, 2020, 268 p. Click here.

The authors' foreword reads as follows (English translation):

"*On November 28, 2019, jurists from various backgrounds met at the french* Cour de cassation *in Paris to reflect on suitable instruments for international cooperation in establishing the content of foreign law.*

This conference is in line with the work previously carried out within the Société de législation comparée *on the subject of foreign law. In particular, it continues the reflections started at the conference concerning the controls on constitutionality and conventionality of foreign law, which was held on September 23, 2016 at the* Cour de cassation*. This event brought together academics and practitioners from several European, North and South American countries and resulted in the publication of a book in 2017 by the Society.*

This approach is also part of the continuity of research carried out in other learned societies at the global or regional level.

The conference of November 28, 2019 confirmed the need for such reflection. On the one hand, all of the contributors affirmed the important place now given to foreign law in the settlement of disputes. This is due, among other things, to the growth of international family and business relationships, the growing demand for recognition of situations established abroad and the possibilities for those concerned to choose the applicable law. On the other hand, the participants attested to the increased role of different legal professions in the application of foreign law. While judges and civil registrars were more traditionally exposed to such a burden, notaries and lawyers in their dual mission of advice and drafting of acts are currently called upon to take into account or implement foreign law.

In this context, while it appears that European Union law is often at the origin of the involvement of these different actors in the application of foreign law, ***another, more recent phenomenon seems to increase occurrences of dealing with such a law: the extensive jurisdictional competition to which***

the European States are engaged because of Brexit. Indeed, Paris, Amsterdam, Brussels and other capitals are establishing courts and chambers specialized in international litigation and in the application of foreign law. This phenomenon is also spreading to major cities, either international, such as Frankfurt am Main or Hamburg, or regional, such as Saarbrücken, in Germany*.*

The stakes are crucial. *The search for suitable instruments for a good knowledge of foreign law is essential for national laws in full legislative and jurisprudential evolution. Indeed, these changes specific to each system reinforce the need for access to reliable content of foreign law in order to guarantee the legal certainty of litigants, as well as to avoid civil liability of legal service providers or even fraud in manipulation of foreign solutions.*

The research envisaged in this colloquium is unfolding, of course, in an environment in which there are formal and informal cooperation mechanisms, the effectiveness of which is only partial in the face of the complexity of the phenomena that cover the application of foreign law. ***Indeed, they were conceived to deal with a foreign law that supposed to be stable and simple and not shifting and plural in its sources****. These mechanisms, not very visible, are also unknown to the practitioners themselves. Current discussions at European (EU) and international (Hague Conference) level attest to the urgency of thinking about responses in this area, using one or more relevant and effective instruments.*

This is what the conference on knowledge of foreign law: in search of suitable cooperation instruments meant to answer. To this end, based on an indicative and non-exhaustive questionnaire, the issue of establishing an inventory was first raised, and then discussions ensued on the solutions adapted to the various requirements revealed both by the type of situation to be treated and by the category of professional involved. ***In this last respect, the needs of the judge and the notary were different, as were those of the registrar and the lawyer.***

The adaptation was also considered in the light of the various questions specific to the original system. ***While the objective may*** **a priori** ***be to achieve the adoption of a general instrument with the widest possible geographical scope, it quickly appeared vain to try to favor such an approach at***

present. *On the one hand, each profession has different needs, on the other hand, the level of development of the different systems compared is not the same. While some countries lag behind and struggle to adopt satisfactory rules in this area, others are at the forefront and therefore are not really in demand for a cooperation instrument whose usefulness does not seem obvious to them.*

In this perspective, different paths for reflection have been explored. They range from the revitalization of old instruments to the creation of specialized institutions at internal, international or European level, including the establishment of specific mechanisms or the use of artificial intelligence. Such abundance shows the crucial nature of the issue and the vitality of the reflections carried out, but also the relevance of having debated it and the need to continue doing so.

In this sense, the next stage of this debate could be that of the opportunity of adopting a European regulation on the matter. In addition to the interest of such an instrument at the European level, it could serve as an impetus for other regional groups, such as Mercosur." (our emphasis)

Prefaced by Professor emeritus Hélène Gaudemet-Tallon (Paris II Panthéon Assas), the book contains the following contributions (most of them in French).

