Enhancing Mutual Trust – Codification of the European Conflict of Laws Rules: Some of the EU Commission's Visions for the Future of EU Justice Policy

By Matthias Weller

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On 11 March 2014 the European Commission presented its vision for the future EU justice policy until 2020. In its Press Release "Towards a true European area of Justice: Strengthening trust, mobility and growth", the Commission identifies three key challenges after the forthcoming end of the European Council's Stockholm Programme on 1 December 2014: Enhancing mutual trust, facilitating mobility and contributing to economic growth. Against the background of the "Assises de la Justice" held in Brussels in November 2013 the Commission, by outlining its own vision of the future EU justice policy, intends to further feed the discussion on the way to the European Council on 24 June 2014. The most comprehensive document is the Communication on the EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union (COM [2014] 144 final of 11 March 2014.

In this document the Commission, after summarizing the development of the European area of freedom, security and justice from Maastricht via Amsterdam and Nice to Lisbon as well as from the European Councils at Tampere via The Hague to Stockholm, further substantiates what it means by the three key challenges identified in its press release:
Firstly, "mutual trust" is evoked as the "bedrock upon which EU justice policy should be built", namely by "building bridges between the different justice

systems", in particular by mutual recognition. Whereas the European legislator has so far simply postulated a sufficient degree of mutual trust amongst the Member States in order to justify obligations for mutual recognition in respect to the judicial cooperation in civil matters, the European Commission now is acknowledging that mutual trust must be strengthened or even built in the first place – a view that has up to now been taken only in respect to criminal matters. But with only 24% of people trusting their own national justice system for example in Slovenia, or 25% in Slovakia, it appears hardly possible to continue presuming a sufficient level of trust, let alone mutual trust.

In this context, the Commission suggests a new framework to safeguard the rule of law in the European Union. In its Communication to this proposal, the Commission explains that this framework is to operate as a "pre-Article 7 TEU procedure" addressing "systemic threats" to the rule of law consisting of three stages, namely a "rule of law warning" to be issued by the Commission to the respective Member State, a "rule of law recommendation" and on the third level a monitoring of the implementation of the recommendations before resorting to the "nuclear option" of Article 7 TEU that allows under certain conditions the suspension of (mainly voting) rights of Member States under the Treaties. The Commission makes crystal clear that its initiative is not meant to deal with individual breaches of fundamental rights or any miscarriage of justice in a particular case. Infringements of the rule of law other than "systemic" ones are to be taken care of – as before – by the national judicial systems including those provided for by the European Convention on Human Rights.

However, if some national judicial systems are perceived by the public or even evaluated by the Commission under its proposed pre Article 7 TEU procedure not to be sufficiently trustworthy, there is a problem both conceptually for building bridges through mutual recognition to the judicial system of such a Member State as well as for the individual suffering or threatened to suffer from a (non-systemic) violation of the rule of law in his / her particular case. One answer to the individual's problem obviously is allowing exceptions to mutual recognition, i.e. public policy-clauses. Therefore, if the Commission is now acknowledging that there may be the need to strengthen mutual trust in respect to certain Member States, it would be contradictory to further pursue at the same time limitations or even deletions of public policy clauses as it was proposed for the Brussels I Recast. Rather, the Commission itself should trust the Member States that they

do not misuse public policy exceptions. Mutual trust does not only operate horizontally but also vertically. It is difficult enough for the aggrieved party to argue and prove a case of violation of public policy. An obvious question not raised by the Commission in this context would be whether initiating pre Article 7 proceedings should affect in any way obligations of other Member States to recognize judicial acts from the Member State addressed by the Commission (possibly depending on the nature of observations made by the Commission), for example by reducing the degree of probability for public policy violations that must be shown in order to benefit from this exception of recognition.

Secondly, the Commission wants to enhance mobility of EU citizens, inter alia by further removing obstacles and "practical and legal difficulties" in respect to e.g. cross-border family matters

Thirdly, the Commission intends to promote economic growth. Interestingly, the envisaged "structural reforms … to be pursued so as to ensure that justice systems are capable of delivering swift, reliable and trustworthy justice" appear to be understood as part of that strategy for economic growth rather than primarily as a core element of the rule of law.

