# 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.

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# Alexander Vik v Deutsche Bank AG: the powers of the English court outside of the jurisdiction in contempt of court proceedings

*By Diana Kostina*

The recent Court of Appeal judgment in *Alexander Vik and Deutsche Bank AG [2018] EWCA Civ 2011*confirmedthat contempt of court applications for alleged

non-compliance with a court order can be served on a party outside the jurisdiction of England and Wales. The Court of Appeal's judgment also contains a useful reminder of the key principles governing the powers of English courts to serve defendants outside of the jurisdiction.

**Background**

This Court of Appeal's judgment is the latest development in the litigation saga which has been ongoing between Deutsche Bank ('the Bank') and Alexander Vik, the Norwegian billionaire residing in Monaco ('Mr Vik') and his company, Sebastian Holdings Inc ('the Company'). The Bank has been trying to enforce a 2013 judgment debt, which is now estimated to be around US $ 320 million.

Within the enforcement proceedings, the English court made an order under CPR 71.2 requiring Mr Vik to appear before the court to provide relevant information and documents regarding the assets of the Company. This information would have assisted the Bank in its efforts to enforce the judgment against him. Although Mr Vik did appear in court, the Bank argued that he had deliberately failed to disclose important documents and lied under oath. Accordingly, the Bank argued that Mr Vik should be held in contempt of court by way of a committal order.

To obtain a committal order, the Bank could have applied under either CPR 71.8 or CPR 81.4. The difference is that the former rule provides for a simple and streamlined committal procedure, while the latter is more rigorous, slow, and — as accepted by courts — possibly extra-territorial. The Bank filed an application under CPR 81.4, and the court granted a suspended committal order. The Bank then sought to serve the order on Mr Vik in Monaco.

**High Court decision**

The Judge at first instance, Teare J, carefully considered the multi-faceted arguments. Teare J concluded that permission should not be required to serve the committal order on Mr Vik, because the debtor was already subject to the incidental jurisdiction of the English courts to enforce CPR 71 order. A similar conclusion could be reached by relying on Article 24(5) of the Brussels Recast Regulation (which provides that in proceedings concerned with the enforcement of judgments, the courts of the member state shall have exclusive jurisdiction regardless of the domicile of the parties). However, if the Bank had needed permission to serve the committal order outside the jurisdiction, then his

Lordship concluded that the Bank could not rely on the gateway set out in PD 6B 3.1(10) (which provides that a claim may be served out of the jurisdiction with the permission of the court where such claim is made to enforce a judgment or an arbitral award). Both parties appealed against this judgment.

**Court of Appeal decision**

The Court of Appeal, largely agreeing with Teare J, made five principal findings.

(1) The court found it ironic that Mr Vik argued that CPR 71.8 (specific ground), rather CPR 81.4 (generic ground) applied to the alleged breach of CPR 71.2, since CPR 81.4 offered greater protections to the alleged contemnor. The likely reason for this "counter-intuitive" step was that the latter provision was extra-territorial. The Court of Appeal confirmed that CPR 71.8 is not a mandatory *lex specialis* for committal applications relating to a breach of CPR 71.2, and that the Bank was perfectly entitled to rely on CPR 81.4.

(2) The Court of Appeal agreed with the findings of Teare J that the court's power to commit contemnors to prison is derived from its inherent jurisdiction. The CPR rules only provide the technical steps to be followed when this common law power is to be exercised. It followed that it did not make much difference which rule to apply – either the broader CPR 81.4 or the narrower CPR 71.8. Thus, if the Bank had made the committal application under CPR 71.8, the application would have had an extra-territorial effect.

(3) Mr Vik sought to challenge Teare J's finding that he should be deemed to be within the jurisdiction in the contempt of court proceedings, because they are incidental to the CPR 71.2 order in which he participated. Instead, he argued, such proceedings were distinguishably "new", and would require permission to serve outside the jurisdiction. The Court of Appeal disagreed and confirmed that the committal order was incidental as the means to enforce the CPR 71.2 order. Therefore, in the light of the strong public interest in the enforcement of English court orders, it was not necessary for the Bank to obtain permission to serve the committal order outside the jurisdiction.