Préface

Hélène GAUDEMET-TALLON

Avant-propos

Gustavo CERQUEIRA and Nicolas NORD

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Cyril NOURISSAT, *Connaissance du droit étranger et coopération internationale : entre nécessité impérieuse et difficultés à surmonter*

I. État des lieux

En France

La magistrature

François ANCEL, *La connaissance du droit étranger. État des lieux – La magistrature*

Cyril ROTH, *Le droit étranger, irréductiblement inconnaissable : leçons tirées de la création d'une collection de lois exotiques*

L'avocature

Dominique FOUSSARD, *Le point de vue d'un avocat au Conseil d'État et à la Cour de cassation*

Olivier BERG, *L'avocat et le droit étranger : entre connaissance et représentation*

L'état civil

Nicolas NORD, *Le droit étranger devant l'officier de l'état civil. État des lieux*

Dans le voisinage

Jochen BAUERREIS, *La connaissance du droit étranger en Allemagne*

Guillermo PALAO MORENO, *La connaissance du droit étranger en Espagne*

Pietro FRANZINA, *La connaissance du droit étranger : cadre juridique et moyens disponibles en Italie*

Lukas HECKENDORN URSCHELER, *La connaissance du droit étranger en Suisse. Une multitude de moyens*

En Amérique Latine

Gustavo Ferraz DE CAMPOS MONACO, *La connaissance du droit étranger en Amérique*

II. Solutions envisageables

Du point de vue des universitaires

Patrick KINSCH, *La preuve de la loi étrangère par renvoi préjudiciel*

Gustavo CERQUEIRA, *Fondamentalisation du droit et justice prédictive. Deux phénomènes à prendre en compte pour la connaissance du droit étranger*

Guillermo PALAO MORENO, *La connaissance du droit étranger : évaluation de la situation en Espagne et propositions dans une perspective européenne*

Maria Rosa LOULA, *The challenges in accessing applicable foreign law and international cooperation in Brazil*

Du point de vue des praticiens

Le magistrat

Jean-Noël ACQUAVIVA, *Connaissance du droit étranger et coopération internationale. Solutions prospectives : l'opinion d'un juge*

Le notaire

Jean-Louis VAN BOXSTAEL, *La connaissance du droit étranger. Le point de vue d'un notaire*

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Wolfgang ROSCH, *La connaissance du droit étranger et la Cour de justice de l'Union européenne*

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Propos conclusifs

Françoise Monéger

Annexes

Questionnaire envoyé aux contributeurs

Programme du Colloque

Liste des contributeurs (auteurs, orateurs, et présidents des séances)

The full table of contents, the preface and the forewords are available here (in French).

More information: https://legiscompare.fr/ecommerce/fr/197-la-connaissance-du-droit-etranger-a-la-recherche-d-instruments-de-cooperation-adaptes

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Review of the AJIL Unbound symposium: Global Labs of International Commercial Dispute Resolution

By Magdalena Lagiewska, University of Gdansk

This post reviews the symposium issue of the *American Journal of International Law* Unbound on "Global Labs of International Commercial Dispute Resolution". This issue includes an introduction and six essays explaining the current changes

and developments in the global landscape for settling international commercial disputes. The multifarious perspectives have been discussed to show tendencies and challenges ahead.

Overall, the *AJIL Unbound* special issue is, without doubt, one of the most impactful contributions on changes in international commercial dispute resolution landscape. It is a successful attempt and a fascinating analysis of recent developments in this field. This is certainly a must-read for anyone interested in reshaping the landscape of dispute resolution worldwide. Beyond the theoretical context, it includes many practical aspects and provides new insight into the prospects of its development and potential challenges for the future. I highly recommend it not only to the researchers on international commercial dispute resolution, but also to legal practitioners—lawyers, arbitrators, and mediators among others. Below, I have outlined each of the symposium's contributions.

