Reviewing a Review, or: What is the meaning of Article 4(1) Rome II?

The 80's British pop band *Prefab Sprout* once recorded a song called „Electric Guitars", dealing with the career of the Beatles, which contained the line: „We were quoted out of context – it was great!" Being quoted out of context in a review, however, is an entirely different and less pleasant matter. In a recent issue of Lloyd's Maritime and Commercial Law Quarterly (2013, pp. 272–274), *Adrian Briggs* from Oxford University criticizes my commentary on Article 4 of the Rome II Regulation (in: *Calliess* (ed.), Rome Regulations, Alphen aan den Rijn, 2011) as follows (p. 273):

„The book is at its best when the reader is looking for an answer to a precise question, such as whether the particular contract with which he is dealing, and which does not contain an express choice of law, falls within any the specific contracts listed in Art. 4(2) of the Rome I Regulation, or whether the particular kind of assignment, or particular right to be assigned, falls within the choice of law rule in Art. 14 of the same Regulation, and so on. There are, of course, odd points with which one is simply bound to disagree. One such is the assertion, in relation to the Rome II Regulation, that the said instrument "is rather conservative, in giving the *lex loci delicti* pride of place as the general rule for torts" (p. 404). It is not the first time this kind of sentiment has been heard, but it is simply not true, and credibility is neither gained nor given by advancing it. The most striking thing about Art. 4, as it was about earlier English legislation, is that it saves one from the gymnastic pain of having to decide where a cross-border tort was committed: to look for the place of the tort is, in a significant number of cases, to look for something which is not there. Article 4 accordingly places its emphasis on the place where the damage occurs. It is not helpful to pretend that this is a rule which it manifestly is not. Indeed, the commentary makes no more of the assertion set out above; it is still a pity that it was there at all.
It might be said that the presentation of arguments is still more German than it is delocalised. For example, the elucidation of the country in which the damage occurs (which is the proper reading of Art.4(1)) states, at p. 406, that the legislation reflects something which is rendered in German as *Erfolgsort*. No

doubt it does. But for the non-German reader, the more helpful starting point would surely be to go to the substantial jurisprudence of the European Court in relation to Art. 5(3) of the Brussels I Regulation. This is soon done, but putting it after the German law point seems wrong. Certainly, when one gets there the analysis of the European material is good and clear, but one might still have thought that this, rather than German understanding of damage and its location, should have been presented as the primary source material. It must be said, however, that the citation of material from sources outside Germany is extraordinarily impressive; and it is, of course, hard not to offer lessons from one's own law where these appear to be instructive. But there are still advantages in trying, in this context, to treat the European law source material as the first resource, and anything generated by national law as ancillary only."

Briggs' first point seems to be that my commentary erroneously tries to assert that the Rome II Regulation clings to the primacy of the place where the tortfeasor acted (place of conduct). Of course, such a statement would be utterly nonsensical. Read in context, however, the incriminated section merely points out that the systematic position of Art. 4(1) Rome II as a general rule must be put into perspective when viewing the more complex structure of the Regulation. The whole section reads as follows:

„Contrary to earlier drafts (*see* mn. 12), the final Rome II Regulation is rather conservative in giving *lex loci delicti* pride of place as the 'general rule' for torts. In fact, *lex loci delicti* is, for logical and systematic reasons, rather a **subsidiary rule**: It applies only if the parties have not chosen the applicable law (Article 14), if there is no manifestly closer connection, for example, because of a contract between the parties (Article 4(3)) and if there is no common habitual residence of the parties (Article 4(2)) [footnotes omitted]".

I have difficulty in understanding what should be wrong about this analysis concerning the obvious, not to say trivial, discrepancy between the numerical position of Art. 4(1) in the Regulation and its real importance for the choice-of-law process. *Briggs*, however, seems to be more infuriated by what he perceives as my incorrect use of "lex loci *delicti*" as encompassing the lex loci *damni* (and not only the law in force at the place of conduct). In this regard, however, the text merely follows the understanding of the term as it was used by the European Commission when it drafted the Rome II Regulation. In its Explanatory Memorandum on the 2003 draft, which already opted for the place of damage as

