26th Meeting of the European Group for Private International Law, Milan 2016

Many thanks to Hans van Loon for this piece of information.

At its 26th meeting, which took place in Milan last September, the European Group on Private International Law worked further on the establishment of common rules of conflict of laws in company law, on the basis of the achievements of the Florence and Luxembourg meetings. As a result the Draft rules on the law applicable to companies and other bodies were agreed upon.

Moreover, a *Resolution on the Commission Proposal for a recast of the Brussels IIa Regulation, concerning parental responsibility and child abduction* was adopted to support the Commission proposal of 30 June 2016 for a recast of the *Brussels II a* Regulation.

Besides a exchange of information on the current state of law of the Union, the Hague Conference and the the jurisprudence of the European Court of Human Rights took place. Finally, various papers were presented on the evolution of Italian civil union law, on the impact of the Brexit on private international law, on the follow-up to the Luxembourg Resolution concerning the legal status of applicants for international protection, and on the principles of interpretation of uniform substantive law.

The report was elaborated in collaboration with Marie Dechamps, Faculty of Law and Criminology of the Catholic University of Louvain, and can be fully read here.

Conference Report on Private

Antitrust Litigation: A New Era in the EU

The author of this post is Kristina Sirakova, Research Fellow at the MPI Luxembourg. Thanks, Kristina.

On 24 and 25 October 2016, the Academy of European Law (ERA) in cooperation with the French Cour de cassation hosted a conference in Paris on private antitrust litigation in Europe and the challenges that the implementation of the antitrust damages package entails for the EU Member States. The speakers, who were of both academic and professional acclaim, provided interesting insights and lively debate on procedural and substantive issues, arising from the recent legislative developments in the field of private antitrust litigation. Topics included inter alia: compensation and quantification of harm suffered from competition law infringements, the role of competition authorities and of the CJEU in private enforcement, limitation periods, evidence and forum shopping considerations.

This post provides an overview of the presentations and discussions on the issues raised.

The objectives of Directive 2014/104/EU and future steps

In her words of welcome, Jacqueline Riffault-Silk, Judge at the Commercial Chamber of the Cour de cassation, addressed the objectives of the Damages Directive in light of the institutional landscape and historical background of the Directive. The first step towards the Directive was made by the CJEU which ruled in cases *Courage and Crehan* (C-453/99, ECLI: EU:C:2001:465, para 26) and *Manfredi* (C-295/04, ECLI: EU:C:2006:461, para 60) that it is "open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition". Hence, the CJEU established the right to compensation which is the first foundation of the Directive. Furthermore, the Directive is founded on the principles of effectiveness and equivalence. The Directive was eventually proposed by the European Commission in 2013 (COM (2013) 404 final).

Eddy de Smijter, Head of the European Competition Network and Private Enforcement Unit, DG Competition, European Commission, presented the two main objectives of the Damages Directive, which the Member States must transpose by 27 December 2016. Firstly, it aims at helping victims of cartel law infringements to obtain compensation by removing practical obstacles in different national laws. Secondly, the Damages Directive serves to enhance the interplay between the public and private enforcement of competition law. With regard to *Pfleiderer* (C-360/09, ECLI:EU:C:2011:389), he noted that the CJEU did what it could in the absence of European legislation on the matter. The European Commission subsequently identified in this CJEU judgment a signal to become active.

Mr de Smijter then explained some of the key provisions of the Directive, focusing especially on the principle of full compensation in Article 3. He noted that even though Article 3 (3) Damages Directive excludes the award of punitive damages, the payment of interest could have a similar effect, depending on the duration of the cartel. Regarding the disclosure of evidence, he highlighted the increased possibilities for obtaining access to relevant documents in Article 5 et seq. Damages Directive. However, before granting access to documents, the courts must balance the interests involved: on the one hand, the right to full compensation shall be protected; on the other hand, effective public enforcement shall be ensured.