As mentioned in the introduction by Anthea Roberts [1], instead of the previous bipolarity and centralization around New York and London, international commercial dispute resolution is facing a new process of decentralization and rebalancing. Today, we are all witnessing the adaptation to a new reality and the COVID-19 pandemic is speeding up the entire process. "New legal hubs" and "one-stop shops" for dispute resolution are springing up like mushrooms in Eurasia and beyond. Therefore, due to the competitiveness between the "old" and "new" dispute resolution institutions, these new bodies are more innovative and thus are expected to attract more and more interested parties.

The main aim of this symposium was to outline the new challenges of the international commercial dispute resolution mechanism around the world. New dispute resolution centres not only influence on the current landscape, but also they offer "fresh insight" in this field.

The first essay by Pamela K. Bookman and Matthew S. Erie, entitled "Experimenting with International Commercial Dispute Resolution" [2], pays attention to the new phenomena on emerging "new legal hubs" (NLHs), international commercial courts and arbitral courts worldwide. This new tendency has recently appeared in China, Singapore, Dubai, Kazakhstan and Hong Kong. All of these initiatives affect the international commercial dispute settlement landscape and increase the competitiveness among these centres. Those centres bravely take advantage of "lawtech" and challenge themselves. As a result, they

are experimenting with legal reforms and some institutional design to attract more interested parties and to become well-known platforms providing high-quality dispute resolution services. The Authors set forth the challenges and threats that may exist in this respect. They also provide an insightful analysis of the impact of these new initiatives on the international commercial dispute resolution, international commercial law, and the geopolitics of disputes.

Further, Giesela Rühl's contribution focuses on "The Resolution of International Commercial Disputes – What Role (if any) for Continental Europe?" [3]. The author pays attention to the Netherlands, which took the initiative to establish a new court exclusively devoted to international cases, and Germany and France, which took more skeptical efforts to establish international commercial chambers both before and after the Brexit referendum in 2016. Rühl believes that the far-reaching reform should be implemented at the European level. Therefore, she advocates the establishment of a common European Commercial Court. This seems to be an interesting approach that would certainly strengthen Europe's position in the global dispute resolution landscape.

Julien Chaisse and Xu Qian outline the importance and key features of the recently established China International Commercial Court (CICC) [4]. Given its foundation, this court should operate as a "one-stop shop" combining litigation, arbitration, and mediation. It is dedicated to solving Belt and Road Initiative (BRI) related disputes. The Authors point out that this court is much more akin to a national court than a genuine international court. Therefore, they challenge its importance with respect to BRI-related disputes and attempt to determine whether the Court will play a significant role in the international dispute settlement landscape. These considerations are especially important given the primary sources in Chinese which bring the reader closer to Chinese legislation.

The following essay, by Wang Guiguo and Rajesh Sharma, addresses the International Commercial Dispute Prevention and Settlement Organization (ICDPASO) established in 2019 [5]. It is another global legal hub that offers "one-stop" services in China. At first glance, the ICDPASO seems to be an interesting body with an Asian flavour, however, the Authors shine a spotlight on some practical challenges ahead and its limited jurisdiction. This body differs significantly from the aforementioned CICC. Whether the ICDPASO will be a game-changer in the BRI-related disputes and will influence importantly on international dispute resolution landscape seems to be a melody of the future. It is

ultimately too soon to answer those questions now, but it is certainly worthwhile to watch this institution.

Further, S.I. Strong brings attention to the actual changes in international commercial courts in the US and Australia [6]. Although Continental Europe, the Middle East, and Asia try to reshape the current international dispute resolution landscape, common law jurisdictions, such as the United States and Australia, are less inclined to changes in establishing international courts specialized in cross-border disputes. Compared to the US, Strong believes that Australia has made more advanced efforts to establish such courts. Nevertheless, aside from the traditional international commercial courts, the newly emerging international commercial mediation services are gaining popularity, most notably due to the entry into force of the UN Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention).

Last but not least, Victoria Sahani contribution's outlines third-party funding regulation [7]. While third-party funding remains a controversial issue in litigation or arbitration, whether domestic or international, it is becoming much more popular globally. There are already over sixty countries experimenting with regulatory questions about third-party funding. In this case, we also deal with some "laboratories" that try out different methods of regulation.