Most interestingly, of course, is the Commission's vision on how to address these challenges:

One core element is the "codification of existing laws" which is perceived to "facilitate the knowledge, understanding and the use of legislation, the enhancement of mutual trust as well as consistency and legal certainty while contributing to simplification and the cutting or red tape". The Commission, having adopted since 2000 "a significant number of rules and civil and commercial matters as well as on conflict of laws", suggests that "the EU should examine whether codifications of the existing instruments could be useful, notably in the area of conflict of laws". It seems that the Commission proclaims the idea of codification in particular for the numerous –existing and forthcoming – instruments on the conflict of laws. From a continental perspective this would certainly be strongly welcomed because a codification would provide the chance to remove inconsistencies such as e.g. different rules on choice-of-law agreements in different instruments and would motivate for systematic thinking about complementing such a codification with rules on general issues like, for example, the handling of preliminary questions or of the characterization or the

interpretation of recurrent connecting factors. It would be an interesting question whether not only the Rome instruments but also the Brussels instruments should be part of such a codification. Since the newest instruments contain both jurisdictional rules as well as choice of law-rules, a possible codification should include all European instruments on private international law.

Complementing the codification of European conflict of laws rules would perfectly fit in the second tool by which the Commission envisages to address the challenges for the EU Justice Agenda which is – "complementing" existing EU law where appropriate, so far proposed by the Commission for the service of documents and the taking of evidence.
Last not least, the Commission considers "facilitating citizens' lifes" in all areas where mobile citizens still encounter problems. For example, "related to civil status records, the EU should assess the need for further action such as rules on family names to complement existing proposals to facilitate the acceptance of those public documents which are of particular practical relevance when citizens or business make use of their free movement rights". Is the Commission thinking of codifying the recent case law of the ECJ in *Garcia Avello, Grunkin Paul* and the following judgments? This would again perfectly fit in the tool box for addressing the challenges for the EU Justice Agenda that consists of – codifying and complementing. Why not complementing by codifying? In that case, the question arises how rules on this area of conflict of laws in direct light of the primary rights of the mobile citizens from Articles 20 and 21 TFEU could be formulated. Methodically, the Commission holds all doors open: "Complementing" may include "mutual recognition" as well as "traditional harmonization".

Workshop on vested rights theory and conference on protection of

adults in Ferrara

The Department of Law of the University of Ferrara will host, on 3 April 2014, the fourth Ferrara Workshop on Private International Law (see here and here for previous editions). The invited speaker, Samuel Fulli-Lemaire (Paris II) will give a presentationtitled “The vested rights theory: relevant at last or as useless as ever?”. He will be joined in the discussion by Fabrizio Marongiu Buonaiuti (University of Macerata) and Giulia Rossolillo (University of Pavia).

A conference (in Italian) will be held on 4 April concerning the international protection of vulnerable adults in view of the possible ratification of the Hague Convention of 13 January 2000 by Italy.

The conference will consist of two sessions, chaired by Stefania Bariatti (University of Milan) and Cristina Campiglio (University of Pavia). The first session will provide an illustration of the Convention. The second will address the main issues surrounding its implementation in the Italian legal order and the coordination of uniform and national rules.

Speakers include academics, judges, notaries, lawyers, officials from the Italian Ministries of Justice and Foreign Affairs as well as representatives of ONGs working in the field of disability rights. The conference will be opened by Francesco Azzarello, Ambassador of Italy in theNetherlands.

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French Supreme Courts rules on Personal Scope of Waiver of Immunity of Enforcement

By Vincent Richard

Vincent Richard is a research fellow at the Max Planck Institute Luxembourg

On March, 5th, 2014, the French Supreme Court for private and criminal matters (*Cour de Cassation*) set aside an enforcement measure carried out by a Swiss company (Romak SA Geneva) against the Republic of Uzbekistan (here).

Facts

In 1996, an Uzbek company (Uzdon) signed a contract with Romak for the delivery of wheat to Uzbekistan. The price agreed was never paid by the Uzbek company and Romak initiated arbitral proceedings in front of the GAFTA. In August 1997, a GAFTA arbitral award ordered Uzdon to pay approximately 10 million dollars to Romak SA Geneva. This award was declared enforceable in France and in November 2009 Romak proceeded to attach a bank account opened by the Republic of Uzbekistan at the Paris branch of HSBC Bank. The Republic of Uzbekistan challenged this attachment in front of a French enforcement court.

Personal Scope of Waiver of Immunity

Uzbekistan claimed that the HSBC bank account under the name Uzbekistan Airways was supplied by air navigation charges and thus covered by enforcement immunity as resulting from public powers activities. The Swiss Company did not contest the origin of the funds but argued that they were not covered by State immunity. This argument was based on the fact that these funds were escrowed in favour of a lending Japanese company in order to guarantee a loan where Uzbekistan clearly waived its immunity.

