Rethinking Choice of Law and International Arbitration in Cross-border Commercial Contracts

*Written by Gustavo Becker**

During the *26th Willem C. Vis Moot*, Dr. Gustavo Moser, counsel at the London Court of International Arbitration and Ph.D. in international commercial law from the University of Basel, coordinated the organization of a seminar regarding choice of law in international contracts and international arbitration. The seminar's topics revolved around Dr. Moser's recent book *Rethinking Choice of Law in Cross-Border Sales* (Eleven, 2018) which has been globally recognized as one of the most useful books for international commercial lawyers.

On April 15th, taking place at Hotel Regina, in Vienna, the afternoon seminar involved a panel organized and moderated by Dr. Moser and composed of Prof. Ingeborg Schwenzer, Prof. Petra Butler, Prof. Andrea Bjorklund, and Dr. Lisa Spagnolo.The panel addressed three core topics in the current scenario of cross-border sales contracts: Choice of law and Brexit, drafting choice of law clauses, and CISG status and prospects.

The conference started with a video presentation in which Michael Mcllwrath *(Baker Hughes, GE)* addressed his perspectives on how Brexit might impact decisions from companies regarding choice of law clauses in international contracts, its effects on the recognition of London as the leading seat for dispute resolution, and the position of English law as the most applicable law in international contracts.

In Mr. Mcllwrath's perspective, in spite of Brexit, London will still remain a significant place for international dispute resolution as it adoptsglobally recognized commercial law principles, is an arbitration friendly state and enjoys a highly praised image as a safe seat for international cases. However, in order to try to predict the impact of Brexit in international dispute resolution, Mr. Mcllwrath collected data released by arbitral institutions and found that in the years leading up to the Brexit vote, London did not grow as a seat of arbitration significantly. Considerable growth nonetheless has been seen outside the

traditional centers of international arbitration. Therefore, the big issue involving Brexit, in Mr. Mcllwrath's view, is the uncertainty that companies will face with the UK's unsettled political future. For this reason, the revision of contract policies is now likely to be undertaken and the choice of English law in international contracts might be affected.

Prof. Schwenzer pointed out that the whole discussion about Brexit and its effects on international dispute resolution depends primarily on the type of Brexit that will be chosen and the agreements between Europe and Great Britain. In her point of view, one of the main questions is whether the UK will join the Lugano Convention, which would make the enforcement of English court decisions easier in European State-members. Prof. Schwenzer also highlighted that, in terms of choice of law, there will be uncertainty issues regarding the regulations that have been imported from Europe and are now part of the English legal system. The problem might be how these rules will be developed further as the Court of Justice of the European Union will no longer be responsible for interpreting this part of English law.

Furthermore, Prof. Bjorklund stated that, whilst the choice of English law will require more caution after Brexit, the well-recognized security related to arbitration in the UK is likely to continue as long as the New York Convention, the English Arbitration Act, and the arbitration friendly character of English commercial courts will not likely change. However, in the point of view of an international arbitration counsel, certainly, the "*risks of arbitrating in the UK*" will leave some room for parties to choose arbitration in other places rather than in London or – at least – to start rethinking the classic choice for English-seated arbitration.

Concerning the choice of English law, Prof. Butler reminded the audience of two important regulations which should be analyzed in the context of Brexit: Rome I for deciding which contract law is applicable in international cases, and the Brussels Regulation to define which court is entitled to decide a case and how to enforce and recognize foreign decisions within the EU. According to Prof. Butler, under the first Brexit bill, the statutes signed within the EU regime would still apply. However, subject to confirmation from the English government, the development of these laws might no longer be applicable.

Dr. Spagnolo added that whether a country joins an international instrument

sometimes has little to do with rational factors and are often “emotional”. In this sense, one of the arguments that the political environment seems to emphasize nowadays under the notion of nationalism is the maintenance of sovereignty. According to Dr. Spagnolo, this is a dangerous consideration to be emphasized in an environment that relies on commercial sense and needs basic guarantees of international harmonization, such as the enforcement of foreign awards or the application of a uniform law.

Regarding the topic “drafting choice of law clauses”, Mr. Mcllwrath highlighted the “emotional” features involving the choice of law. In his opinion, as Dr. Moser has demonstrated in his book, many choices of law decisions are driven by factors such as how many times a specific law had already been applied by a law firm or what law the attorneys involved in that contract were already familiar with. Considering this, Mr. Mcllwrath understands that Brexit can make lawyers rethink the application of English law, even though this might be dependant upon whether financial institutions and companies currently based in London will or will not move away from the UK.