(4) Teare J observed that Article 24(5) of the Brussels Recast Regulation meant that that permission to serve Mr Vik outside of the jurisdiction was not required. Article 24(5) confers exclusive jurisdiction on the courts of the Member State in which the judgment was made and to be enforced by, regardless of the domicile

of the parties. The Court of Appeal (in obiter) was generally supportive of this approach, opining that the committal application in the case at hand was likely to fall within Article 24(5) of the Brussels Recast Regulation. However, the careful and subtle wording of Article 24(5) implied that this conclusion might be subject to further consideration on a future occasion.

(5) Under CPR 6.36, a claimant may serve a claim form out of the jurisdiction with the permission of the court where the claim comes within one of the "gateways" contained in PD 6B. The relevant gateway in the Mr Vik's case was to be found at PD 6B, para 3.1(1), as a claim made to enforce a judgment. Teare J was of the view that the Bank could not rely on this gateway to enforce the committal order. The Court of Appeal was reluctant to give a definitive answer on this point, even though "there may well be considerable force" in the Teare J's approach. Thus, it remains unclear whether the CPR rules regulating service outside the jurisdiction would apply to the CPR 71 order and the committal order.

**The importance of the judgment**

This Court of Appeal's judgment serves as an important reminder for parties who are involved in the enforcement of English judgment debts. Rather than giving a short answer to a narrow point of civil procedure, the judgment contains an extensive analysis of English and EU law. The judgment highlights the tension between important Rule of Law issues such as "*enforcing court orders on the one hand"* and *"keeping within the jurisdictional limits of the Court, especially as individual liberty is at risk, on the other*" (Court of Appeal judgment, at para. 1).

The judgment demonstrates the broad extra-territorial reach of the English courts. It also confirms the English court's creditor-friendly reputation. The findings on the issues of principle may be relevant to applications to serve orders on defendants out of the jurisdiction in other proceedings, for instance worldwide freezing orders or cross-border anti-suit injunctions.

Nevertheless, the judgment demonstrates the need for clear guidance on the jurisdictional getaways to serve out of the jurisdiction for contempt of court. In giving judgment, Lord Justice Gross carefully suggested that the Rules Committee should consider implementing a specific rule permitting such service on an officer of a company, where the fact that he is out of the jurisdiction is no bar to the making of a committal application.

Another issue that seems subject to further clarification is whether a committal order or a provisional CPR 71 order are covered by the Brussels Recast Regulation. A definitive answer to this question becomes particularly intriguing in the light of Brexit.

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# Receivables and Securities in Private International Law

A conference, organised by IACPIL – Interdisciplinary Association of Comparative and Private International Law, will take place in Vienna on 29 November 2018 under the title *Receivables and Securities in Private International Law*.

The aim of this half-day conference is to discuss the proposal of the European Commission on the law applicable to third-party effects of transactions in securities and assignment and the relevant issues arising in cross-border securities and receivables finance transactions.

Speakers from the Commission, academia and law practice will address issues arising in the context of cross-border security trading, assignment and subrogation, factoring, securitisation, and similar transactions both in the light of the relevant EU proposal, national law and uniform law instruments, such as the UN Assignment of Receivables Convention and the UNCITRAL Model Law on Secured Transactions. The advantages and disadvantages of the different approaches will be discussed from a comparative law perspective, with a focus on current challenges and opportunities arising from the digitalisation of trade and Brexit.

Registration is required by 25 November 2018.

The full programme is available here, together with further practical information.

# Job vacancies at the MPI Luxembourg

The **Max Planck Institute Luxembourg for Procedural Law** is offering three full-time positions at the **Research Department of European and Comparative Procedural Law**, two for Research Fellows in EU Procedural Law (PhD candidate) and one for a Senior Research Fellow. The contracts are on a fixed-term basis for 24 months with the possibility of a contract extension.

