Australian Private International Law for the 21st Century (Hart, 2014)



Australian Private International Law in the 21st Century

A new edited collection, ***Australian Private International Law for the 21st Century: Facing Outwards***, has just been published by Hart/Bloomsbury. Edited by Andrew Dickinson, Mary Keyes and Thomas John, here's the blurb:

> *A nation's prosperity depends not only on the willingness of its businesses to export goods and services, and of its citizens and residents to travel to take advantage of opportunities overseas, but also on the willingness of the businesses and citizens of other nations to cross the nation's borders to do business. Economic expansion, and parallel increases in tourism and immigration, have brought Australians more frequently into contact with the laws and legal systems of other nations. In particular, in recent years, trade with partners in the Asia-Pacific Region has become increasingly important to the nation's future. At the same time, Australian courts are faced with a growing number of disputes involving foreign facts and parties. In recognition of these developments, and the need to ensure that the applicable rules meet the needs both of transacting parties and society, the Attorney-General's Department launched in 2012 a full review of Australian rules of private international law. This collection examines the state and future of Australian private international law against the background of the Attorney-General's review. The contributors approach the topic from a variety of perspectives (judge, policy maker, practitioner, academic) and with practical and theoretical insights as to operation of private international law rules in Australia and other legal systems.*

You can purchase it for the (very competitive) price of £50GBP from the Hart

website, both in paper and digital versions.

Latest Issue of RabelsZ: Vol. 78 No 4 (2014)

The latest issue of "Rabels Zeitschrift für ausländisches und internationales Privatrecht – The Rabel Journal of Comparative and International Private Law" (RabelsZ) has recently been released. It contains the following articles:

McGrath, Colm Peter, and Helmut Koziol: *Is Style of Reasoning a Fundamental Difference Between the Common Law and the Civil Law?*

Renner, Moritz: *Transnationale Wirtschaftsverfassung* (Transnational Economic Constitutionalism)

Since the 1920ies, the concept of the Economic Constitution ("Wirtschaftsverfassung") has been highly influential in German and European legal thinking. The Economic Constitution refers to the mandatory legal rules which shape the relationship of economy and politics within a democratic society. In Europe, these norms have come to be defined on a supranational level. Here, the Four Freedoms and the competition rules of the EU Treaty are the cornerstones of a European Economic Constitution. On the international level, there is no equivalent to such norms. World trade and investment law enshrine free trade, whereas there is an apparent lack of even basic rules of market regulation. The practice of cross-border economic exchange can be described as "private ordering in the shadow of law". Rules from different legal sources are recombined – or even replaced – by private mechanisms of dispute-resolution and standard-setting. The article analyzes this development with a view to the rise of international commercial arbitration and the growing importance of international accounting standards. Both examples show the limited reach of domestic and supranational Economic Constitutions, as they can be employed for

“opting out” of mandatory regulation in cross-border contexts. At the same time, however, the institutions of private ordering described here increasingly develop their own standards of mandatory law, both by referring to existing national, supranational and international norms and by generating new rules of a genuinely transnational character. The article argues that these rules may form the nucleus of an emerging Transnational Economic Constitution ordering the relationship between economy, politics and law on a global level.

Donini, Valentina M.: *Protection of Weaker Parties and Economic Challenges – An Overview of Arab Countries’ Consumer Protection Laws*

Lieder, Jan: *Die Aufrechnung im Internationalen Privat- und Verfahrensrecht* (Set-off in International Private and Procedural Law)