Prof. Schwenzer highlighted that what Dr. Moser has found in his research regarding the emotional aspect of the choice of law is a proving fact of what she has experienced in practice: choice of law decisions are mostly emotionally charged and seldom rational. One example is that even though Swiss law is arguably the second most chosen law in international contracts, in Prof. Schwenzer’s view, Swiss law is not predictable: in core areas of contract law, such as limitation of liability, Swiss law is not advantageous for commercial contracts in her opinion. Prof. Schwenzer added that this shows that lawyers seldom analyze the pros and cons of laws deeply before applying them in international commercial contracts.

Concluding the panel discussions, Dr. Moser brought up the topic “CISG status and prospects”. While discussing this matter, all the panelists agreed upon the urgent need of global initiatives to increase awareness and improve knowledge of the CISG for both young lawyers who are sitting for the bar exam, and for judges who will face international commercial cases and might not be familiar with the CISG or even prepared to apply its set of provisions.

*With contributions from Gustavo Moser

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15 April: Event on “Choice of Law in International Contracts”

On 15 April 2019 eleven international publishing will host an event on “Choice of Law in International Contracts” to honor the publication of Dr Gustavo Moser’s book *Rethinking Choice of Law in Cross-Border Sales.* The event will take place from 1 to 5 pm in the Salon Franz Josef, Hotel Regina, Rooseveltplatz 15, 1090 Vienna, Austria. Topics will include:

- Choice of Law and Brexit
- Drafting Choice of Law Clauses
- CISG Status and Prospects

1:00 pm – 3:00 pm| Roundtable Lunch with the Stakeholders

Speakers: Professor Ingeborg Schwenzer; Louise Barrington; Dr Patricia Shaughnessy; Michael McIlwrath; Luca Castellani; Dr Florian Mohs; and Dr Sabrina Strassburger

Moderator: Dr Gustavo Moser

3:30 pm – 5:00 pm| Coffee & Tea Talk

Speakers: Professor Ingeborg Schwenzer; Professor Petra Butler; Professor Andrea Bjorklund; and Dr Lisa Spagnolo

Moderator: Dr Gustavo Moser

Resistance is Futile – How Private International Law Will Undermine National Attempts to Avoid 'Upload Filters' when Implementing the DSM Copyright Directive

Last week, the European Parliament adopted the highly controversial proposal for a new Copyright Directive (which is part of the EU Commission's Digital Single Market Strategy). The proposal had been criticized by academics, NGOs, and stakeholders, culminating in an online petition with more than 5 million signatures (a world record just broken by last week's Brexit petition) and public protests with more than 150,000 participants in more than 50 European (although mainly German) cities.

Under the impression of this opposition, one of the strongest proponents of the reform in the European Parliament, Germany's *CDU*, has pledged to aim for a national implementation that would sidestep one of its most controversial elements, the requirement for online platforms to proactively filter uploads and block unlicensed content. The leader of Poland's ruling party *PiS* appears to have recently made similar remarks.

But even if such national implementations were permissible under EU law, private international law seems to render their purported aim of making upload filters 'unnecessary' virtually impossible.

Background: Article 17 of the DSM Copyright Directive

Article 17 (formerly Article 13) can safely be qualified as one of the most significant elements of an otherwise rather underwhelming reform. It aims to address the so-called platform economy's 'value gap', i.e. the observation that few technology giants like 'GAFA' (Google, Apple, Facebook, Amazon) keep the vast majority of the profits that are ultimately created by right holders. To this end, it

carves out an exception from Art 14(1) of the e-Commerce Directive (Directive 2000/31/EC) and makes certain 'online content-sharing service providers' directly liable for copyright infringements by users.

Under Art 17(4) of the Directive, platforms will however be able to escape this liability by showing that they have

> *(a) made best efforts to obtain an authorisation, and*
>
> *(b) made, in accordance with high industry standards of professional diligence,* ***best efforts to ensure the unavailability of specific works and other subject matter*** *for which the rightholders have provided the service providers with the relevant and necessary information; and in any event*
>
> *(c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from, their websites the notified works or other subject matter, and made* ***best efforts to prevent their future uploads*** *in accordance with point (b).*

This mechanism has been heavily criticised for *de-facto* requiring platform hosts to proactively filter all uploads and automatically block unlicensed content. The ability of the necessary 'upload filters' to distinguish with sufficient certainty between unlawful uploads and permitted forms of use of protected content (eg for the purposes of criticism or parody) is very much open to debate – and so is their potential for abuse. In any case, it does not seem far-fetched to assume that platforms will err on the side of caution when filtering content this way, with potentially detrimental effects for freedom of expression.