**Positions:**

The Institute is looking for a highly motivated **Senior Research Fellow** who would join the Department of European and Comparative Procedural Law led by Prof. Dr. Dres. h.c. Hess and composed by a team of five senior research fellows and 15 research fellows. The Department conducts scientific research in three areas: European civil procedural law, comparative procedural law and dispute resolution in the cross-roads between private and public international law.

The **Research Fellow** will conduct legal research and cooperate at the Max Planck Institute Luxembourg within the Project "EUFam's II – Facilitating cross-border family life: towards a common European understanding)" which aims (i) at assessing the effectiveness of the functioning 'in concreto' of the EU Regulations in family matters, as well as the most relevant Hague instruments in this field of law along with Regulation (EU) 2016/1191 on public documents; and (ii) at identifying the paths that lead to further improvement of such effectiveness. Moreover, the Project will focus on the impact of the arrival of refugees in Europe as well as of the Brexit phenomenon in the field of European Family Law.

The successful candidate will have the great opportunity to contribute to the development of the Department of European Comparative Procedural Law led by Prof. Dr. Dres. h. c. Burkhard Hess and, in parallel, work on her/his PhD project.

The Research Fellow is expected to assist in the achievement of the objectives of the Project on a part-time basis during the two years of duration of the project,

namely by carrying out and developing legal research with a view to contributing to the drafting of the Project's Final Study and by participating in the presentation of the scientific outcomes of the Project.

In addition, the successful candidate is expected to write her/his PhD thesis and perform the major part of her/his PhD research work in the premises of the institute in Luxembourg, but also in close collaboration with her/his external supervisor and with the university or institution delivering her/his PhD diploma. A supervision of a PhD-thesis by Professor Hess will also be possible.

**Profiles:**

**Senior Research Fellow:** Applicants must have earned a degree in law and hold a PhD degree by the time they join the MPI, preferably in a topic falling within the scope of European Procedural Law in civil and commercial matters. The successful candidate shall possess a strong interest and aptitude for legal research and have a high potential to develop excellence in academic research.

Her/his CV must portray a consolidated background in EU international procedural law or in comparative procedural law: prior publications in this field of the law shall be highly regarded in the selection process. An interest in Family law is an asset. Full proficiency in English (and other foreign language) is compulsory (written and oral).

**Research Fellow:** Applicants are required to have obtained at least a Master degree in Law with outstanding results and to have knowledge of domestic procedural and European procedural law, in particular linked to family matters. According to the academic grades already received, candidates must rank within the top 10 %.

The successful candidates should demonstrate a great interest and curiosity for fundamental research and have a high potential to develop excellence in academic research. Proficiency in English is compulsory (in written and oral); further language skills (in French notably) are of advantage.

All applications are to be made online until **30th October 2018** via the following links:

- Senior Research Fellow

- Research Fellow

For further information see here.

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# International commercial courts: should the EU be next? – EP study building competence in commercial law

*By Erlis Themeli, Xandra Kramer*, and *Georgia Antonopoulou, Erasmus University Rotterdam (postdoc researcher, PI, and PhD candidate ERC project Building EU Civil Justice)*

Previous posts on this blog have described the emerging international commercial and business courts in various Member States. While the primary aim is and should be improving the dispute resolution system for businesses, the establishment of these courts also points to the increase of competitive activities by certain Member States that try to attract international commercial litigation. Triggered by the need to facilitate business, prospects of financial gain, and more recently also by the supposed vacuum that Brexit will create, France, Germany, the Netherlands, and Belgium in particular have been busy establishing outlets for international commercial litigants. One of the previous posts by the present authors dedicated to these developments asked who will be next to enter the competition game started by these countries. In another post, Giesela Rühl suggested that the EU could be the next.