This paper analyses the functions of set-off, illustrates the differences between individual national regimes, introduces and explains Art. 17 of the Rome I Regulation (Rome I) and discusses disputes regarding further topics relating to the private international and procedural law of set-off. The primary function of set-off is the simplification of payment transactions. It facilitates the settlement of mutual claims of two parties against one another in a fast and simple way and reduces transaction costs by rendering unnecessary the execution of two separate payment transactions and by disburdening lawsuits from multiple claims. Given these – and other – functional advantages, no developed legal system can afford to abstain from providing the legal institute of set-off. Nevertheless, there are profound differences between individual legal systems, e. g. in the classification of set-off as a matter of substantive or procedural law, in whether there is a pre-condition of an offsetting statement, and whether the set-off has a retroactive effect back to the moment in which the two claims faced each other for the first time (ex tunc) or whether it just takes effect ex nunc after the issuance of an offsetting statement. European and international academic model rules (DCFR, UNIDROIT) basically follow the German-coined continental approach, with the exception of instead giving a set-off an ex nunc effect to a large extent. The regulation of the conflicts of law by the newly established Art. 17 Rome I is of fundamental importance given the differences between the legal systems. It declares as applicable the law governing the claim against which the right to set-off is asserted and abolishes former disputes about the applicable law. It aims at protecting

the set-off opponent, which is justified since he is confronted with the extinction of his claim and the party who has pleaded the set-off, judicially or extra-judicially, had the choice to file a suit instead. The author argues that all known kinds of unilateral set-offs should be governed by Art. 17 Rome I, and that – irrespective of the scope of Rome I – all kinds of claims, contractual and non-contractual, should be subjected to its Art. 17 (analogously). Since Art. 17 Rome I does not regulate the law applicable to set-off by contract, the general rules of the law of conflicts apply, especially Arts. 3 and 4 Rome I. Furthermore, Art. 17 Rome I does not apply to genuinely procedural aspects of a set-off, so that the lex fori is to be applied. Heavily disputed is the question of the international jurisdiction of a court in respect to procedural set-offs against disputed, non-connected claims. Here, the author argues against international jurisdiction as a prerequisite since the set-off opponent is not deserving of any protection.

Corneloup, Sabine: *Rechtsermittlung im internationalen Privatrecht der EU: Überlegungen aus Frankreich* (The Application of Foreign Law in European Private International Law: Reflections from a French Perspective)

On 16 January 2014, a symposium of the German Council of Private International
Law took place in honour of the 80th birthday of Hans Jürgen Sonnenberger. This article is based on a presentation given at that symposium. Its purpose is to formulate, as far as the scope of application of the Private International Law of the EU is concerned, proposals for harmonizing the application of foreign law by the national courts of the Member States. First, it provides an overview of the position in France and comes to the conclusion that the French case law is not completely satisfactory. Secondly, regarding the mandatory or facultative nature of conflict-of-law rules, it proposes that a clear distinction should be made between the judge and the parties. Conflict-of-law rules should always be applied ex officio by the judge, whereas the parties should have the possibility in the course of the proceedings to choose the lex fori. The limits of party autonomy are defined according to two different models which both might be appropriate. Regarding the ascertainment of foreign law, the article advocates for better judicial cooperation especially within the European Judicial Network.

WIPO-ILA Seminar on IP and Private International Law

A one day Seminar (starting 1 pm, ending 6pm) on Intellectual Property and Private International Law organized by the World Intellectual Property Organization (WIPO) and the International Law Association (ILA), will be held at the WIPO Headquarters, Geneva, Switzerland, on January 16, 2015. Consecutive panels will address WIPO and Private International Law, the Work of the Hague Conference on Private International Law, preceding Projects (ALI, CLIP, Transparency Project, Japan-Korea Principles Project), the Mission of the ILA Committee on Intellectual Property and Private International Law, and Selected Issues from the ILA Committee Guidelines (jurisdiction, applicable law, recognition of foreign judgments and arbitration). Discussion will follow.

The Seminar is open to the public, and there is no registration fee. Attendees are requested to register online and bring a photo ID. The language of the Seminar will be English.

Click here to see the program.

Opinion 2/13 of the Court (Full Court). Accession of the European Union to the European Convention for the Protection of Human

Rights and Fundamental Freedoms.

On the Compatibility of the draft agreement with the EU and FEU Treaties: a resounding “no”.

The agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms

See the whole text here.

Weller in Search of the Future of European Private International Law

Matthias Weller from the EBS Law School in Wiesbaden has posted a paper on “Mutual Trust: In Search of the Future of European Private International Law” on SSRN. The paper is forthcoming in the Journal of Private International Law. The pre-edited version can be downloaded here free of charge.

The abstract reads as follows:

> *What will EU justice policy look like in 2020? – This is the question the European Commission posed at the Assises de la Justice, “a forum to shape the future of EU Justice Policy” held at Brussels on 21-22 November 2013, under*

the leitmotif of "building trust in justice systems in Europe". In its press release of 11 March 2014, the Commission again referred to mutual trust as a cornerstone of judicial co-operation in the EU, and submitted several statements and memoranda with a view to the European Council on 26 and 27 June 2014. And indeed, the European Council confirmed that "the smooth functioning of a true European area of justice with respect for the different legal systems and traditions of the Member States is vital for the EU. In this regard, mutual trust in one another's justice systems should be further enhanced".

This text seeks to establish firmer ground in the search for the future of European private international law as a cornerstone for the implementation of the European Union's vision of judicial co-operation in civil-matters. It unfolds possible meanings and functions of the rather opaque, yet almost omnipresent buzzword of mutual trust in the European policy-making on private international law. In a first step, the potential role of mutual trust in private international law in general will briefly be considered (II.). The main focus, of course, will be on European law (III.). The law of the European Union will be analyzed first on the level of primary law (1.). On this level, firstly, the rather abstract question will be addressed what to trust in (a.). Secondly, and more concretely, the functioning of the fundamental freedoms and their structural repercussions on European choice of law thinking will be considered insofar as it revolves around a mutual "recognition" of legal relationships (b.). On the level of secondary law (2.). it will be considered (a.) the normative system of judicial co-operation in civil matters in light of mutual trust, (b.) the operation of that normative system by the European Court of Justice in recent and telling cases, (c.) challenges for this normative system from European Human Rights as well as (d.) challenges from the Commission's 2014 proposal for reacting to systemic deficiencies in the administration of justice in a Member State. Finally (e.), suggestions will be submitted how these challenges could be integrated into the normative system. The last part (IV.) will sum up insights from the deconstruction of the multifaceted term of "mutual trust".

Regulation (EU) No 1329/2014 – Forms in Matters of Successions

The Commission Implementing Regulation (EU) No 1329/2014 of 9 December 2014 establishing the Forms referred to in Regulation (EU) No 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession has been published today.

Click here to access OJ L 359.

Liber Amicorum for Hans Micklitz: Varieties of European Economic Law and Regulation

Kai Purnhagen and *Peter Rott* have edited a book entitled "Varieties of European Economic Law and Regulation". Published by Springer and completely written in English the volume honors the work of *Hans Micklitz*, one of the leading scholars in EU economic law.

The publisher's official abstract reads as follows:

> *This is the first book to comprehensively analyze the work of Hans Micklitz, one of the leading scholars in the field of EU economic law. It brings together analysts, academic friends and critics of Hans Micklitz and results in a unique collection of essays that evaluate his work on European Economic Law and Regulation. The contributions discuss a wide range of Micklitz' work: from his theoretical work on private law beyond party autonomy, with a special focus on its regulatory function, to the illustration of how his work has built the basis for*

current solutions such as used in solving the financial crisis. The book is divided into sections covering foundations of private law, regulatory law, competition and intellectual property law, product safety law, consumer contract law and the enforcement of law. This book clearly shows the enormous impact of Hans Micklitz' work on the EU legal system in both scholarship and practice.

More information is available on the publisher's website.