In light of these risks, and of the resulting opposition from stakeholders, the German *CDU* has put forward ideas for a national implementation that aims to make upload filters 'unnecessary'. In essence, they propose to require platform hosts to conclude mandatory license agreements that cover unauthorised uploads (presumably through lump-sum payments to copyright collectives), thus replacing the requirement of making 'best efforts to ensure the unavailability of unlicensed content' according to Art 17(4) of the Directive.

Leaving all practical problems of the proposal aside, it is far from clear whether such a transposition would be permissible under EU law. First, because it is not

easily reconcilable with the wording and purpose of Art 17. And second, because it would introduce a new exception to the authors' rights of communication and making available to the public under Art 3 of the Information Society Directive (Directive 2001/29/EC) without being mentioned in the exhaustive list of exceptions in Art 5(3) of this Directive.

Private International Law and the Territorial Scope of Copyright

But even if EU law would not prevent individual member states from transposing Art 17 of the Directive in a way that platforms were required to conclude mandatory license agreements instead of filtering content, private international law seems to severely reduce the practical effects of any such attempt.

According to Art 8(1) Rome II, the law applicable to copyright infringements is 'the law of the country for which protection is claimed' (colloquially known as the *lex loci protectionis*). This gives copyright holders the option to invoke any national law, provided that the alleged infringement falls under its (territorial and material) scope of application. With regard to copyright infringements on the internet, national courts (as well as the CJEU – see its decision in Case C-441/13 *Hejduk* on Art 5(3) Brussels I) tend to consider every country in which the content can be accessed as a separate place of infringement.

Accordingly, a right holder who seeks compensation for an unlicensed upload of their content to an online platform will regularly be able to invoke the national laws of every member state – most of which are unlikely to opt for a transposition that does not require upload filters. Thus, even if the German implementation would allow the upload in question by virtue of a mandatory license agreement, the platform would still be liable under other national implementations – unless it has *also* complied with the respective filtering requirements.

Now, considering the case law of the Court of Justice regarding other instruments of IP law (see, eg, Case C-5/11 *Donner*; Case C-173/11 *Football Dataco*), there may be room for a substantive requirement of targeting that could potentially reduce the number of applicable laws. But for the type of online platforms for which Art 17 is very clearly designed (most importantly, *YouTube*), it will rarely be possible to show that only audiences in certain member states have been targeted by content that has not been geographically restricted.

So either way, if a platform actually wanted to avail itself of the option not to

proactively filter all uploads and, instead, pay for mandatory license agreements, its only option would be to geographically limit the availability of all content for which it has not obtained a (non-mandatory) license to users in countries that follow the German model. It is difficult to see how this would be possible… without filtering all uploaded content.

The International Business Courts saga continued: NCC First Judgment – BIBC Proposal unplugged

Written by Georgia Antonopoulou and Xandra Kramer, Erasmus University Rotterdam (PhD candidate and PI ERC consolidator project Building EU Civil Justice)

1. Mushrooming International Business Courts on the Eve of Brexit

Readers of this blog will have followed the developments on the international business courts and international commercial chambers being established around Europe and elsewhere. While many of the initiatives to set up such a court or special chamber date from before the Brexit vote, it is clear that the UK leaving the EU has boosted these and is considered to be a big game changer. It remains to be seen whether it really is, but in any case the creation of courts and procedures designed to deal with international commercial disputes efficiently is very interesting!

The Netherlands was one of the countries where, after the Senate came close to torpedoing the proposal (see our earlier blogpost), such an international commercial court (chamber) was created. The Netherlands Commercial Court (NCC) opened its doors on 1 January 2019, and it gave its first judgment on 8 March 2019 (see 2). Meanwhile, in Belgium the proposal for the Brussels

International Business Court (BIBC) seems to be effectively unplugged due to lack of political support (see 3).

2. The First NCC Judgment

As reported earlier on this blog, on 18 February 2019 the Netherlands Commercial Court (NCC) held its first hearing (see here). The NCC' s first case *Elavon Financial Services DAC* v. *IPS Holding B.V. and others* was held in summary proceedings and concerned an application for court permission to privately sell pledged shares under Article 3:251 (1) Dutch Civil Code. The NCC scheduled a second hearing on 25 February 2019, offering the interested parties that did not appear before court the opportunity to be heard. However, these notified the court about their intention not to attend the hearing and leave the application uncontested. As a result, the NCC cancelled the planned hearing and gave its first judgment granting the requested permission on 8 March 2019 (see here). Our discussion will focus on the NCC's judgment regarding the four main jurisdictional requirements and aims at offering a sneak preview on the Court's future case law on the matter.