A recently published study of the European Parliament's Committee on Legal Affairs (JURI Committee) on Building Competence in Commercial Law in the Member States, authored by Giesela Rühl, focuses on the setting up of commercial courts in the Member States and at the EU level with the purpose of enhancing the enforcement of commercial contracts and keeping up with the

judicial competition in and outside Europe. This interesting study draws the complex environment in which cross-border commercial contracts operate in Europe. From existing surveys it is clear that the laws and the courts of England and Switzerland are selected more often than those of other (Member) States. While the popularity of these jurisdictions is not problematic as such, there may be a mismatch between the parties' preferences and their best available option. In other words, while parties have clear ideas on what court they should choose, in reality they are not able to make this choice due to practical difficulties, including a lack of information or the costs involved. The study recommends reforming the Rome I and Rome II Regulations to improve parties' freedom to choose the applicable law. In addition, a European expedited procedure for cross-border commercial cases can be introduced, which would simplify and unify the settlement of international commercial disputes. The next step, would be to introduce specialised courts or chambers for cross-border commercial cases in each Member State. In addition to these, the study recommends the setting up of a European Commercial Court equipped with experienced judges from different Member States, offering neutrality and expertise in cross-border commercial cases.

This study takes on a difficult and complicated issue with important legal, economic, and political implications. From a pure legal perspective, expanding – the already very broad – party autonomy to choose the law and forum (*e.g.* including choosing a non-state law and the possibility to choose foreign law in purely domestic disputes) seems viable but will likely not contribute significantly to business needs. The economic and political implications are challenging, as the example of the Netherlands and Germany show. In the Netherlands, the proposal for the Netherlands Commercial Court (NCC) is still pending in the Senate, despite our optimistic expectations (see our previous post) after the adoption by the House of Representatives in March of this year. The most important issue is the relatively high court fee and the fear for a two-tiered justice system. The expected impact of Brexit and the gains this may bring for the other EU Member States should perhaps also be tempered, considering the findings in empirical research mentioned in the present study, on why the English court is often chosen. A recently published book, *Civil Justice System Competition in the EU*, authored by Erlis Themeli, concludes on the basis of a theoretical analysis and a survey conducted for that research that indeed lawyers base their choice of court not always on the quality of the court as such, but also on habits and trade usage.

England’s dominant position derives not so much from its presence in the EU, but from other sources.

The idea of a European Commercial Court that has been put forward in recent years and is promoted by the present study, is interesting and could contribute to bundling expertise on commercial law and commercial dispute resolution. However, it is questionable whether there is a political interest from the Member States considering other pressing issues in the EU, the investments made by some Member States in setting up their own international commercial courts, and the interest in maintaining local expertise and keeping interesting cases within the local court system. Considering the dominance of arbitration, the existing well-functioning courts in business centres in Europe and elsewhere and the establishment of the new international commercial courts, one may also wonder whether a further multiplicity of courts and the concentration of disputes at the EU level is what businesses want.

That this topic has a lot of attention from practitioners, businesses, and academics was evident at a very well attended seminar (Rotterdam, 10 July 2018) dedicated to the emerging international commercial courts in Europe, organized by Erasmus University Rotterdam, the MPI Luxembourg, and Utrecht University. For those interested, in 2019, the papers presented at this seminar and additional selected papers will be published in an issue of the *Erasmus Law Review*, while also a book that takes a European and global approach to the emerging international business courts in being prepared (more info here). At the European Law Institute’s Annual Conference (Riga, 5-7 September 2018) an interesting meeting with vivid discussions of the Special Interest Group on Dispute Resolution, led by Thomas Pfeiffer, was dedicated to this topic. An upcoming conference “Exploring Pathways to Civil Justice in Europe” (Rotterdam, 19-20 November 2018) offers yet another opportunity to discuss court specialisation and international business courts, along with other topics of dispute resolution.

# UK government publishes paper on future of judicial cooperation in civil matters

Yesterday, the UK government published new paper on the future of judicial cooperation in civil matters. It sets out the UK's vision for the handling of civil legal cases if no Brexit deal can be reached.

The full paper is available here.