Unsurprisingly, the enforcement court declared that the waiver of immunity was made solely in favour of the Japanese company for the purpose of the loan and could not be extended to all creditors of Uzbekistan. The Court considered that the funds were covered by Uzbekistan enforcement immunity and the attachment was thus annulled. This decision was confirmed by the Court of Appeal and by the French Supreme Court.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (2/2014)

Recently, the March/April issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

- ***Moritz Renner/Marie Hesselbarth***: "Corporate Control Contracts and the Rome I Regulation"

The article deals with the law applicable to control contracts within a group of corporations in the sense of §§ 291 et seq. AktG. Here, the Rome I Regulation calls for a reassessment of current conflict-of-laws approaches. As the article seeks to show, applying the Rome I Regulation to corporate control contracts demands a contractual qualification of the latter. Interpreting the notions "contractual obligations" and "questions governed by the law of companies" according to EU law methods leads to an extensive definition of the former and a narrow scope of application of the latter provision. Two aspects merit special attention. First, a systematic comparison to the Brussels I Regulation has to be drawn. Under Brussels I, the ECJ has extensively interpreted the term "contractual relation", especially in contrast to company law questions. Secondly, primary EU law, namely the freedom of establishment, demands contractual freedom of choice for corporate control contracts. Domestic law provisions protecting creditors and minority shareholders can be applied as overriding mandatory provisions in the sense of art. 9 Rome I Regulation.

- ***Jürgen Stamm***: "A plea for the abandonment of the European account preservation order – Ten good reasons against its adoption"

The cross-border enforcement of claims shall be facilitated by the adoption of a European account preservation order. In view of the heterogeneous enforcement systems of the EU Member States this undertaking resembles the attempt to introduce a European enforcement law through the back door. In addition, the current draft of a Council Regulation considers neither the constitutional principles nor the system of the Council Regulation (EC) No.

44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The following article illuminates these aspects and makes suggestions to reduce obstacles to the cross-border enforcement of claims in the existing system of Council Regulation (EC) No 44/2001.

- ***Oliver L. Knöfel:*** "A new approach to EU Private International Law for seamen's employment agreements: with special reference to the employer's engaging place of business"

The article reviews a judgment of the European Court of Justice (Fourth Chamber) of 15 December 2011 (C-384/10), relating to the construction of Article 6(2)(b) of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations. Dealing with labour aboard a sea-going vessel, the ECJ ruled that the concept of "the place of business through which the employee was engaged" must be understood as referring exclusively to the place of business which engaged the employee and not to that with which the employee is connected by her actual employment. Thus, the ECJ approaches a modern classic of European conflicts law in employment matters, but unfortunately takes the wrong side in a long-standing controversy between a "contract test" and a "function test". The author analyses the relevant issues of cross-border labour in the transportation sector, explores the decision's background in EU private international law, and discusses its consequences for the coherency and justice of the system of connecting factors in Art. 6 Rome Convention/Art. 8 Rome I Regulation.

- ***Herbert Roth***: "Europäischer Rechtskraftbegriff im Zuständigkeitsrecht?"– the English abstract reads as follows:

The European Court of Justice has developed an autonomous conception of substantive res judicata concerning a special question of the international jurisdiction of the courts. The claim dismissing adjudication by first instance courts comprises, inter alia, the prejudicial question of the validity of a choice-of-forum clause, which shall be binding on the Court of recognition in accordance with Art. 33 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The decision must be rejected because the interests of

the parties are not taken into account sufficiently.

- ***Nils Lund***: "Der Rückgriff auf das nationale Recht zur europäisch-autonomen Auslegung normativer Tatbestandsmerkmale in der EuGVVO"– the English abstract reads as follows:

The ECJ's decision discussed in this article concerns two provisions of the Brussels I Regulation. In the first part of its ruling the ECJ has held that the concept of "civil and commercial matters" of Art. 1(1) includes an action for recovery of an amount unduly paid by a public body in compensation of an act of persecution carried out by a totalitarian regime. The second part of the decision, that is concerning Art. 6(1), clarifies that a "close connection" between the claims exists if the defendant's pleas have to be determined on a uniform basis and that the provision does not apply to defendants domiciled outside of the EU. Regarding the approach of the court to the interpretation of the terms "civil and commercial matters" and "close connection", this article concludes that the autonomous construction of the Regulation does in certain cases allow for the recourse on national law.