The entire symposium is available here.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1/2021: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)" features the following articles:

R. Wagner: **Judicial cooperation in civil and commercial matters after Brexit**

Brexit has become a reality. When the UK left the EU on 31 January 2020 at midnight, it entered the transition period stipulated in the UK-EU Withdrawal Agreement. During this period, EU law in the field of judicial cooperation in civil and commercial matters applied to and in the United Kingdom. The transition period ended on 31 December 2020. The following article primarily describes the legal situation in the judicial cooperation in civil and commercial matters from 1 January 2021.

Addendum: At the time when this contribution was written, the conclusion of a Trade and Cooperation Agreement between the EU and United Kingdom still was uncertain. Meanwhile, the Agreement of 24 December 2020 has come into existence. It is applicable provisionally since 1 January 2021 for a limited period and will be permanently applicable when after ratification it has formally come into force. The Agreement does not envisage any additional provisions on judicial cooperation in civil and commercial matters between the United Kingdom and the EU. Therefore, it has to be concluded that the present article reflects the current state of law as established by the Trade and Cooperation Agreement (Rolf Wagner).

K. Thorn/K. Varón Romero: **Conflict of laws in the "Twilight Zone" – On the reform of German private international law on welfare relationships**

With the government draft of 25 September 2020, a comprehensive reform of guardianship and care law is approaching which will fundamentally modernize these areas. This reform also includes an amendment to the autonomous conflict-of-law rules in that area. The most important changes within this amendment concern the provisions of the Introductory Act to the German Civil Code (EGBGB). On the one hand, it includes a methodological change to the relevant Article 24 EGBGB which takes greater account of its role as a merely supplementary provision to prior international treaties and Union law. The authors welcome the changes that this will entail but point out that some clarifications are still needed before the reform is completed, particularly in cases of a change in the applicable law. On the other hand, a new Article 15 EGBGB is intended to create a special

conflict-of-law rule for the mutual representation of spouses which is based on the also new substantive rule of Section 1358 of the German Civil Code (BGB) and is designed as a unilateral conflict-of-law rule in favour of domestic substantive law. The authors basically agree with the reasoning for this approach and in addition address questions which remain unresolved even after reading the reasoning, in particular the relationship between Article 15 of the Introductory Act to the Civil Code and the conflict-of-law rules of Union law.

D. Coester-Waltjen: **Conflict rules on formation of marriage – Some reflections on a necessary reform**

The conflict rule on formation of marriages (Article 13 Introductory Law to the Civil Code) underwent several changes during the last years. In addition, societal conditions and circumstances changed considerably. It seems at least questionable whether the cumulative application of the national law of both prospective spouses in case of a heterosexual marriage and the law of the place of registration in case of a homosexual marriage provides a reasonable solution. The article deals with a possible reform of the conflict rule on formation of marriage and envisages whether a comparable solution might be found for other (registered or factual) relationships.

U.P. Gruber: **Reflections on the reform of the conflict of laws of the registered life partnerships and other partnerships**

Under the current law, the formation of a registered life partnership, its general effects and its dissolution are governed by the substantive provisions of the country in which the life partnership is registered. The article deals with a possible reform of this rule. In particular, it addresses the question whether there can be a convergence of the private international law for marriage and registered partnership. Moreover, the article discusses a conflict-of-law rule for de facto relationships.

F. Temming: **Payment of wage supplements in respect of annual leave**

constitute a civil and commercial matter within the scope of Art. 1 Brussels Regulation