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# Montenegro Ratifies Hague Choice of Court Convention

(Only) last week, the government of the Netherlands – the depositary of the Convention – has informed the Permanent Bureau of the Hague Conference on Private International Law that Montenegro ratified the 2005 Hague Choice of Court Convention on 18 April 2018, with the Convention entering into force for Montenegro on 1 August 2018. This brings the number of Contracting Parties to 32 (the EU, all member states (since 30 May 2018 including Denmark), Mexico, Singapore, and Montenegro), with three others (China, Ukraine, and the United States) having signed but not ratified the Convention.

Pursuant to its Articles 1(1), 3(a), and 16(1), exclusive choice-of-court agreements designating Montenegro concluded after 1 August 2018 must be given effect under the Convention by all Contracting States (except Denmark, for which it only enters into force on 1 September 2018). Montenegro must give the same effect to all such agreements designating other Contracting States as long as they have been concluded after the Convention entered into force for the designated state (EU and Mexico: 1 October 2015; Singapore: 1 October 2016; Denmark: 1 September 2018).

The Convention has repeatedly been mentioned as an option for the UK to maintain a minimum of cooperation in the area of civil justice with the EU, should a more comprehensive agreement not be reached (see Dickinson ZEuP 2017, 539, 560–62; Rühl (2018) 67 ICLQ 127–28; Sonnentag, Die Konsequenzen des Brexits (Mohr 2017), 89–91). It should be noted, though, that even if the UK ratified the Convention the very day of its withdrawal from the EU on 29 March 2019, it would only enter into force three months later, on 1 July 2019 (see Art 31(1)).

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# Towards a European Commercial Court?

The prospect of Brexit has led a number of countries on the European continent to take measures designed to make their civil justice systems more attractive for international litigants: In Germany, the so-called "Justice Initiative Frankfurt", consisting of lawyers, judges, politicians and academics, has resulted in the creation of a special chamber for commercial matters at the District Court in Frankfurt which will, if both parties agree, conduct the proceedings largely in English (see here). In France, an English-language chamber for international commercial matters was established at the Cour d'appel in Paris, adding a second instance to the English-speaking chamber of commerce at the Tribunal de commerce in Paris (see here). In the Netherlands, the Netherlands Commercial Court and the Netherlands Commercial Court of Appeal will soon begin their work as special chambers of the Rechtbank and the Gerechtshof Amsterdam (see here). And in Belgium, the government plans to establish a Brussels International Business Court (see here). Clearly: the prospect of Brexit has stirred up the European market for international litigation.

The interesting question, however, is whether the above-mentioned measures will yield much success? Will Germany, France, the Netherlands or Belgium manage to convince internationally active companies to settle their disputes on the European continent rather than in London? Doubts are in order. To begin with, the many national initiatives vary considerably in detail and, thus, send rather

diffuse signals to the business community. Moreover, most of the measures that have been taken or are being planned so far, notably those in Germany and France do not go far enough. They focus too much on English as the court language and neglect other factors that contribute to the outstanding success of London as a place for settling international disputes. This includes, for example, a pronounced service mentality that goes hand in hand with a strict orientation towards the special litigation needs of international companies. In any case, it is doubtful whether the withdrawal of London from the European judicial area can be compensated through national initiatives.

So, what can the remaining Member States do to offer European and other companies an attractive post-Brexit forum to settle their disputes? In a soon to be published study for the European Parliament I suggest a package of measures, one of which envisions the establishment of a European Commercial Court. This Court would complement the courts of the Member States and offer commercial litigants one more forum for the settlement of international commercial disputes. It would come with a number of advantages that national courts are not able to offer.

## Advantages

To begin with, a European Commercial Court would be a truly international forum. As such it could better respond to the needs of international commercial parties than national courts which are embedded in existing national judicial structures. In particular, it could better position itself as a highly experienced and neutral forum for the settlement of international disputes: just like an international arbitral tribunal, it could be equipped with experienced commercial law judges from different states. These judges would ensure that the Court has the necessary legal expertise and experience to settle international disputes. And they would credibly signal that the Court offers neutral dispute settlement that is unlikely to favour one of the parties. A European Commercial Court could, therefore, offer commercial parties much of what they get from international commercial arbitration – without sacrificing the advantages associated with a state court.