- ***Reinhold Geimer:*** "Streitbeendigung durch Vergleich in Südafrika"
- ***Jan D. Lüttringhaus: "***Eingriffsnormen im internationalen Unionsprivat- und Prozessrecht: Von Ingmar zu Unamar" – the English abstract reads as follows:

Thirteen years after the landmark Ingmar case, the ECJ has again been asked to define the concept of overriding mandatory provisions and, in particular, to characterise national rules transposing Directive 86/653/EEC on commercial agents. Whereas in Ingmar the parties had chosen the law of a non-EU-Member State that did not provide for a level of protection required by European law, Unamar involves a scenario where the law designated by the parties is the law of a Member State which meets the minimum requirements laid down by Directive 86/653/EEC. The question brought before the ECJ in the case at hand is whether the court of another EU Member State may nonetheless apply its national provision as overriding mandatory rules on the grounds that the protection of a commercial agent under the lex fori goes beyond that provided for by the European Directive. Since the ECJ answers this question in the

affirmative, Unamar may have far-reaching consequences for the system of European private international law.

- ***Dirk Looschelders***: "Continuance or Extinction of Parental Responsibility after a Change of Habitual Residence"

Different legal systems provide very different rules for determining the parental responsibility of non-married parents. Therefore, if the habitual residence of the child changes, the joint responsibility of non-married parents established under the law of the child's former residence state may become extinct under the law of the new residence state. In order to avoid this unreasonable result, Article 16 (3) of the 1996 Hague Convention on the Protection of Children expressly rules that parental responsibility which exists under the law of the state of the child's habitual residence persists after a change of that habitual residence to another state. However, Article 16 (3) is not applied in German courts if the child's habitual residence changed before the Convention came into force in Germany on 1 st January 2011. In such cases, joint parental responsibility appears to cease.

The present decision of the Oberlandesgericht Karlsruhe shows that the problems usually can be solved by a judicial order awarding parental responsibility back to both parents. Nevertheless, with regard to cases of child abduction it is preferable to maintain joint parental responsibility on a continuing basis by limiting changes in the law governing parental care according to Article 21 EGBGB.

- ***Florian Eichel:*** "The application of s. 287 of the German Code of Civil Procedure (investigation and estimation of damages) within the scope of the Rome I and Rome II Regulations"

S. 287 of the German Code of Civil Procedure (dZPO) empowers a court to estimate a damage at its discretion and conviction, when the issue of whether or not damages have occurred is in dispute among the parties. The assessment is based on the court's evaluation of all circumstances. The court, therefore, may decide at its discretion whether or not – and if so, in which scope – any taking of evidence should be ordered as applied for, or whether or not any experts should be heard. Where the law to be applied is foreign law, the

question arises whether a German court may refer to s. 287 dZPO as lex fori or whether s. 287 dZPO has to be classified as substantive law preventing the court from estimating the damage when such a rule is unknown by the lex causae. Recently, two German district courts adopted a different view on this issue and, thus, produced different outcomes of two lawsuits with comparable facts. Whereas this question has been in dispute in the German doctrine of international civil procedure for decades, the Rome I/II Regulations set a new legal reference for this discussion: Due to the fact that s. 287 dZPO concerns both the law of assessment of damages and the law of procedure, not only Article 1(3) of each regulation, but also Article 12(1)(c) Rome I and Article 15(c) Rome II Regulation have to be considered. The essay argues that the application of a rule like s. 287 dZPO is neither affected by Articles 12(1)(c)/15(c) nor by Articles 18/22 Rome I/II Regulation and remains applicable pursuant to their Article 1(3).

- ***Andreas Fötschl***: "No Application of the Lugano Convention for Plaintiffs from Third States – The Decision of the Norwegian Highest Court in Raffels Shipping v. Trico Subsea AS"

The decision of the Norwegian Highest Court on 20 December 2012 deals with the question of whether a Norwegian court has jurisdiction over an international dispute, concerning a ship-broker's commission, between a plaintiff from Singapore and a defendant registered in Norway. This depended upon whether the Norwegian courts should apply the Lugano Convention in a case where the plaintiff is registered in a Third State and the dispute has no connection to the Contracting States, other than the fact that the seat of the defendant is located in the forum. The Norwegian Highest Court refused to apply the Lugano Convention and applied the Norwegian rules on international jurisdiction instead, which include a statutory requirement comparable to the doctrine of forum non conveniens.