In its judgement the CJEU holds that an action for payment of wage supplements in respect of annual leave pay brought by a body competent to organize the annual leave of workers in the construction sector against an employer, in connection – among others – with the posting of workers to a Member State where they do not have their habitual place of work, can be qualified as a "civil and commercial matter" for the purpose of the Brussels Ibis Regulation and, thus, falls within the scope of its Article 1. This can even be the case if the competent body is governed by public law, such as the Construction Workers' Leave and Severance Pay Fund of Austria (hereinafter "BUAK"), provided that it does not act under a public law prerogative of its own conferred by law. This case note argues that the contested section 33h (2b) of the BUAG does not constitute such a prerogative but rather can be construed according to EU law in such a manner that an Austrian court can fully review the accuracy of a claim relied on by BUAK. The importance of the Korana judgement of the CJEU lies in the fact that it ensures the recognition and enforcement of judgments according to Art. 36 ff. of the Brussels I Regulation in favour of these above mentioned bodies. In so doing the CJEU strengthens the regulatory framework set up by the revised Posting of Workers Directive 96/71/EC. It marks the procedural keystone of a long-standing CJEU jurisprudence enabling a special, however adequate and institutionalised system of granting annual leave in the building sector. At the same time, it sends a clear signal towards the Swiss Federal Court that took a contrary view with respect to Art. 1 of the Lugano Convention 2007.

F. Maultzsch: **International Jurisdiction for Liability and Recourse Claims in the Wake of Cum-Ex Transactions**

The Higher Regional Court of Frankfurt (OLG Frankfurt a.M.) had to deal with issues of international jurisdiction for liability and recourse actions resulting from so-called cum-ex transactions that failed on a tax-based level. In doing so, the court took position on diverse jurisdictional issues under the Brussels Ibis Regulation. These issues covered the requirements of a sufficient contest of jurisdiction by the defendant in appellate proceedings, a possible jurisdiction under Art. 7 No. 5 Brussels Ibis Regulation for disputes arising out of the

operations of a branch, aspects of characterization regarding the forum of the contract (Art. 7 No. 1 Brussels Ibis Regulation), as well as the standards of international jurisdiction for a recourse claim from joint and several liability for tax payments. The following article analyses the findings of the court and discusses, inter alia, the application of Art. 26 Brussels Ibis Regulation in cases of a modification of the matter in dispute.

J. Schulte: **A reinforced EU trademark through a strengthened alternative forum**

The EU trademark has been strengthened when it comes to infringements via internet by the recent ECJ decision in AMS Neve, reviving the alternative forum of the place where an act of infringement has been committed or threatened. The Court ruled out an interpretation not congruent with that in Art. 8 (2) Rome II (applicable law) or Art. 7 no. 2 Brussels Ia (international jurisdiction for national trademarks). Instead, it transferred the EU Trademark Regulation's substantive law understanding, thus guaranteeing a uniform interpretation of the regulation. Competent are the courts of the Member State where the consumers or traders are located to whom an allegedly infringing advertising or offers for sale are directed. This reverses the unfortunate "Parfummarken"-doctrine of the German Bundesgerichtshof and gives plaintiffs more leeway for choosing a forum and the possibility of bringing actions for infringements of EU and national trademarks simultaneously at the same court.

H. Schack: **Does Art. 27 Lugano Convention permit requiring a special legitimate interest in actions for negative declaratory relief?**

In an antitrust dispute between a Swiss watch manufacturer and a British wholesaler the Swiss Federal Court gives up its former holding (BGE 136 III 523) that a Swiss action for negative declaratory relief required a special legitimate interest. Today, at least in international cases, the plaintiff's mere interest in fixing the forum is sufficient. That strengthens the attractiveness of Swiss courts in transborder cases.

Álvarez-Armas on potential human-rights-related amendments to the Rome II Regulation (I): The law applicable to SLAPPs

Eduardo Álvarez-Armas is Lecturer in Law at Brunel University London and Affiliated Researcher at the Université Catholique de Louvain. He has kindly provided us with his thoughts on recent proposals for amending the Rome II Regulation. This is the first part of his contribution; a second one on corporate social responsibility will follow in the next days.

On December the 3rd, 2020, the EU commission published a call for applications, with a view to putting forward, by late 2021, a (legislative or non-legislative) initiative to curtail "*abusive litigation targeting journalists and civil society*". As defined in the call, strategic lawsuits against public participation (commonly abbreviated as SLAPPs) "*are groundless or exaggerated lawsuits, initiated by state organs, business corporations or powerful individuals against weaker parties who express, on a matter of public interest, criticism or communicate messages which are uncomfortable to the litigants*". As their core objective is to silence critical voices, SLAPPs are frequently grounded on defamation claims, but they may be articulated through other legal bases (as "*data protection, blasphemy, tax laws, copyright, trade secret breaches*", etc) (p. 1).