A European Commercial Court, however, would not only enrich the European dispute settlement landscape and offer international commercial litigants an additional, an international forum for the settlement of their disputes. It could

also participate more convincingly in the global competition for international disputes that has gained momentum during the past years and triggered the establishment of international commercial courts around the world: Singapore, for example, opened the Singapore International Commercial Court in 2015 to offer a special court for cases that are "of an international and commercial nature". Qatar has been running the Qatar International Court and Dispute Resolution Centre (QICDRC) for a number of years by now. Abu Dhabi is hosting the Abu Dhabi Global Markets Courts (ADGMC) and Dubai is home to the International Financial Centre Courts (DIFC). And in 2018 China joined the bandwagon and created the China International Commercial Court (CICC) for countries along the "New Silk Road" as part of the OBOR (One Belt, One Road) initiative. The establishment of a European Commercial Court would be a good and promising response to these developments. The more difficult question, however, is whether the EU would actually be allowed to establish a new European court?

## Competence

Under the principle of conferral embodied in Article 5 TEU, the EU may only act within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. With regard to the establishment of a European Commercial Court the EU could rely on Article 81 TFEU. This provision allows the EU to adopt measures to improve judicial cooperation in civil matters having cross-border implications. In particular, it allows the EU to adopt measures that improve access to justice (Article 81(2) lit. e) TFEU) and eliminate obstacles to the proper functioning of civil proceedings (Article 81(2) lit. f) TFEU). A European Commercial Court could be understood to do both: improving access to justice and eliminating obstacles to the proper functioning of civil proceedings. However, would it also fit into the overall European judicial architecture? Above all: would the CJEU accept and tolerate another European court?

Doubts are in order for at least two reasons: first, according to TEU and TFEU it is the CJEU that is entrusted with the final interpretation of EU law. And, second, the CJEU has recently – and repeatedly – emphasized that it does not want to leave the interpretation of EU law to other courts. However, both considerations should not challenge the establishment of a European Commercial Court because that Court would not be responsible for interpreting European law, but for

settling international disputes between commercial parties. It would – like any national court and any arbitral tribunal – primarily apply national law. And, as far as it is concerned with European law, the Court should be entitled and required to refer the matter to the CJEU. A European Commercial Court would, therefore, recognize and, in fact, defer to the jurisdiction the CJEU.

## Challenges

The establishment of a European Commercial Court would be a good response to the many challenges international commercial litigation is currently facing. In order to succeed, however, the Court would have to be accepted by the business community. To this end the Court would require staff, equipment and procedures that meet the highest standards of professional dispute resolution. In addition, the Court would have to be fully integrated into the European judicial area and benefit from all measures of judicial cooperation, in particular direct enforcement of its judgments. Ensuring all this would certainly not be easy. However, if properly established a European Commercial Court would enrich and strengthen the European dispute resolution landscape. And it would contribute to the development of a strong and globally visible European judicial sector.

What do you think?

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# Out now: Zeitschrift für Vergleichende Rechtswissenschaft (ZvglRWiss) 117 (2018) No. 2

The most recent issue of the German Journal of Comparative Law (*Zeitschrift für Vergleichende Rechtswissenschaft*) features four articles on private international

law. The English abstracts, kindly provided by the journal's editor-in-chief, Prof. Dr. *Dörte Poelzig* (M.jur., Oxon), University of Leipzig, read as follows:

### Die Abwicklung von Bankengruppen und der Einfluss von Trennbankenregeln im transatlantischen Rechtsvergleich

Moritz Renner und Roman Kowolik*

ZVglRWiss 117 (2018) 83-116

[The Resolution of Banking Groups and the Influence of Bank Separation Rules – a Transatlantic Comparison]