The morphology and mapping of antitrust damage actions

Assimakis Komninos, Partner at the Brussels office of White & Case LLP, presented "The morphology and mapping of antitrust damage actions" focusing mainly on four key points in damages litigation: types of competition law infringements, types of claimants, follow-on vs. stand-alone claims and types of harm. Firstly, he differentiated between shield litigation and sword litigation. While in shield litigation the claimant seeks for example the nullity of the contract pursuant to Article 101 (2) TFEU, in sword litigation he claims for instance injunctions, damages, restitution or declaratory relief. Secondly, Komninos explained the importance of stand-alone actions for effective judicial protection. In fact, the numbers show that stand-alone actions are more frequently filed than follow-on actions for damages. The claimant's decision to bring a follow-on or a stand-alone action largely depends on the type of infringement. While follow-on actions are suitable to deal both with exploitative (e.g. cartels) and exclusionary

infringements (e.g. foreclosure) stand-alone cases concern mainly exclusionary scenarios. Thirdly, he focused on certain specificities that depend on the type of claimant. Various procedural questions may arise depending on whether the claim was brought by direct/indirect purchasers and/or suppliers, umbrella customers, end consumers, distributors or competitors.

Liability, causality and the principles of effectiveness and equivalence

Sabine Thibault-Liger, Counsel at the Competition/Antitrust department of Linklaters in Paris, presented "Liability, causality and the principles of effectiveness and equivalence". Starting with the principles of effectiveness and equivalence, she explained that they safeguard the effective enforcement of European law. From a substantive standpoint, the effectiveness of the right to compensation depends on the scope of liability which must be sufficiently wide to ensure that the victim is compensated for the damage suffered. In the framework of the personal scope of liability, Thibault-Liger dealt with two problems. Firstly, the Directive does not define the notion of "undertaking"; thus the question arises as to whether an injured party can sue the parent company of an infringing party. She concluded that the concept of "undertaking" shall be understood in the same way as in competition law; thus, the liability of the parental company depends on whether it had decisive influence over its subsidiaries. Secondly, she explored the several liability for multiple infringing parties as regulated in Article 11 Damages Directive. With regard to the material scope of liability, Thibault-Liger raised four main points: the presumption of damage in Article 17 (2) Damages Directive, umbrella claims, the impact of the fault of the victim and the combination of licit and anticompetitive causes for the damage.

Quantification of damages and the passing-on of overcharges

Three presentations dealt with the quantification of damages both from a legal and an economic perspective.

Firstly, Diana Ungureanu, Judge at the Court of Appeal Pitesti, Romania and Marc Ivaldi, Professor of Economics at the Toulouse School of Economics and at the Ecole des Hautes Etudes en Sciences Sociales, jointly presented "The amount of compensation". Ungureanu focused on the principle of full compensation and the risk of overcompensation. She pointed out the inconsistency between the principle of full compensation and the court's power to estimate the amount of

harm. Thus, she concluded that full compensation is a judicial fiction. Ungureanu identified three questions that arise in the framework of the principle of full compensation: Who is damaged? How are they damaged? By how much are they damaged? Focusing on the amount of harm, she warned of the risk of overcompensation which exists in cases of supply chains. If in such a case a direct purchaser brings a claim for damages against his supplier and the defendant is unable to establish the passing-on defense, the direct purchaser would be awarded full damages for the overcharge. In an action for damages brought subsequently by an indirect purchaser against the same defendant, the claimant can rely on the presumption that the overcharge has been passed on (Article 14 (2) Damages Directive). The fact that the defendant was unable to prove the passing-on of overcharges in the previous proceedings, would not be enough to rebut the presumption, thus the defendant will have to pay again. The two judgments would not contradict to each other as each case would be decided according to the applicable rules on burden of proof. Payment of multiple damages by the defendant and unjust enrichment of at least one of the claimants would be likely to arise as a result.