(a) Jurisdiction of the Amsterdam District Court

Unlike what the name suggests, the NCC is not a self-standing court but a chamber of the Amsterdam District Court (see the new Article 30r (1) Dutch Code of Civil Procedure (DCCP) and Article 1.1.1. NCC Rules). Therefore, the jurisdiction of the NCC depends on the jurisdiction of the Amsterdam District Court (Article 30r (1) DCCP and Article 1.3.1. (a) and (c) NCC Rules). The Court confirmed its international and territorial jurisdiction based on a contractual choice-of-court agreement in favour of the Amsterdam District Court (Article 25 (1) Brussels Regulation Recast). With regard to the interested parties that were not a party to the agreement, the Court based its jurisdiction on the fact that they either entered an appearance or sent a notice to the Court acknowledging its jurisdiction without raising any objections (Article 26 (1) Brussels Regulation Recast and Article 25 Lugano Convention). Regarding the subject-matter jurisdiction of the Amsterdam District Court, Article 3:251 (1) Dutch Civil Code explicitly places applications for the private sell of pledged assets under the jurisdiction of the provisional relief judge of the District Court.

(b) Civil or commercial matter within the parties' autonomy

Second, the dispute concerned a civil or commercial matter that lies within the parties' autonomy (Article 30r (1) Dutch Code of Civil Procedure and Article 1.3.1. (a) NCC Rules).

(c) Internationality

Third, the NCC solely deals with international, cross-border disputes. So as to define the notion of internationality, the Explanatory Notes to Article 1.3.1. (b) NCC Rules entail a list of alternative, broad criteria that gives the dispute the required internationality (see Annex I, Explanatory Notes). The application in question was filed by Elavon Financial Services DAC, a company established in Ireland, and some of the interested parties are Dutch subsidiaries of a Swiss parent company (Explanatory Notes to Article 1.3.1. (b)). Although, pursuant to the Explanatory Notes, these circumstances were sufficient to establish the matter's international character, the court went on to address other cross-border elements present in the case. Based on a broad understanding of a dispute's international character, the court underlined that some of the interested parties are internationally active, operate or at least plan to operate business abroad (see also The Hague Court of Appeal, ECLI:NL:GHSGR:2011:BR1381). Similar to the rules of other countries' international commercial courts, the NCC Rules qualify a case as international when the dispute arises from an agreement prepared in a language other than Dutch. Since the documents related to the application were drafted in English, the NCC regarded the English language of the contract as another international element.

(d) NCC Agreement

The fourth requirement for the NCC's jurisdiction is that the parties should have expressly agreed in writing for the proceedings to be in English and according to the NCC Rules (Article 30r (1) Rv and Article 1.3.1. (d) NCC Rules). Since the NCC, unlike the rest of the Dutch courts, conducts proceedings entirely in English and applies its own rules of civil procedure the parties' agreement justifies such a deviation and ensures that the parties wilfully found themselves before the newly established chamber. In the present matter, the parties signed a pre-application agreement and expressly agreed on the NCC' s jurisdiction to hear their case. Although, two of the interested parties were not signatories to that agreement one of them appeared before the court leaving the NCC' s jurisdiction uncontested and the other did not raise any objections against the chamber' s

jurisdiction in its communication with the court (see also Article 2.2.1 NCC Rules and the Explanatory Rules).

(3) The Fate of the Belgian BIBC Proposal

As reported on this blog, the proposal to create the Brussels International Business Court was brought before Parliament in May 2018. Interesting features of this proposal are that the rules of procedure are based on those of the UNCITRAL Model Law on International Commercial Arbitration and that cases are heard by three judges, including two lay judges. The proposal has been criticized from the outset (see for some interesting initial thoughts Geert Van Calster's blogpost). As in the Netherlands, many discussions evolved around the fear for a two-tiered justice system, giving big commercial parties bringing high value claims a preferential treatment over ordinary court cases (see for the discussions in the Netherlands our earlier blogpost). The Belgian Ministry of Justice and Prime Minister presented the English language court as an asset in times of Brexit and efforts were made to adjust the proposal to get it through.