The stakes at play are major: beyond an immediate limitation or suppression of open debate and public awareness over matters that are of significant societal interest, the economic pressure arising from SLAPPs can "drown" defendants, whose financial resources are oftentimes very limited. Just to name but a few recent SLAPP examples (For further review of cases throughout the EU see: Greenpeace European Unit [O. Reyes, rapporteur], "Sued into silence – How the

rich and powerful use legal tactics to shut critics up", Brussels, July 2020, p. 18ff): at the time of her murder in 2017, Maltese journalist Daphne Caruana Galizia was facing over 40 civil and criminal defamation lawsuits, including a 40-million US dollar lawsuit in Arizona filed by Pilatus Bank (Greenpeace European Unit [O. Reyes, rapporteur], pp. 9-12); in 2020, a one million euros lawsuit was introduced against Spanish activist Manuel García for stating in a TV program that the poor livestock waste management of meat-producing company "Coren" was the cause for the pollution of the As Conchas reservoir in the Galicia region.

In light of the situation, several European civil-society entities have put forward a model "*EU anti-SLAPP Directive*", identifying substantive protections they would expect from the European-level response announced in point 3.2 of the EU Commission´s "*European democracy action plan*". If it crystallized, an EU anti-SLAPP directive would follow anti-SLAPP legislation already enacted, for instance, in Ontario, and certain parts of the US.

Despite being frequently conducted within national contexts, it is acknowledged that SLAPPs may be "*deliberately brought in another jurisdiction and enforced across borders*", or may "*exploit other aspects of national procedural and private international law*" in order to increase complexities which will render them "*more costly to defend*" (Call for applications, note 1, p. 1) Therefore, in addition to a substantive-law intervention, the involvement of private international law in SLAPPs is required. Amongst core private-international-law issues to be considered is the law applicable to SLAPPs.

De lege lata, due to the referred frequent resort to defamation, and the fact that this subject-matter was excluded from the material scope of application of the Rome II Regulation, domestic choice-of-law provisions on the former, as available, will become relevant. This entails a significant incentive for forum shopping (which may only be partially counteracted, at the jurisdictional level, by the "*Mosaic theory*").

De lege ferenda, while the risk of forum shopping would justify by itself the insertion of a choice-of-law rule on SLAPPs in Rome II, the EU Commission´s explicit objective of shielding journalists and NGOs against these practices moreover pleads for providing a content-oriented character to the rule. Specifically, the above-mentioned "gagging" purpose of SLAPPs and their interference with fundamental values as freedom of expression sufficiently justify

departing from the neutral choice-of-law paradigm. Furthermore, as equally mentioned, SLAPP targets will generally have (relatively) modest financial means. This will frequently make them "weak parties" in asymmetric relationships with (allegedly) libeled claimants.

In the light of all of this, beyond conventional suggestions explored over the last 15 years in respect of a potential rule on defamation in Rome II (see, amongst other sources: Rome II and Defamation: Online Symposium), several thought-provoking options could be explored, amongst which the following two:

1st Option: Reverse mirroring Article 7 Rome II

A first creative approach to the law applicable to SLAPPs would be to introduce an Article 7-resembling rule, with an inverted structure. Article 7 Rome II on the law applicable to non-contractual obligations arising from environmental damage embodies the so-called "theory of ubiquity" and confers the prerogative of the election of the applicable law to the "weaker" party (the environmental victim). In the suggested rule on SLAPPs, the choice should be "reversed", and be given to the defendant, provided they correspond with a carefully drafted set of criteria identifying appropriate recipients for anti-SLAPP protection.

However, this relatively straightforward adaptation of a choice-of-law configuration already present in the Rome II Regulation could be problematic in certain respects. Amongst others, for example, as regards the procedural moment for performing the choice-of-law operation in those domestic systems where procedural law establishes (somewhat) "succinct" proceedings (i.e. with limited amounts of submissions from the parties, and/or limited possibilities to amend them): where a claimant needs to fully argue their case on the merits from the very first written submission made, which starts the proceedings, how are they meant to do so before the defendant has chosen the applicable law? While, arguably, procedural adaptations could be enacted at EU-level to avoid a "catch-22" situation, other options may entail less legislative burden.