In the wake of the recent financial crisis, structural reforms of the financial sector have been intensely discussed as a means to address the failure of systemically important banking groups. In the US, the prevalent resolution strategy solely targets the top holding company of a banking group. This approach ought to enable the resolution of cross-border operating banking conglomerates while preserving the financial and organizational structure of the group and the operational contractual relations of its subsidiaries. In contrast, this resolution strategy has not yet prevailed within the European Union due to the traditional universal bank structure of European banking groups that impedes such an approach. The attempt of the European legislator to introduce bank separation rules had the potential to mitigate these structural constraints. However, the European Commission recently withdrew its proposal and hence stopped the formerly envisaged structural reforms. Considering prospective reform attempts, the European legislator should favor a functional separation of business areas within a banking group over group-wide activity restrictions in order to facilitate a centralized resolution approach.

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### The Regulation of Bitcoin and Other Virtual Currencies under Japanese Law in Comparative Perspective

Christopher Danwerth*

ZVglRWiss 117 (2018) 117-155

Japan amended its Payment Service Act to regulate virtual currency exchange

service providers in April 2017. Those providers must register with the FSA, prevent money laundering and terrorist financing and ensure customer protection. The regulation is mainly driven by the Mt. Gox bankruptcy. In Germany, virtual currencies are considered “units of account” and are, therefore, “financial instruments”, falling under within the scope of the German Banking Act. The Japanese and German regulations differ in technicality and structure. Regarding the content, both approaches are broadly similar. The rise of Initial Coin Offerings, high volatility and speculation and unregulated online wallet services require further adjustments that should lean to a capital market-based regulation, including a prospectus requirement, investor tests and the prevention of insider trading and market manipulation.

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## Are Statutory Damages the New Punitive Damages? – Haftungs- und Prozessrisiken durch pauschalierte Schadenersatzansprüche im U.S.-amerikanischen Recht

Martin Konstantin Thelen*

ZVglRWiss 117 (2018) 156-188

In the United States, statutory damages allow plaintiffs to sue even if they cannot demonstrate the precise economic harm they have suffered from the defendant’s violation of a statute. As a result, the alleged damages can exceed the actual harm by far. When thousands of consumers join together in a class action, the multiplication effect makes defendants face immense liability amounts. The question whether and how to reduce these amounts is still unsettled in U.S. law. Vice versa, German courts have to decide whether American class actions for statutory damages shall be served and U.S. judgments shall be recognized. This article shows that German courts cannot refuse to serve a suit under Art. 13(1) of the Hague Service Convention. However, based on the public policy exception of § 328(1)(4) German Civil Procedure Code, they can deny the recognition of a foreign statutory damages judgement if it does not specifically indicate what kind of harms shall be compensated by the statutory damages amount. Notably, if the foreign judgement itemizes the kinds of intangible harms the plaintiff shall be compensated for, German courts should recognize this verdict at least in part.

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**Effekte des Brexit aus europäisch gesellschaftsrechtlicher Perspektive**

– de lege lata über lege ferenda –

Jean Mohamed*

ZVglRWiss 117 (2018) 189-213

[Effects of the Brexit from the Perspective of European Corporate Law]

Around nine months after the historic Brexit referendum on the 23rd of June 2016, the British government has initiated the withdrawal process from the EU on the 29th of March 2017. For European company law – a British top export – Brexit could soon have far-reaching implications with regard to the recognition of UK-legal forms. With this article, two issues should be addressed from a corporate law perspective. Firstly (according to law as it exists) the implications that affect the corporate law of the remaining Member States and of the United Kingdom itself are briefly presented. Then, perspectives on corporate law are discussed de lege ferenda and in concreto for the new British "partnership" with the European Union. At any rate, the list of questions and topics is long: Will the common law still shape the future of European corporate law? Who will benefit from the new regulatory competition in company Law (GER/UK)? And it is also questionable what will happen to companies based on the UK model established within the UK and having their headquarters in another Member State after a "hard" Exit. In this context, the author discusses "international private law", "intertemporal law" and "cross-border transitions".