Ivaldi looked at the amount of compensation "through the economic window". He presented the damage as an economic concept, constituting the difference between the economic situation of an actor in the absence of a competition law violation (counterfactual scenario) and the economic situation of the same actor as a result of the competition law violation. He explained that from an economic perspective full compensation has three effects: a direct cost effect (direct overcharge), an output effect and a pass-on effect. The direct cost effect is the price overcharge multiplied by the total quantity purchased, yet the main challenge is to determine the overcharge. The output effect is the cost for the purchaser not to have purchased the desired amount at competitive prices. The sum of the direct cost effect and the output effect is the loss caused by the cartel. On the contrary, the pass-on effect constitutes the gains from higher downstream prices.

In the second presentation on quantification of damages Marc Ivaldi talked about "Quantification in practice: challenges and aids for the national judge". He explained the methods for quantification of harm, which can be divided into two categories: methods based on an existing price benchmark (so called comparator-based methods) and methods based on a construction of the competitive but-for

price (cost-markup methods and simulation analysis). While the comparator-based methods compare existing prices across time and/or across markets to identify the counterfactual price, the cost-markup methods and the simulation analysis construct the counterfactual price by adding to the cost a markup for reasonable profit (cost-markup methods) or a markup for maximized profit (simulation analysis).

The third presentation by Benoît Durand, Partner at RBB Economics, focused on "The study on the passing-on of overcharges arising from competition law infringements: an economic perspective" (the study is now available here). Before explaining the various methods applied to quantify the passing-on effect, Durand commented on the role of economists in private antitrust litigation. He highlighted that they not only provide a framework within which both qualitative and quantitative evidence can be evaluated, but also develop counterfactual analysis to quantify damages. He then pointed out key influences on the extent of passing-on and explained that the passing-on effect is the price increase multiplied by the quantity sold. The main challenge to the quantification of the passing-on effect is thus again to estimate the increase in price. Two approaches can be used for this purpose: Firstly, the direct approach estimates the downstream price increase applying the same comparator-based methods used to estimate the initial overcharge. Secondly, the pass-on rate approach uses the purchaser's pass-on rate and applies it to the input cost increase.

Relationship between public and private enforcement

Wolfgang Kirchhoff, Judge in the antitrust division of the German Federal Court of Justice, presented "Relationship between public and private enforcement". Although public and private enforcement proceedings are separate, they are related through the binding effect which the Commission's and national competition authorities' (NCA) decisions have on courts (Article 16 (1) Reg. 1/2003; Article 9 Damages Directive). German law goes even further than the Directive in this respect and confers on foreign NCA decisions the same binding effect as their own NCA decisions (Article 33 (4) GWB). Kirchhoff explained the scope of the binding effect on the basis of a recent Federal Court judgment in case *Lottoblock II* (KZR 25/14, ECLI:DE:BGH:2016:120716UKZR25.14.0). It follows from it that only the operative part of a final administrative decision and those parts of the reasons needed to support the final decision with regard to facts and law are binding for courts. He stressed the fact that the binding effect

concerns only the competition law infringements and can be extended neither to causality nor to quantification of harm. Furthermore, he explored the possibilities for the Commission and NCAs to act as amicus curiae in private enforcement proceedings and described the extensive German experience with oral statements by the Federal Competition Authority which judges reportedly find very useful. The court, however, is not bound by those statements. Finally, Kirchhoff noted that experience with competition law cases and profound training in competition law are key elements to successful dispute resolution.

The role of the CJEU in interpreting Directive 2014/104/EU

Ian Forrester, Judge at the General Court of the European Union, took a step backwards from the Directive and shared some historical thoughts on the development of European competition law. He explained that in the 70s and 80s it was unusual for firms to bring claims against each other based on competition law. In the 90s, however, the institutionalization of competition law started. Leniency programs were introduced in the US and in Europe. The adoption of competition law measures became desirable and even possibilities to bring actions for damages were mentioned. Yet, in 2003, the case of Courage and Crehan showed how many instances one had to go through to actually be awarded damages suffered from anticompetitive practices. A long discussion followed which finally ended with the adoption of Directive 2014/104/EU. Judge Forrester, however, expressed some doubts about its practical impact. He made a comparison with the Product Liability Directive, which was also controversially discussed before being adopted but has not often been used. He expects that the Damages Directive will share the same destiny because the world has changed since the Directive has been discussed. The law just follows the reality. He stressed the fact that nowadays, settlements are very common in Europe and noted that the need for settlements changes legal professions. This, however, shall not diminish the importance of the Directive, preliminary questions on which will surely be directed to the CJEU. In particular, questions on access to documents, limitation periods, causation and burden of proof are very likely to arise. In his opinion, however, the answers to these particular questions will not be as important as other factors of life.