Over the last week it became clear that there is insufficient political backing for the proposal after one of the big parties withdrew its support (see De Standaard). Other – mostly left-wing parties – had expressed their concerns earlier and the proposed court has been referred to as a 'caviar court' and a 'court for the super rich'. But probably the most fierce opponent is the judiciary itself. Arguments range from principled two-tiered justice fears (including for instance by the First President of the Court of Cassation) to concerns about the feasibility to attract litigation in the Brussels courts and the costs involved in establishing this new 'vip court'. The message seems to be: we have enough problems as it is. Referring to the Dutch NCC and the French International Commercial Chamber, the Minister of Justice, Koen Geens, said that withdrawing the BIBC proposal would be a missed opportunity and that he can counter the arguments against the establishment of the BIBC. However, as it looks now it seems highly unlikely that Belgium will be among the countries that will have an international business court in the near future.

The Netherlands Commercial Court holds its first hearing!

Written by Georgia Antonopoulou and Xandra Kramer, Erasmus University Rotterdam (PhD candidate and PI ERC consolidator project Building EU Civil Justice)

Only six weeks after its establishment, the Netherlands Commercial Court (NCC) held its first hearing today, 18 February 2019 (see our previous post on the creation of the NCC). The NCC's maiden case *Elavon Financial Services DAC* v. *IPS Holding B.V. and others* was heard in summary proceedings and concerned an application for court permission to sell pledged shares (see here). The application was filed on 11 February and the NCC set the hearing date one week later, thereby demonstrating its commitment to offer a fast and efficient forum for international commercial disputes.

The parties' contract entailed a choice of forum clause in favour of the court in Amsterdam. However, according to the new Article 30r (1) of the Dutch Code of Civil Procedure and Article 1.3.1. of the NCC Rules an action may be initiated in the NCC if the Amsterdam District Court has jurisdiction to hear the action and the parties have expressly agreed in writing to litigate in English before the NCC. Lacking an agreement in the initial contract, the parties in *Elavon Financial Services DAC* v. *IPS Holding B.V.* subsequently agreed by separate agreement to bring their case before the newly established chamber and thus to litigate in English, bearing the NCC's much higher, when compared to the regular Dutch courts, fees. Unlike other international commercial courts which during their first years of functioning were 'fed' with cases transferred from other domestic courts or chambers, the fact that the parties in the present case directly chose the NCC is a positive sign for the court's future case flow.

As we have reported on this blog before, the NCC is a specialized chamber of the Amsterdam District Court, established on 1 January 2019. It has jurisdiction in international civil and commercial disputes, on the basis of a choice of court agreement. The entire proceedings are in English, including the pronouncement of the judgment. Judges have been selected from the Netherlands on the basis of their extensive experience with international commercial cases and English

language skills. The Netherlands Commercial Court of Appeal (NCCA) complements the NCC on appeal. Information on the NCC, a presentation of the court and the Rules of Procedure are available on the website of the Dutch judiciary. It advertises the court well, referring to "the reputation of the Dutch judiciary, which is ranked among the most efficient, reliable and transparent worldwide. And the Netherlands – and Amsterdam in particular – are a prime location for business, and a gateway to Europe." Since a number of years, the Dutch civil justice system has been ranked no. 1 in the WJP Rule of Law Index.

In part triggered by the uncertainties of Brexit and the impact this may have on the enforcement of English judgments in Europe in particular, more and more EU Member States have established or are about to establish international commercial courts with a view to accommodating and attracting high-value commercial disputes (see also our previous posts here and here). Notable similar initiatives in Europe are the 'Frankfurt Justice Initiative' (for previous posts see here and here) and the Brussels International Business Court (see here). While international commercial courts are mushrooming in Europe, a proposal for a European Commercial Court has also come to the fore so as to effectively compete with similar courts outside Europe (see here and here).

UK Ratifies Hague Choice of Court and Hague Maintenance Conventions

As reported on Twitter by *Pacta sunt servanda*, the UK has just (on 28 December 2018) signed and ratified the 2005 Hague Convention on Choice of Court Agreements and the 2007 Hague Convention on the International Recovery of Child Support and other Forms of Family Maintenance. Both Conventions currently apply to the UK by virtue of its membership of the European Union but may cease to do so once the UK leaves the EU on 29 March 2019. (The relevant notifications by the Dutch Ministry of Foreign Affairs can be found here and

here.)