the basic connecting factor, the Commission points out explicitly: "The Commission's objectives in confirming [!] the *lex loci delicti commissi* rule [!] are to guarantee certainty in the law and to seek to strike a reasonable balance between the person claimed to be liable and the person sustaining the damage. The solutions adopted here also reflect recent developments in the Member States' conflict rules" (COM [2003]427 final, p. 11). The fact that the European legislature saw lex loci damni merely as a more precise, uniform definition of the place where a harmful event occurred rather than an antithetical novelty is also supported by Recitals 15 and 16 of the final Regulation. Being a non-native speaker, I concede that I would accept any criticism referring to an idiosyncratic use of established English (or, in this case, Latin) legal terms. In their treatise „The Private International Law of Obligations", 3rd ed. 2009, para. 18–007, however, *Richard Plender & Michael Wilderspin* state as well: „Article 4(1) [Rome II] thus represents a refined version of the classic *lex loci delicti commissi* rule [!] which has always been applied in one way or another in all Member States." Thus, with due respect for my learned colleague *Adrian Briggs*, I still think that the section he strongly criticizes as pitiful is correct both in its wording and its substance.

Briggs' second point of concern refers to my seemingly parochial preference for quoting German sources rather than genuine European material. Again, the section that he criticizes is far more nuanced when it is read in context:

„Although the language of Article 4(1) Rome II is rather complex, defining the place of injury as 'the country in which the damage occurs … irrespective of the country or the countries in which the indirect consequences of that event occur', the explicit exclusion of 'indirect consequences' makes clear that the real connecting factor is not the place where mere pecuniary damage was suffered ('I suffered the damage in my pocket'),[35] but the place of injury, the *Erfolgsort* in the traditional German terminology.[36]"

The footnote 35 explicitly refers to the rejection of a so-called money pocket rule under Art. 5(3) of the Brussels I Regulation. Moreover, the section *Briggs* criticizes is actually preceded [!] by a paragraph (marginal number 13) which draws the reader's attention to the "settled case law of the ECJ" on Art. 5(3) Brussels I. Apart from that, even the Commission, when drafting Rome II, occasionally referred to established German legal terms, for instance in COM [2003]427 final, p. 11: "The rule entails, where damage is sustained in several

countries, that the laws of all the countries concerned will have to be applied on a distributive basis, applying what is known as *‚Mosaikbetrachtung'* in German law." This explanation shows that the Commission did not legislate on a clean slate, but was very aware of the experience gained under former domestic approaches to choice of law in torts. Thus, making the reader familiar with some established German legal terms and their background might actually be helpful in understanding some ideas underlying the Rome II Regulation.

For other, more balanced reviews of the Commentary, see, for example, *Matteo Fornasier*, Zeitschrift für Europäisches Privatrecht (ZEuP) 20 (2012), p. 676 et seq. and *Xandra Kramer*, Common Market Law Review 51 (2014), pp. 335-337. By the way: A new edition of the Commentary is forthcoming in 2015. In addition to the Rome I and II Regulations, Rome III will be covered as well. Stay tuned!

Stefan Wrbka on European Consumer Access to Justice Revisited

Stefan Wrbka, Associate Professor for European and Comparative Private Law at Kyushu University, has authored a book on "European Consumer Access to Justice Revisited". Published by Cambridge University Press it will be out in late November.

More information is available on the publisher's website. The official abstract reads as follows:

> *European Consumer Access to Justice Revisited takes into account both procedural and substantive law questions in order to give the term 'access to justice' an enhanced meaning. Specifically, it analyses developments and recent trends in EU consumer law and aims to evaluate their potential for increasing consumer confidence in the cross-border market. Via a critical assessment of the advantages and disadvantages of the means initiated at the EU level, the*

author highlights possible detriments to the cross-border business-to-consumer (B2C) market. To remedy this, he introduces an alternative method of creating a legal framework that facilitates B2C transactions in the EU – 'access to justice 2.0'.

A Note from Professor S.I. Strong on the Results of Her Recent Survey on International Commercial Mediation and Conciliation

With the permission of the publishers, I wanted to let you know that the preliminary results from a recent empirical study on international commercial mediation and conciliation are now available. The study, which is entitled "*Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation*," collected detailed data on 34 different questions from 221 respondents from all over the world. Survey participants included private practitioners, neutrals, in-house counsel, government lawyers, academics and judges with expertise in both domestic and international proceedings.