2nd option: a post-Brexit conceptual loan from English private international law = double actionability

A more extravagant (yet potentially very effective) approach for private-international-law protection would be to "borrow" the English choice-of-law rule

on the law applicable to defamation: the so-called double actionability rule. As it is well-known, one of the core reasons why "*non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation*" were excluded from the material scope of the Rome II Regulation was the lobbying of publishing groups and press and media associations during the Rome II legislative process (see A. Warshaw, "Uncertainty from Abroad: Rome II and the Choice of Law for Defamation Claims"). With that exclusion, specifically, the English media sector succeeded in retaining the application by English courts of the referred rule, which despite being "*an oddity*" in the history of English law (*Vid*. D. McLean & V. Ruiz Abou-Nigm, *The Conflict of Laws,* 9th ed., Swett & Maxwell, 2016, p. 479), is highly protective for defendants of alleged libels and slanders. The double actionability rule, roughly century and a half old, (as it originated from *Philips v. Eyre* [*Philips v. Eyre* (1870) L.R. 6 Q.B. 1.] despite being tempered by subsequent case law) is complex to interpret and does not resemble (structurally or linguistically) modern choice-of-law rules. It states that:

"*As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England … Secondly, the act must not have been justifiable by the law of the place where it was done*" (*Philips v. Eyre*, p. 28-29).

The first of the cumulative conditions contained in the excerpt is usually understood as the need to verify that the claim is viable under English law (*Lex fori*). The second condition is usually understood as the need to verify that the facts would give rise to liability also under foreign law. Various interpretations of the rule can be found in academia, ranging from considering that once the two cumulative requirements have been met English law applies (*Vid*. Dicey, Morris & Collins, *The Conflict of Laws,* vol. II, 15th ed., Swett & Maxwell, 2012, pp. 2252-2270, para. 35-111), to considering that only those rules that exist simultaneously in both laws (English and foreign) apply, or that exemptions from liability from either legal system free the alleged tortfeasor (*Vid*. Cheshire, North & Fawcett, *Private International Law*, 15th ed., OUP, 2017, p. 885. Similarly, Dicey, Morris & Collins, *The Conflict of Laws,* vol. II, 15th ed., Swett & Maxwell, 2012, pp. 2252-2270, para. 35-128). Insofar as it is restrictive, and protective of the defendant, double actionability is usually understood as a "*double hurdle*"

(*Vid*. Cheshire, North & Fawcett, *Private International Law*, 15th ed., OUP, 2017, p. 885; D. McLean & V. Ruiz Abou-Nigm, *The Conflict of Laws*, 9th ed., Swett & Maxwell, 2016, p. 479) to obtaining reparation by the victim, or, in other words, as having to win the case "*twice in order to win* [only] *once*" (*Vid*. A. Briggs, *The Conflict of Laws*, 4th ed., Clarendon Law Series, OUP, 2019, p. 274). Thus, the practical outcome is that the freedom of speech of the defendant is preserved.

A plethora of reasons make this choice-of-law approach controversial, complex to implement, and difficult to adopt at an EU level: from a continental perspective, it would be perceived as very difficult to grasp by private parties, as well as going against the fundamental dogma of EU private international law: foreseeability. This does not, nevertheless, undermine the fact that it would be the most effective protection that could be provided from a private-international-law perspective. Even more so than the protection potentially provided by rules based on various "classic" connecting factors pointing towards the defendant´s "native" legal system/where they are established (as their domicile, habitual residence, etc).

Truth be told, whichever approach is chosen, a core element which will certainly become problematic will be the definition of the personal scope of application of the rule, i.e. how to precisely identify subjects deserving access to the protection provided by a content-oriented choice-of-law provision of the sort suggested (and/or by substantive anti-SLAPP legislation, for that matter). This is a very delicate issue in an era of "fake news".