Importantly, both conventions have been ratified only for the event of a Brexit scenario in which no withdrawal agreement with the EU has been reached and contain the following qualification:

> *In accordance with Article 29 of the 2005 Hague Convention/Article 59 of the 2007 Hague Convention, the United Kingdom is bound by the Convention by virtue of its membership of the European Union, which approved the Convention on behalf of its Member States. The United Kingdom intends to continue to participate in the 2005/2007 Hague Convention after it withdraws from the European Union.*
>
> *The Government of the United Kingdom and the European Council have reached political agreement on the text of a treaty (the "Withdrawal Agreement") on the withdrawal of the*
> *United Kingdom from the European Union and the European Atomic Energy Community. Subject to signature, ratification and approval by the parties, the Withdrawal Agreement*
> *will enter into force on 30 March 2019.*
>
> *The Withdrawal Agreement includes provisions for a transition period to start on 30 March 2019 and end on 31 December 2020 or such later date as is agreed by the United*
> *Kingdom and the European Union (the "transition period"). In accordance with the Withdrawal Agreement, during the transition period, European Union law, including the*
> *2005/2007 Hague Convention, would continue to be applicable to and in the United Kingdom. The European Union and the United Kingdom have agreed that the European Union will*
> *notify other parties to international agreements that during the transition period the United Kingdom is treated as a Member State for the purposes of international agreements concluded by the European Union, including the 2005/2007 Hague Convention.*
>
> *In the event that the Withdrawal Agreement is not ratified and approved by the United Kingdom and the European Union, however, the United Kingdom wishes to ensure continuity of application of the 2005/2007 Hague Convention from the*

> *point at which it ceases to be a Member State of the European Union.* ***The United Kingdom has therefore submitted the Instrument of Accession in accordance with Article 27(4) of the 2005 Hague Convention/Article 58(2) of the 2007 Hague Conventio only in preparation for this situation. The Instrument of Accession declares that the United Kingdom accedes to the 2005 Hague Convention in its own right with effect from 1 April 2019.***
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> ***In the event that the Withdrawal Agreement is signed, ratified and approved by the United Kingdom and the European Union and enters into force on 30 March 2019, the United Kingdom will withdraw the Instrument of Accession which it has today deposited.*** *In that case, for the duration of the transition period as provided for in the Withdrawal Agreement as stated above, the United Kingdom will be treated as a Member State of the European Union and the 2005 Hague Convention will continue to ha ve effect accordingly.*

In the past, it had been questioned if the UK would be able to ratify these conventions before having left the EU (see, eg, Dickinson, ZEuP 2017, 539, 560), which, if the "No Deal" scenario became a reality, would leave a period of at least three months in which the conventions would not apply. By ratifying the Conventions now, the UK seems to have reduced this potential gap to two days as both conventions will enter into force for the UK on 1 April 2019.

The Impact of the EU-UK Draft Agreement on Judicial Cooperation in Civil and Commercial Matters

Yesterday, on 14 November 2018, the UK cabinet, after five hours of deliberation, accepted the Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic

Energy Community, as agreed at negotiators' level on the same day. The text (TF 50 [2018] 55) contains provisions on judicial cooperation in civil and commercial matters in Articles 66 to 69. Pursuant to Article 66(a) of the Draft Agreement, the Rome I Regulation shall apply in the UK in respect of contracts concluded before the end of the transition period, which will be on 31 December 2020 (Article 126 of the Draft Agreement). Under Article 66(b) of the Draft Agreement, the Rome II Regulation shall apply in the UK in respect of events giving rise to damage, where such events occurred before the end of the transition period. The remaining EU Member States will continue to apply the Rome I and II Regulations in EU-British relations anyway following the principle of universal application (Article 2 Rome I, Article 3 Rome II).

Article 67 of the Draft Agreement deals with jurisdiction, recognition and enforcement of judicial decisions, and related cooperation between central authorities. This article reads as follows

"1. In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, in respect of legal proceedings instituted before the end of the transition period and in respect of proceedings or actions that are related to such legal proceedings pursuant to Articles 29, 30 and 31 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council, Article 19 of Regulation (EC) No 2201/2003 or Articles 12 and 13 of Council Regulation (EC) No 4/2009, the following acts or provisions shall apply:

(a) the provisions regarding jurisdiction of Regulation (EU) No 1215/2012;

(b) the provisions regarding jurisdiction of Regulation (EU) 2017/1001, of Regulation (EC) No 6/2002, of Regulation (EC) No 2100/94, of Regulation (EU) 2016/679 of the European Parliament and of the Council and of Directive 96/71/EC of the European Parliament and of the Council;

(c) the provisions of Regulation (EC) No 2201/2003 regarding jurisdiction;

(d) the provisions of Regulation (EC) No 4/2009 regarding jurisdiction.