This information was gathered to assist UNCITRAL and UNCITRAL Working Group II (Arbitration and Conciliation) as they consider a proposal from the Government of the United States regarding a possible convention in this area of law. The U.S. proposal will be considered in depth at the Working Group II meeting in February 2015.

Those who would like to see a copy of the preliminary report can download a free

copy here. The data will be further analyzed in the coming months and published sometime next year as an article.

Many thanks to those from conflictsoflaw.net who participated in the survey and who helped distribute it among their networks. If you have any questions about the preliminary report, please feel free to let me know.

Kind regards,

S.I. Strong, FCIArb
Associate Professor of Law
Senior Fellow, Center for the Study of Dispute Resolution University of Missouri

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Papers ELI/UNIDROIT Project on Civil Procedure published

As we reported earlier, in October 2013, the first exploratory workshop of the ELI/UNIDROIT project on European Rules of Civil Procedure took place. This was followed by the launch of three pilot studies this spring, the first results of which will be discussed in Rome next week.

Most of the papers presented at the first exploratory workshop have meanwhile been published in the *Uniform Law Review* 2014, issues 2 and 3.

Uniform Law Review 2014/2

- Diana Wallis – **Introductory remarks on the ELI-Unidroit project**
- Geoffrey C. Hazard, Jr. – **Some preliminary observations on the proposed ELI/Unidroit civil procedure project in the light of the experience of the ALI/Unidroit project**
- Sacha Prechal and Kees Cath – **The European acquis of civil procedure: constitutional aspects**
- Thomas Pfeiffer – **The contribution of arbitration to the harmonization of procedural laws in Europe**

- Xandra E. Kramer – **The structure of civil proceedings and why it matters: exploratory observations on future ELI-Unidroit European rules of civil procedure**
- Nicolò Trocker – **From ALI–Unidroit Principles to common European rules on access to information and evidence? A preliminary outlook and some suggestions**
- Loïc Cadiet – **The ALI–Unidroit project: from transnational principles to European rules of civil procedure: Public Conference, opening session, 18 October 2013**
- Neil Andrews – **Fundamentals of costs law: loser responsibility, access to justice, and procedural discipline**
- Miklós Kengyel – **Transparency of assets and enforcement**
- Rolf Stürner – **Principles of European civil procedure or a European model code? Some considerations on the joint ELI–Unidroit project**

Uniform Law Review 2014/3

- Eva Storskrubb – **Due notice of proceedings: present and future**
- Ianika N. Tzankova – **Case management: the stepchild of mass claim dispute resolution**

International Seminar on Private International Law, Madrid 2015

The 9th International Seminar on Private International Law promoted by Professor Fernández Rozas and Professor De Miguel Asensio (University Complutense, Madrid), has been scheduled for May 22 next year.

This edition's speakers will be, among others, Prof. Burkhard Hess (Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law), Bertrand Ancel (Université Paris II), Franco Ferrari (New York University) and Louis D'Avout (Université Paris II). Short contributions from academics and law professionals are welcome provided they are timely submitted.

In this regard the organizers kindly request those intending to participate to send an email to Professor Patricia Orejudo (patricia.orejudo@der.ucm.es) as soon as possible, in any event not later than December 15, 2014, including the title of the proposal and a brief summary of its contents. Accepted papers will be eligible for publication in the *Anuario Español de Derecho Internacional Privado*, subject to prior scientific peer evaluation.

The definitive program, schedule of presentation, venue and further details on organization will be announced here as soon as they become available.

Commemorating Bernd von Hoffmann (1941-2011)

The University of Trier will hold an academic ceremony commemorating the late Professor Dr. Bernd von Hoffmann (1941-2011), on November 28, 2014. Bernd von Hoffmann held a Chair in Private Law, Comparative Law and Private International Law at the University of Trier from 1979 to 2007 and is recognized as one of the leading scholars of his generation, particularly in the fields of private international law and arbitration. The ceremony will be followed by a symposium (in German) dealing with „Structural asymmetries in international dispute resolution“ on November 29, 2014. The ceremony and the symposium are organized by von Hoffmann’s academic pupils, Professor Dr. Herbert Kronke, LL.M., University of Heidelberg, who is currently serving as a judge with the Iran-United States Claims Tribunal in The Hague, and Professor Dr. Karsten Thorn, LL.M., Bucerius Law School, Hamburg, in close collaboration with the Institute for Legal Policy at the University of Trier and the University’s law faculty.