Limitation periods

Ben Rayment, experienced litigator at Monckton Chambers in London, presented

“Limitation periods: When does the clock start and stop?” exploring Articles 10 and 18 Damages Directive. In his presentation he dealt mainly with three groups of issues. Firstly, he addressed factors that start the limitation “clock” and focused on the notion of “knowledge” in Article 10 (2) Damages Directive. Secondly, Rayment discussed issues around stopping the limitation “clock”. In other words, he explained under what circumstances time limits can be suspended. Problems can arise in connection with Article 10 (4) Damages Directive because it might not be sufficiently clear when an investigation of an infringement is started and/or finalized. Moreover, Article 18 Damages Directive leaves the question open as to whether formal arrangements for consensual dispute resolution are necessary to suspend the time limit. Thirdly, he addressed some transitional issues arising out of Article 22 Damages Directive. Finally, he concluded that the rules on limitation in the Directive are generous to claimants and are therefore consistent with the aim of the Directive to facilitate private enforcement.

Evidence

Eric Barbier de la Serre, Partner at Jones Day, presented issues of evidence. On the one hand, the Directive aims at facilitating compensation and solving information asymmetry between parties. On the other hand, however, coordination between public and private enforcement requires the protection of leniency statements and settlements. Barbier de la Serre discussed five types of remedies for this controversy: a change of liability test, a definition of proxies, a lower standard of proof, an introduction of presumptions and a facilitation of the collection of evidence. To a certain extent, the Directive adopts to his opinion all of them. With regard to the collection of evidence, he noted that the Directive still leaves discretion to national judges to order disclosure, so it is unclear whether there is a subjective right to it. Furthermore, it remains to be seen whether costs will act as a deterrent and whether disclosure might become a reason for forum shopping. Concerning the introduction of presumptions, he addressed the presumption in Article 9 Damages Directive that an infringement exists, the presumption of damage for cartels in Article 17 (2) Damages Directive as well as the rules concerning passing-on.

Forum-shopping considerations

Finally, a round table on forum shopping considerations and impact closed the

conference.

Jonas Brueckner, Senior Associate of Baker & McKenzie's Competition Law Practice Group, explained firstly the rules of the Brussels Ibis Regulation on the basis of case *CDC Hydrogen Peroxide* (C-352/13, ECLI:EU:C:2015:335) which govern the question of jurisdiction. Secondly, he presented four considerations for the choice of a forum: the applicable procedural law, the applicable substantive law, soft factors as well as the possibility for recognition and enforcement abroad. He pointed out that the softened standard of proof for damages and the possibility to litigate in English make Germany an attractive jurisdiction for claimants. However, high advance payments and a rather hostile attitude of the judiciary towards private antitrust litigation might discourage claimants to start litigation in German courts.

Ben Rayment stressed the soft factors that make the UK an attractive forum. Judges are highly specialized and have by no means a hostile attitude towards private enforcement. Furthermore, claimants are attracted by the rules on disclosure and the different funding options available. The numerous cases with which UK courts have already dealt have also led to the development of the law and have increased legal certainty.

Jacqueline Riffault-Silk noted that there are fewer cases in France than in the UK and The Netherlands. She stressed the fact that private enforcement falls under civil matters. Therefore the principle of party disposition applies. It is for the parties to start litigation and to define the subject matter of the action. A problem arises, however, when various claimants start proceedings in different Member States against the same cartel members. She noted that this deconcentration of proceedings is not favorable to private enforcement.