2. In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, the following acts or provisions shall apply as follows in

respect of the recognition and enforcement of judgments, decisions, authentic instruments, court settlements and agreements:

(a) Regulation (EU) No 1215/2012 shall apply to the recognition and enforcement of judgments given in legal proceedings instituted before the end of the transition period, and to authentic instruments formally drawn up or registered and court settlements approved or concluded before the end of the transition period;

(b) the provisions of Regulation (EC) No 2201/2003 regarding recognition and enforcement shall apply to judgments given in legal proceedings instituted before the end of the transition period, and to documents formally drawn up or registered as authentic instruments, and agreements concluded before the end of the transition period;

(c) the provisions of Regulation (EC) No 4/2009 regarding recognition and enforcement shall apply to decisions given in legal proceedings instituted before the end of the transition period, and to court settlements approved or concluded, and authentic instruments established before the end of the transition period;

(d) Regulation (EC) No 805/2004 of the European Parliament and of the Council shall apply to judgments given in legal proceedings instituted before the end of the transition period, and to court settlements approved or concluded and authentic instruments drawn up before the end of the transition period, provided that the certification as a European Enforcement Order was applied for before the end of the transition period.

3. In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, the following provisions shall apply as follows:

(a) Chapter IV of Regulation (EC) No 2201/2003 shall apply to requests and applications received by the central authority or other competent authority of the requested State before the end of the transition period;

(b) Chapter VII of Regulation (EC) No 4/2009 shall apply to applications for recognition or enforcement as referred to in point (c) of paragraph 2 of this Article and requests received by the central authority of the requested State before the end of the transition period;

(c) Regulation (EU) 2015/848 of the European Parliament and of the Council shall apply to insolvency proceedings, and actions referred to in Article 6(1) of that Regulation, provided that the main proceedings were opened before the end of the transition period;

(d) Regulation (EC) No 1896/2006 of the European Parliament and of the Council shall apply to European payment orders applied for before the end of the transition period; where, following such an application, the proceedings are transferred according to Article 17(1) of that Regulation, the proceedings shall be deemed to have been instituted before the end of the transition period;

(e) Regulation (EC) No 861/2007 of the European Parliament and of the Council shall apply to small claims procedures for which the application was lodged before the end of the transition period;

(f) Regulation (EU) No 606/2013 of the European Parliament and of the Council shall apply to certificates issued before the end of the transition period."

Article 68 of the Draft Agreement concerns ongoing judicial cooperation procedures, in particular within the framework of the EU Regulations on cross-border service of documents and the taking of evidence. Article 69 of the Draft Agreement contains miscellaneous provisions dealing, inter alia, with legal aid, mediation, and relations with Denmark.

The full text of the Draft Agreement is available on the Commission's website here and in the press, e.g. via the Guardian's website here. It remains to be seen, however, whether the British Parliament will ratify this text (see here). Stay tuned!

Out now: Zeitschrift für

Europäisches Privatrecht, Issue 4 (2018)

The latest issue of the Zeitschrift für Europäische Privatrecht has just been released. It contains the following articles:

Thomas Ackermann, Sektorielles EU-Recht und allgemeine Privatrechtssystematik

> *In the German tradition, private law is considered as a system of consistent rules that can be reduced to a unity formed by a small number of axioms. This idea has been the driving force behind huge efforts to overcome the fragmentation of EU private law. However, the concept of a private law system is unsuitable for a democratic polity whose supranational level is formed by the EU. Instead, the systematic quest for unity and consistency should aim at positioning private law rules in the entirety of our legal order. This leads to a better understanding of European legislation and case-law in the field of private law.*

Jürgen Basedow, Sektorielle Politiken und allgemeine Privatrechtssystematik

> *Following Ackermann the author elaborates on the distinction of horizontal and vertical EU legislation. The problems caused by the latter aggravate by the increasing use of regulations (instead of directives) and by the progressive adoption of rules on liability in acts aiming at market regulation. The author advocates renewed work on a Common Frame of Reference and the creation of a unit within the Commission that would be tasked with the survey of coherence of provisions of the private law acquis.*

Brigitta Lurger, Die Dominanz zwingenden Rechts – die vermeintlichen und tatsächlichen Schattenseiten des EU-Verbraucherschutzrechts

> *EU private law, in particular EU consumer law, has encountered heavy criticism: It was, for instance, accused of being one-dimensional – ie only market functional – or to transform contract law into a set of mostly inadequate or inefficient mandatory rules. The article analyses this criticism by creating*

links between several discourses: (behavioral) law and economics, paternalism, fundamental rights, competences, contract law versus regulatory law, and the conflict between self-interest and social responsibility.

Gerhard Wagner, Zwingendes Vertragsrecht

Modern contract law, as applied between businesses and consumers, operates in the form of mandatory law. This pattern dominates not only in Europe, but also in the United States. It is supported by strong normative reasons. However, it is time to rethink the relationship between mandatory law and court control over standard business terms: Court control over standard terms does better than mandatory law in reconciling consumer protection and private autonomy, and should thus be preferred.