ELR Issue on PIL and global governance

The latest issue of Erasmus Law Review (vol. 7, issue 3) is dedicated to "The Role of Private International Law in Contemporary Society: Global Governance as a Challenge". It includes the following contributions:

- **The Role of Private International Law in Contemporary Society: Global Governance as a Challenge**

  author: Laura Carballo Piñeiro & Xandra Kramer

- **Faith and Scepticism in Private International Law: Trust, Governance, Politics, and Foreign Judgments**

  author: Christopher Whytock

- **The Role of Private International Law in Corporate Social Responsibility**

  author: Geert Van Calster

- **Global Citizens and Family Relations**

  author: Yuko Nishitani

- **Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law**

  author: Laura Maria van Bochove

- **Private International Law: An Appropriate Means to Regulate Transnational Employment in the European Union?**

  author: Aukje A.H. van Hoek

Opinion of Advocate General Jääskinen in Case C-352/13 (CDC) on jurisdiction in cartel damage claims under the Brussels I Regulation

by Jonas Steinle

Jonas Steinle, LL.M., is fellow at the Research Center for Transnational Commercial Dispute Resolution (www.ebs.edu/tcdr) at EBS Law School in Wiesbaden.

On 11 December 2014, Advocate General Jääskinen delivered its Opinion in Case

C-352/13 (*CDC*). The case deals with the application of different heads of jurisdiction of the Brussels I Regulation to cartel damage claims.

The facts

The claim arises out of a complex cartel in the sector of the sale of hydrogen peroxide that covered the entire European Economic Area and had been going on for years before it was disclosed and fined by the European Commission. The Commission established that there was a single and continuous infringement of Art. 101 TFEU. The claimant, a Belgian company that is the buyer and assignee of potential damage claims resulting from this cartel, brought proceedings against the members of the cartel at the regional court (*Landgericht*) in Dortmund. The defendants in the case have their seats in different Member States including one defendant who has its seat in Germany.

Being seized in this complex case, the *Landgericht Dortmund* struggles with the application of several heads of jurisdiction under the Brussels I Regulation in order to establish its own jurisdiction. Therefore, the *Landgericht Dortmund* referred to following three questions to the CJEU as an order for reference:

1. Must Art. 6 No. 1 of the Brussels I Regulation be interpreted in a way that under circumstances like in the case at hand the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments from separate proceedings? Is it relevant that the claim against the defendant who is domiciled in the Member State of the seized court was withdrawn after service of process to the defendants?

2. Must Art. 5 No. 3 of the Brussels I Regulation be interpreted in a way that under circumstances like in the case at hand the place where the harmful event occurred or may occur may be located with respect to every defendant in any Member State where the cartel agreement had been concluded or implemented?

3. Does the well-established principle of effectiveness with respect to the enforcement of the prohibition of restrictive agreements allow to take into account a jurisdiction or arbitration agreement, even if that would lead to the non-application of jurisdiction grounds such as Art. 5 No. 3 or Art. 6 No. 1 Brussels I Regulation?

The Opinion

As for the application of Art. 6 No. 1 of the Brussels I Regulation, the Advocate General referred first to the well-established principle of the CJEU that a risk of irreconcilable judgments must arise in the context of the same situation of fact and law. For the same situation of fact, the Advocate General simply referred to the binding decision of the European Commission that had established a single and continuous infringement of Art. 1010 TFEU. For the same situation of law the Advocate General pointed out that the members of a cartel are severally and jointly liable and that there was the risk that different Member State courts would interpret the joint and several debt differently which could lead to conflicting decisions in different Member States courts. Furthermore, the Advocate General pointed out that Art. 6 para. 3 Rome II Regulation implicitly refers to Art. 6 No. 1 Brussels I Regulation so that in sum the Advocate General held that Art. 6 No. 1 Brussels I Regulation might be applied to a case like the one at hand. As for the withdrawal of the claim against the German anchor-defendant, the Advocate General did not consider this to be relevant for the jurisdiction of the referring court since he considered the service of process to be the relevant point in time to fulfil the criteria of Art. 6 No. 1 Brussels I Regulation.