- ***Friedrich Niggemann:*** "Eine Entscheidung der Cour de cassation zu Art. 23 EuGVVO – Fehlende Einigung, fehlende Bestimmbarkeit des vereinbarten Gerichts oder Inhaltskontrolle?" – the English abstract reads as follows:

In its decision of 29.9.2012 the French Cour de cassation held that a choice of

forum clause is void which provides for the exclusive jurisdiction of the courts at a bank's seat (Luxembourg), but allows the bank to sue its client at any other jurisdiction. The court found that the clause fails to correspond to the sense and purpose of Art. 23 of the Brussels I Regulation; it only binds the client and contains an element of arbitrary ("un element potestatif") in favor of the bank. Clauses of this kind are frequent in banking contracts and financing transactions. The Cour de cassation uses terminology of French law, which gives rise to the question whether it abides by the principle of autonomous interpretation. Further it appears to introduce into Art. 23 of the Brussels I Regulation an element of appreciation of equal rights of the parties.

- ***Hilmar Krüger:*** "Zur Anerkennung nicht begründeter ausländischer Entscheidungen in der Türkei"
- ***Hilmar Krüger:*** "Zum obligatorischen Gebrauch der türkischen Sprache in Schiedsverträgen"
- ***Florian Heindler:*** "Precedence of the 1996 Hague Child Protection Convention over the Brussels IIbis Regulation when leaving the EU"

The annotated judgement focuses on the question of international jurisdiction for parental responsibility cases. If the habitual residence of a child changes during a pending procedure in Austria, and the new place of habitual residence is in Australia (contracting state to the Hague Convention 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children), Art. 5 no. 2 Hague Convention 1996 shall be applied. Thus, Australian institutions have jurisdiction and contradicting Austrian decisions shall be annulled by Austrian courts. Judgements rendered before the change of the habitual residence remain in force, however, they can be replaced by courts at the child's new place of habitual residence. Contrary to Art. 5 no. 2 Hague Convention 1996, Art. 8 no. 1 Brussels IIa Regulation stipulates jurisdiction of the Member State court "over a child who is habitually resident in that Member State at the time the court is seized" (perpetuatio fori). Neglecting this provision, the Austrian Supreme Court (OGH) applied Art. 5 no. 2 Hague Convention. Hence, the decision of the appellate court had to be set aside, because jurisdiction was denied without establishing at which date the habitual residence in Australia commenced.

- ***Hilmar Krüger:*** "Zum Problem der Brautgabe im türkischen Recht"
- ***Tong XUE***: "New Rules from the Supreme People's Court: The first Judicial Interpretation of the Chinese Choice of Law Rules Act"

On 10 December 2012, the Supreme People's Court promulgated the Interpretation on issues concerning the application of the Act of the People's Republic of China on Application of law in Civil Relations with Foreign Contacts, which came into effect as of 7 January 2013. This Interpretation reconstructs the sources of law of Chinese conflict of laws rules and gives a number of detailed regulations on various specific issues, such as preliminary question, mandantory rules, party autonomy, habitual residence and proof of foreign law. Beginning with a short introduction to the background of these judicial rules this article will deliver a detailed insight into these new rules with moderate analysis.

- ***Erik Jayme:*** "Der internationale Rechtsverkehr mit den lusophonen Ländern – Jahrestagung der Deutsch-Lusitanischen Juristenvereinigung in Hamburg"

New Papers on Business and Human Rights

"Business, Human Rights And Children: The Developing International Agenda", by O. Martin-Ortega and R. Wallace, has been published in *The Denning Law Journal* 2013, vol 25, pp 105 – 127. The following excerpt illustrates the contents:

> "The instruments analysed in this article are part of an important trend: the development of a comprehensive response to the risks children's rights face from business activities. Until recently international focus has been somewhat ad hoc and sector-specific. This has been evidenced by the concentration on the regulation of child labour and economic exploitation of children and the consequences of the privatisation of public services on their rights. The

> international legal instruments regulating these spheres placed the responsibility in the fulfilment of the rights of the child exclusively on states. However, both the CRB Principles and General Comment 16 acknowledge a responsibility of business vis-à-vis children's rights beyond that of the state (…). Whilst only states have direct obligations with regards to children's rights, increased recognition of business responsibilities in instruments such as the ones analysed here, contribute to (…) the creation of fertile ground for increased demands on business. This may lead to indirect obligations in international law and the development of direct obligations in national systems.
>
> The CRB Principles and General Comment 16 are also important because they are based on the conception of children as rights bearers. This goes beyond the traditional perception, in the context of business activities, that children are mainly objects of protection from economic exploitation and abuse as members of the labour force or recipients of welfare services."