Pietro Sirena, Die Rolle wissenschaftlicher Entwürfe im europäischen Privatrecht

The article deals with the projects of a European private law, which have been drafted in black letter rules, and their influence upon the laws of the Member States as well as that of the European Union. The author points out that a genuine European private law could not overlook the best developments of the national legal cultures, which have been flourishing in the last two centuries on the basis of the national codifications of civil law and the judge-made common law.

Reinhard Zimmermann: Die Rolle der wissenschaftlichen Entwürfe im europäischen Privatrecht

The creation of various sets of „model rules", „restatements", or „non-legislative codifications", particularly concerning contract law, is one of the most remarkable phenomena in the field of comparative private law over the last fourty years. The present essay argues that one important function of these model rules is to facilitate the discussion of legal problems beyond national borders and thus to stimulate the development of a truly European legal doctrine. They can thus help to achieve what Professor Sirena in his lecture is aiming for.

Horst Eidenmüller: Collateral Damage: Brexit's Negative Effects on Regulatory Competition and Legal Innovation in Private Law

> *This article attempts to assess the consequences of Brexit for English and European private law. More specifically, I am interested in how the level of legal innovation in private law will be influenced by Brexit. I argue that Brexit will reduce the level of efficiency-enhancing legal innovation in Member States' and European private law. Brexit will eliminate the UK as a highly innovative competitor on the European market for new legal products in private law, reducing the beneficial effects of regulatory competition. Further, private law-making on the European level will no longer benefit from the UK's efficiency-enhancing influence. I substantiate and illustrate the main thesis of this article with examples taken mostly from contract law and dispute resolution, company law and insolvency law.*

Marc-Philippe Weller/Chris Thomale/Susanne Zwirlein, Brexit: Statutenwechsel und Acquis communautaire

> *The Brexit will have considerable consequences for international private and procedural law. From an individual point of view, there will be changes to the applicable law that can be managed with the methods of the PIL. At a general and abstract level, the shape of the acquis will change in several respects.*

Lado Chanturia, Die Ausdehnung des Europäischen Privatrechts auf Drittstaaten am Beispiel Georgiens

> *Georgia signed an Association Agreement with the EU on 27.6.2014. According to the Association Agreement (AA) the reform of private law should be considered as further development of the Europeanization of Georgian law, which began in the early 1990s. The political decision in favor of the Europeanization of law is now turning into an obligation of legal harmonization. The pertinent areas as per the agreement are electronic commerce, intellectual property rights, competition, company law, accounting and auditing, corporate governance and consumer policy.*

Reiner Schulze, Die Ausdehnung des Europäischen Privatrechts auf Drittstaaten

Following the article by Lado Chanturia ('Die Ausdehnung des Europäischen Privatrechts auf Drittstaaten am Beispiel Georgiens', in this issue, page 919), this contribution analyses different ways of third countries adopting European Private Law beyond the institutionalized forms of approximation of law. In particular, it deals with the reception of the law of the Member States and the „acquis commun" alongside the Acquis communautaire and criticizes the concept of a „legal transplant" of European law in third countries.

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60 years BIICL, 50 years Brussels Regime, 60 years New York Convention

In 2018, not only the British Institute of International and Comparative Law (BIICL) celebrates a round birthday, but also the two most important regimes for cross-border cooperation in civil and commercial litigation and arbitration – the Brussels Regime (1968), to which the United Kingdom acceded 40 years ago, and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). Thus, Professor *Eva Lein* (Lausanne) has convened an event at the BIICL in order to take stock and assess the effects and benefits of both regimes for citizens, businesses, lawyers and courts. Moreover, the participants will try to look into the post-Brexit future. The conference will take place at the BIICL on 29th November, 2018. For the full programme, a list of speakers and further details on registration, please click here.

The Future Relationship between the UK and the EU following the UK’s withdrawal from the EU in the field of family law

This study, commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the Committee on Legal Affairs, authored by Marta Requejo Isidro, Tim Amos, Pedro de Miguel Asensio, Anatol Dutta and Mark Harper, explores the possible legal scenarios of judicial cooperation between the EU and the UK at both the stage of the withdrawal and of the future relationship in the area of family law, covering the developments up until 5 October 2018. More specifically, it assesses the advantages and disadvantages of the various options for what should happen to family law cooperation after Brexit in terms of legal certainty, effectiveness and coherence. It also reflects on the possible impact of the departure of the UK from the EU on the further development of EU family law. Finally, it offers some policy recommendations on the topics under examination.