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* *Dr. Jean Mohamed*, Mag. iur., ist wissenschaftlicher Mitarbeiter am Seminar für Handels-, Schifffahrts- und Wirtschaftsrecht der Universität Hamburg und Referendar am Hanseatischen OLG Hamburg. Zum Zeitpunkt der Erstellung der Abhandlung war er Doktorand bei *Prof. Dr. Ulrich Noack* an der Heinrich-Heine-Universität Düsseldorf. Die Abhandlung wurde im September 2017 mit dem 1. Platz des Stiftungspreises 2017 der Stiftung Wissenschaftsforum Wirtschaftsprüfung und Recht ausgezeichnet und im Rahmen einer Podiumsdiskussion am 4. 9. 2017 vorgestellt. Der neueste Stand von Schrifttum und Rechtsprechung wurde nachgetragen.

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# Case C-191/18 and Us

Open your eyes, we may be next. Or maybe we are already there? Case C- 191/18, *KN v Minister for Justice and Equality*, is not about PIL. The questions referred to the CJ on March 16, actually relate to the European Arrest warrant (and Brexit). However, PIL decisions are mirroring the same concerns.

It has been reported, for instance, that a Polish district court has refused a Hague child return to England on the basis (*inter alia*) that Brexit makes the mother`s position too uncertain. A recent case before the Court of Appeal of England and Wales shows that English judges are also struggling with this (see "Brexit and Family Law", published on October 2017 by Resolution, the Family Law Bar Association and the International Academy of Family Lawyers, supplemented by mainland IAFL Fellows, Feb 2018).

And even if it was not the case: can we really afford to stay on the sidelines?

Needless to say, Brexit is just one of the ingredients in the current European Union melting pot. Last Friday's presentation at the Comité Français de Droit International Privé, entitled « Le Droit international privé en temps de crise », by Prof. B. Hess, provided a good assessment of the main economic, political and human factors explaining European contemporary mess – by the way, the parliamentary elections in Slovenia on Sunday did nothing but confirm his views. One may not share all that is said on the paper; it's is legitimate not to agree with its conclusions as to the direction PIL should follow in the near future to meet the ongoing challenges; the author's global approach, which comes as a follow up to his 2017 Hague Lecture, is nevertheless the right one. Less now than ever before can European PIL be regarded as a "watertight compartment", an isolated self-contained field of law. Cooperation in criminal and civil matters in the AFSJ follow different patterns and maybe this is how it should be (I am eagerly waiting to read Dr. Agnieszka Frackowiak-Adamska's opinion on the topic, which seem to disagree with the ones I expressed in Rotterdam in 2015, and published later). The fact remains that systemic deficiencies of the judiciary in a given Member State can hardly be kept restricted to the criminal domain and leave untouched the civil one; doubts hanging over one prong necessarily expand to the other. The *Celmer* case, C-216/18 PPU, *Minister for Justice and Equality v LM*, heard last Friday (a commented report of the hearing will soon be released in Verfassungsblog, to the best of my knowledge), with all its political charge, cannot be deemed to be of no interest to us; precisely because a legal system forms a consistent whole mutual trust cannot be easily, if at all, compartmentalized.

The Paris presentation was of course broader and it is not my intention to address it in all its richness, in the same way that I cannot recall the debate which followed, which will be reproduced in due time at the *Travaux*. Still, I would like to mention the discussion on asylum and PIL, if only to refer to what Prof. S. Corneloup very correctly pointed out to: asylum matters cannot be left to be dealt with by administrative law alone; on the contrary, PIL has a big say and we – private international lawyers- a wide legal scenario to be alert to (for the record, albeit I played to some extent the dissenting opinion on Friday, my actual stance on the need to pair up public and private law for asylum matters is clear in *CDT*, 2017). Last year the JURI Committee of the European Parliament commissioned

two studies (here and here; they were also reported in CoL) on the relationship between asylum and PIL, thus suggesting some legislative initiative might be taken. But nothing has happened since.