Still in the domain of business and human rights, another recent (and critical) publication of Prof. Zamora Cabot is worth mentioning – this time on the USSC Daimler decision: "Decisión del Tribunal Supremo de los Estados Unidos en el caso Daimler Ag v. Bauman et al.: Closing the Golden Door" (Papeles *El tiempo de los derechos*, 2014, 2).

To download click here (in Spanish).

New Book on Interregional Enforcement of Judgments

Jie Huang, who is is an Associate Professor of Law and Associate Dean at Shanghai University of International Business and Economics School of Law and Director of China Association of Private International Law, has published Interregional Recognition and Enforcement of Civil and Commercial Judgments – Lessons for China from US and EU Law (Hart publishing).

Judgment recognition and enforcement (JRE) between the US states, between EU Member States, and between mainland China, Hong Kong and Macao, are all forms of 'interregional JRE'. This extensive comparative study of the three most important JRE regimes focuses on what lessons China can draw from the US and the EU in developing a multilateral JRE arrangement for mainland China, Hong Kong and Macao.

Mainland China, Hong Kong and Macao share economic, geographical, cultural, and historical proximity to one another. The policy of 'One Country, Two Systems' also provides a quasi-constitutional regime for the three regions. However, there is no multilateral JRE scheme among them, as there is in the US and the EU; and it is harder to recognise and enforce sister-region judgments in China than in the US and the EU. The book analyses the status quo of JRE in China and explores its insufficiencies; it proposes a multilateral JRE arrangement for Chinese regions to alleviate current JRE difficulties; and it also provides solutions for the macro and micro challenges of establishing a multilateral arrangement, drawing upon the rich literature on JRE regimes found in the US and the EU.

Shill on Boilerplate Shock

Gregory Shill (Denver Sturm College of Law) has posted Boilerplate Shock on SSRN.

No nation was spared in the recent global downturn, but several Eurozone countries arguably took the hardest punch, and they are still down. Doubts about the solvency of Greece, Spain, and some of their neighbors are making it more likely that the euro will break up. Observers fear a single departure and sovereign debt default might set off a "bank run" on the common European currency, with devastating regional and global consequences. What mechanisms are available to address — or ideally, to prevent — such a disaster?

One unlikely candidate is boilerplate language in the contracts that govern

sovereign bonds. As suggested by the term "boilerplate," these are provisions that have not been given a great deal of thought. And yet they have the potential to be a powerful tool in confronting the threat of a global economic conflagration — or in fanning the flames.

Scholars currently believe that a country departing the Eurozone could convert its debt obligations to a new currency, thereby rendering its debt burden manageable and staving off default. However, this Article argues that these boilerplate terms — specifically, clauses specifying the law that governs the bond and the currency in which it will be paid — would likely prevent such a result. Instead, the courts most likely to interpret these terms would probably declare a departing country's effort to repay a sovereign bond in its new currency a default.

A default would inflict damage far beyond the immediate parties. Not only would it surprise the market, it would be taken to predict the future of other struggling European countries' debt obligations, because they are largely governed by the same boilerplate terms. The possibility of such a result therefore increases the risk that a single nation's departure from the euro will bring down the currency and trigger a global meltdown.

To mitigate this risk, this Article proposes a new rule of contract interpretation that would allow a sovereign bond to be paid in the borrower's new currency under certain circumstances. It also introduces the phrase "boilerplate shock" to describe the potential for standardized contract terms drafted by lawyers — when they come to dominate the entire market for a given security — to transform an isolated default on a single contract into a threat to the broader economy. Beyond the immediate crisis in the Eurozone, the Article urges scholars, policymakers, and practitioners to address the potential for boilerplate shock in securities markets to damage the global economy.

Second PIL Workshop at Nanterre University

The University of Paris Ouest Nanterre la Defense will host its second private international law workshop on 19 March 2014.

Professor Géraud de la Pradelle (Emeritus Nanterre University) and Mr. Elie Kleiman (Freshfields) will discuss attachment of sovereign assets in France after the 2013 judgments of the French Supreme Court in the *NML v. Argentina* case.

Professor Mathias Audit (Nanterre University) will act as a discussant.

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ECJ Rules on Lis Pendens and Submission to Jurisdiction

On February 27th, 2014, the Court of Justice of the EU delivered its ruling in Cartier Parfums Lunettes v. Ziegler (case 1/13).

The issue before the court was whether the lis pendens rule in the Brussels I Regulation also applies when the jurisdiction of the court first seized was founded in a submission to its jurisdiction.

The court held that it does.

> *38 It follows that the system established by Regulation No 44/2001, as is clear from Articles 24 and 27 thereof, was devised in order to avoid prolonging the length of time for which proceedings were stayed by the court second seised, when, in reality, the jurisdiction of the court first seised may no longer be*

challenged, as set out in paragraph 36 above.