The program is as follows:

Friday, November 28, 2014 – 17.30

Welcome Addresses
Professor Dr. Mark A. Zöller, Dean, Faculty of Law, University of Trier

Professor Dr. Michael Jäckel, President, University of Trier

Zur Person Bernd von Hoffmann
Professor Dr. Herbert Kronke, LL.M., University of Heidelberg; Judge, Iran-United States Claims Tribunal, The Hague

Privatautonomie und Parteiautonomie: (familienrechtliche) Zukunftsperspektiven
Professor Dr. Dr. h.c. mult. Dieter Henrich, University of Regensburg

Saturday, November 29, 2014 – 9.00 – 14.00

Welcome Address
Professor Dr. Gerhard Robbers, Minister of Justice, Rhineland-Palatinate

Der Schutz des Geschädigten bei grenzüberschreitenden Delikten im europäischen Zivilprozessrecht
Professor Dr. Jan von Hein, University of Freiburg/Germany

Grenzüberschreitende Rechtsdurchsetzung und Gemeinsames Europäisches Kaufrecht
Professor Dr. Jens Kleinschmidt, LL.M., University of Trier

Schiedsvereinbarungen in Fällen struktureller Unterlegenheit – hinreichende Schutzmechanismen oder Regelungslücken?
Professor Dr. Karsten Thorn, LL.M., Bucerius Law School, Hamburg

Kollektiver Rechtsschutz im Schiedsverfahren
Professor Dr. Thomas Rüfner, University of Trier

Justice is open to all – like the Ritz Hotel: Schiedsvereinbarungen im Sport
Dr. Francesca Mazza, Deutsche Institution für Schiedsgerichtsbarkeit

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Convention on Taking Evidence in

the EU

The Institute for Civil, Comparative and International Private Law of the Faculty of Law in Ljubljana is organising an international conference titled “European Dimension of Taking Evidence in Civil Procedure”. This conference is focused on one of the important topics in the EU law on civil procedure and its various aspects, including the principle of *audiatur et altera pars*, role of the judge in taking evidence, administration and integrity of evidence as well as function of the information technology in the process. This conference is one of the activities within the EU funded project Dimensions of Evidence in European Civil Procedure. More details are available in the program.

The conference will be held 15 and 16 January 2015 at the premises of the Faculty of Law in Ljubljana, Slovenia.

22nd Croatian Arbitration Days

An annual international arbitration conference with long tradition will gather for the 22nd time some of the leading arbitration experts from Croatia and abroad. This year’s topics deal with damages and expert vitnesses in arbitration, in addition to the overview of the recent arbitration developments in the South East Europe. Among presenations which are mostly arbitration-orented, there are some which also have private International law character. The program of the conference is available here: 22nd CAD – Conference Program.

The conference is scheduled for 4-5 December 2014 and will take place in Zagreb at the Croatian Chamber of Economy. Further details may be found on the Chamber’s webpage.

Kurt Lipstein: Collection of Essays

Peter Feuerstein and *Heinz-Peter Mansel* have edited a "Collection of Essays" by Kurt Lipstein, a German law professor who emigrated from Germany to England in 1934.

The English abstract reads as follows:

> *This collection contains a selection of essays by the late Professor Kurt Lipstein, who emigrated from Germany to Cambridge in 1934. It focuses on his central works on the general principles of private international law, which are characterized by his comparative approach and his attention to the many relationships between conflicts of law and questions of public international and European law. It includes Lipstein's first studies of the conflict of laws as well as his powerful Hague lecture on the basic principles of private international law and his influencing articles on the development of the conflict of laws through international courts and arbitral tribunals.*

More information is available on the publisher's website.

Save the date: 128th Conference of the Private International Law Association of Japan (2015)

The Private International Law Association of Japan was formed as an academic organization on November 4, 1949, for the purpose of enhancing the study of private international law and promoting cooperation with similar academic bodies overseas, as well as coordination among researchers of private international law. Its 128th conference will take place on Saturday, June 6, and Sunday, June 7, 2015, at the Campus of Waseda University, Shinjuku-Ward, Tokyo. One of the panels will deal with „Regional Economic Integration and Private International

Law“ from a comparative perspective. Further information and programme details will follow as and when they become available here.