With respect to Art. 5 No. 3 Brussels I Regulation, the Advocate General differentiated, again according to well-established case law of the CJEU, between the place giving rise to the damage and the place where the damage occurred. However, the Advocate General considered both alternatives of Art. 5 No 3 Brussels I Regulation to be inapplicable to the case at hand. The Advocate General observed that in a case of a long-standing and wide-spread cartel like the one at hand, it is essentially impossible to identify one single place where the event giving rise to the damage took place. Similarly, the place where the damage occurred would lead to the place of the claimant’s seat as the relevant place of jurisdiction which is contrary to the purpose of the Brussels I Regulation. Hence, the Advocate General held that Art. 5 No. 3 Brussels I Regulation is in applicable in a case like to one at hand.

Finally, Advocate General Jääskinen considered the third question with respect to jurisdiction and arbitration agreements. He therefore drew the line between jurisdiction agreements under Art. 23 Brussels I Regulation on the one hand and jurisdiction agreements that designate Non-Member States courts or arbitration agreements on the other hand. As for agreements under Art. 23 Brussel I Regulation, the Advocate General referred to the principle of mutual trust and

held that the principle of effectiveness could not hinder the application of Art. 23 Brussels and thereby the derogation of other grounds of jurisdiction in cartel damage claims. Contrarily, the Advocate General held that the principle of effectiveness with respect to the enforcement of the prohibition of restrictive agreements might render agreements of the second type inapplicable if an effective enforcement of EU competition law would not be assured.

Evaluation

The Opinion of the Advocate General is grist to the mill of the ongoing enhancement of private enforcement of competition law in the European Judicial Area. After the Directive on antitrust damage actions has been signed into law on 26 November 2014, jurisdiction in cartel damage claims is the last resort that has been left untouched so far. Jurisdiction is the first hurdle that potential claimants have to overcome in these types of cases. As one can see from the proceedings pending before the *Landgericht Dortmund,* these proceedings can be extremely complex and time-consuming. Guidance on these issues by the CJEU is therefore much awaited.

As the Advocate General points out in his Opinion (para. 7), it is the first time that the CJEU will have to decide whether and to what extent the substantive EU law (e.g. Art. 101 TFEU) influences the jurisdictional rules of the Brussels I Regulation in their application. According to the Advocate General, the Brussels I Regulation is not very well suited to enhance private enforcement of competition law (para. 8). The consequences that the Advocate General draws from this finding are noteworthy: As considers Art. 5 No. 3 Brussels I Regulation, being the core jurisdictional rule for cartel damages claims, the Advocate General simply promotes to not apply this rule in complex cases such as the one at hand (para. 47). He even goes further and calls for the European legislator to introduce delict-specific jurisdictional rules into the Brussels I Regulation (para. 10).

This line of argumentation is a striking move. The non-application of a head of jurisdiction in a complex case is somewhat surprising. However, this would not solve the existing problems since it remains unclear in which cases Art. 5 No. 3 Brussels might be still applied then. The call for the introduction of delict-specific rules into the Brussels I Regulation is even more problematic since it breaks with the general scheme of the Brussels I Regulation as a general and cross-cutting legal instrument that might uniformly be applied to any case that is not excluded

from its scope. Instead of creating more exceptions in this complex area of law, the CJEU should build on the existing system of the Brussels I Regulation and come forward with some guiding principles for the referring court which are drawn from the idea of procedural justice and not so much from substantive law influences from the specific area of law.

Council Decision of 4 December 2014, on the approval of the Hague Convention of 30 June 2005 (OJ)

The Council Decision of 4 December 2014, on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements, has been published today (see OJ L 353).

The President of the Council is authorised to designate the person(s) empowered to deposit the instrument of approval provided for in Article 27(4) of the Convention, which shall take place within one month of 5 June 2015. The date of entry into force for the Union of the Convention will be published in the Official Journal of the European Union by the General Secretariat of the Council.