39 Such a risk does not arise where, as in the case in the main proceedings, the court first seised has not declined jurisdiction of its own motion and none of the parties has contested its jurisdiction prior to or up to the time when a position is adopted which is regarded under national procedural law as the first defence.

40 In the second place, as regards the purpose itself of Regulation No 44/2001, it must be recalled that one of the aims of that regulation, as is clear from recital 15 in the preamble thereto, is to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given where a number of courts have jurisdiction to hear the same dispute. It is for that purpose that the European Union legislature intended to put in place a mechanism which is clear and effective in order to resolve situations of lis pendens. It follows that, in order to achieve those aims, Article 27 of Regulation No 44/2001 must be interpreted broadly (Overseas Union Insurance and Others, paragraph 16).

41 It must be stated that an interpretation of Article 27(2) of that regulation, according to which, in order to establish the jurisdiction of the court first seised within the meaning of that provision, it is necessary that that court has impliedly or expressly accepted jurisdiction by a judgment which has become final would, by increasing the risk of parallel proceedings, deprive the rules intended to resolve situations of lis pendens, laid down by that regulation, of all their effectiveness.

42 Furthermore, as is clear from the Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1) and the case-law of the Court on Article 21 thereof, which corresponds to Article 27 of Regulation No 44/2001, the aim of the rule on lis pendens is also to avoid negative conflicts of jurisdiction. That rule was introduced so that the parties would not have to institute new proceedings if, for example, the court first seised of the matter were to decline jurisdiction (see Overseas Union Insurance and Others, paragraph 22).

43 Where the court first seised has not declined jurisdiction of its own motion and no objection of lack of jurisdiction has been raised before it, the fact that the court second seised declines jurisdiction cannot result in a negative conflict of jurisdiction since the jurisdiction of the court first seised can no longer be

contested.

Ruling:

> ***Article 27(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, except in the situation where the court second seised has exclusive jurisdiction by virtue of that regulation, the jurisdiction of the court first seised must be regarded as being established, within the meaning of that provision, if that court has not declined jurisdiction of its own motion and none of the parties has contested its jurisdiction prior to or up to the time at which a position is adopted which is regarded in national procedural law as being the first defence on the substance submitted before that court.***

Is Private Enforcement of Competition Law Still an Option in Germany?

Some thoughts on the judgment of LG Düsseldorf from December 17th, 2013, 37 O 200/09 (Kart), by Polina Pavlova, Max Planck Institute Luxembourg.

On December 17th, 2013, the District Court Düsseldorf dismissed a claim for damages against the participants in the German cement cartel. The case at issue can be regarded as a pilot one in the area of private cartel law enforcement in Germany. The judgment, although a first instance one, is the result of a long lasting litigation. In April 2009, the Federal Court of Justice confirmed the admissibility of the claim. Particularly against this background, the dismissal on the merits by the Regional Court came as a surprise.

The case started originally in 2003, when the German Federal Cartel Office issued record fines against the participants in the German cement cartel which had been operating since 1988. In 2005, Cartel Damage Claims (CDC), a Belgian publicly held corporation, brought an action for damages against the former cartel members. The Belgian corporation had been established with the aim of bringing the present lawsuit as a plaintiff in German courts. The corporation acquired the claims of 36 companies who had purchased cement from producers participating in the anti-competitive agreement. CDC bought each claim at a modest price and additionally arranged for the cartel victims to receive a share of the damages obtained in case of success of the action. The claims were assigned to CDC; their total value amounted to 131 million Euro. In an interlocutory judgment from 2007, subsequently upheld by all instances, the District Court of Düsseldorf confirmed the admissibility of the lawsuit.

On the merits, however, the District Court dismissed the claim because of invalidity of the assignments to CDC; as a result, CDC had no standing to sue. According to the District Court, the assignments initially performed before July 1st, 2008 were invalid due to the violation of the German Act on the Prohibition of Legal Advice. This Act, which dates back to 1935, has no equivalent in other European legislations. Its purpose was to guarantee the quality of legal advice, i.a. by preventing debt-collection agencies from taking advantage of consumers. The constitutionality of the Act has repeatedly been questioned on the grounds that it restricts severely the constitutional guarantee of professional freedom. However, the German Federal Constitutional Court has given its support to the Act in several decisions, arguing it protects the general public against unprofessional legal advice. Similar doubts regarding the fundamental freedom of services under Article 49 TFEU were dispelled by the ECJ in case C- 3/95, *Reisebüro Broede v. Sandker*.

Under Section 1 of the Act of 1935, professional collection of debts required special (and not easy to obtain) authorisation by the competent authority. Initially, CDC had not applied for such authorisation. Therefore, the Regional Court of Düsseldorf decided that there had been a breach of law which, under Section 134 of the German Civil Code, entailed the invalidity of the assignments. In July 2008, the Legal Advice Act was replaced by the Legal Services Act. The current Act essentially pursues the same purpose as its predecessor and sets similar requirements in order to ensure the sufficient qualification of providers of legal

services; it nonetheless permits and facilitates the provision of legal services by registered entities. CDC registered under the new Act, and all claims for damages were assigned a second time to it. However, even though the Legal Services Act allows the assignment of claims to registered entities, the District Court denied once more the validity of the operation, this time by asserting it was against public policy (Section 138 of the German Civil Code).

The District Court based its reasoning on the assumption that in the event of losing, the plaintiff would not have the funds required to reimburse the legal costs of the defendants. The argument must be read together with the German procedural "loser pays" rule (Section 91 of the Code of Civil Procedure), according to which the losing party is obliged to cover the full costs of the litigation, including the lawyer's statutory fees incurred by the winning party. Therefore filing a claim entails a financial risk, particularly high in cases like the one at issue (a claim for more than 130 million €). According to the District Court, pushing forward an undercapitalised legal entity as a plaintiff transfers the risk to the defendant; an outcome that was evident for both CDC and the assignors. As a result, the Court concluded that the assignments of the claims violated the good morals and were null and void.

This statement comes as a surprise. It is worth noting that, at the beginning of the proceedings, the plaintiff had formally applied for a reduction of the value of the dispute in order to cut down the costs of the litigation. As the litigation costs in Germany are calculated according to the value of the claim, the diminution of the value of the dispute narrows the litigation risks for both parties. Usually, German courts are not empowered to reduce the value of the litigation unless it is explicitly provided by law; however, this is the case in cartel matters where the court may – at its discretion – reduce the amount of the dispute in order to facilitate private enforcement of competition law.

In the cement cartel case CDC's application for a reduction of amount of the litigation had been surprisingly dismissed – it seems that the Court was uncomfortable with the business model of CDC, aiming at increasing the value of litigation by bundling claims for damages from different victims of the cartel. When evaluating the litigation risks, the District Court relied on the information given by the plaintiff on its financial situation when it had sought the reduction of the amount of the litigation. Accordingly, the District Court held that CDC's own submissions regarding its inability to pay the costs of the litigation at the

beginning of the proceedings indicated that the plaintiff would be unable to compensate the litigation costs of the other parties. As a consequence, the Court decided that the assignment of the claims deteriorated the procedural situation of the defendants with regard to the (future) compensation of their litigation costs, and, therefore, it was void. The final outcome of the reasoning of the Court is a shift of the legal framework for encouraging private enforcement to its contrary: first the plaintiff was denied a reduction of the cost risk; then, the claim was dismissed because of the plaintiff's inability to carry that risk. In this respect the line of argument of the District Court seems paradoxical.

Furthermore, it is worth stressing that considerations of EU competition law are completely absent from the Court's reasoning. Again, this line of argument must be criticized: the plaintiff had based its claim for compensation on a general tort provision of the German Civil Code (Section 823 para 2 BGB) in conjunction with Article 81 TEU (now: Article 101 TFEU). Yet the District Court only relied on the infringement of German cartel law by a domestic cartel, i.e., it did not address the right of cartel victims to compensation that derives directly from the TFEU. According to the case-law of the ECJ since *Courage v. Crehan*, victims of cartel infringements are entitled to a full and efficient compensation. However, the District Court did not consider these principles of Union law when it assessed the legality of the assignment to CDC under Section 138 of the German Civil Code.

All in all, the decision of the District Court shows a remarkable reluctance with regard to the private enforcement of cartel damages. It should be noted that the business model of the plaintiff (CDC) has been challenged in other civil courts in Europe (see recently the interlocutory judgment of the District Court of Helsinki from July 4th, 2013), but it has never been declared illegitimate. Decisions as the one by the Regional Court of Düsseldorf, even first instance ones, could make Germany less attractive as a forum for efficient cartel law enforcement. As a result, plaintiffs will shop to other jurisdictions like the Netherlands, Finland or the United Kingdom. However, it still remains to be seen whether the Court of Appeal and the Supreme Federal Civil Court will uphold the judgment of the first instance.