Comments and discussion

Each presentation was followed by a lively debate. The speakers and participants highlighted the significance of private enforcement and assessed to what extent the Directive is likely to achieve its aim of facilitating private enforcement. In particular, practical issues on quantification of damages and access to evidence were often subject to discussion. The potential consequences of Brexit on private enforcement as well as incentives for consensual settlements were also widely discussed.

Changes and challenges in cross-border litigation – a post-referendum view from the UK

On Friday, 7 October 2016, the Institute of Advanced Legal Studies at the University of London will host a half-day conference on Changes and challenges in cross-border litigation after the Brexit referendum. Designed to give speakers and attendees the opportunity to reflect on topics that are or could be affected by 'Brexit' for better or worse, the focus of the conference will be on areas of law that are relevant to commercial law such as choice of law, dispute resolution, banking resolution and cross border securities. A comparative viewpoint will be taken to include perspectives from Scotland and England and other European legal systems. The objective is to invite fresh approaches to legal solutions as they have been manifested in European Union legislation that may benefit from rethinking in the light of the June 2016 referendum on the UK's EU Membership. Registration is possible and requested via the conference website.

The Programme reads as follows:

Introductory Remarks: **Prof. Andrew Dickinson**, University of Oxford, tbc – *"The future direction of private international law in the UK"*

Keynote Speaker: **Prof. Giesela Ruehl**, University of Jena – *"Choice of law and choice court clauses after the EU Referendum"*

Prof. Sophia Tang, University of Newcastle – *"Future Private International Law and Judicial Cooperation: Different Models"*

Dr Maren Heidemann, Visiting Fellow, IALS – *"Identities in EU PIL – an outdated social model?"*

Dr Lorna Gillies, University of Strathclyde – *"Some observations on intra-UK rules post-Brexit"*

Prof. Gerard McCormack, University of Leeds – "Insolvency litigation after Brexit"

Dr Jonathan Fitchen, University of Aberdeen – *"Post-Brexit recognition and enforcement of UK civil and commercial judgments in the European Union: problems and challenges"*

Dr Mukarrum Ahmed, University of Aberdeen – *"BREXIT and English Jurisdiction Agreements: The Post-Referendum Legal Landscape*

Opening of the European and Private International law Section in Blog Droit Européen

Many thanks to Alexia Pato, PhD candidate at the Universidad Autónoma, Madrid, for this piece of news. And my best wishes!

Today, blog droit européen officially celebrates the opening of its European and private international law section (hereafter, EU and PIL section), which is edited and coordinated by Karolina Antczak (Ph.D. candidate at Université de Lille), Basile Darmois (Ph.D. candidate at Université Paris Est Créteil) and Alexia Pato (Ph.D. candidate at Universidad Autónoma de Madrid). In a recently published inaugural post (available here), they present their project in detail. In particular, they expose the positive interactions between PIL and European law, as well as their friction points. Undoubtedly, the increasingly tight links that are forged between these two disciplines encourage legal experts to collaborate and exchange their views. The creation of the mentioned section in blog droit européen contributes to the achievement of this objective.

The Content of the European and Private International Law Section

Although the EU and PIL section has just been inaugurated, more food for thought will be uploaded soon. Readers will find articles diving into PIL issues, and we will be covering additional areas such as international civil litigation, as well as the internal market and its four freedoms. Don't miss our upcoming co-signed article on Brexit, highlighting its legal consequences from an international perspective. Also, on its way is a post discussing the EU's competence to adopt minimum standards of civil procedure. Additionally, the team plans to upload interviews with professors and legal experts, who debate fundamental EU and PIL matters. These interviews will be available in video format. Lastly, readers will be able to stay updated by reading our posts on the latest legal news.

Contribute to the European and Private International Law Section

In order to foster constructive debates and extract the merits of collaborative learning, we welcome any Ph.D. candidate, professor, or legal professional to voice his/her opinion on the EU and PIL section. You may submit your ideas in the form of a post (approximately 1.000 words), which consists of a critical assessment on a particular topic. Working papers, video conferences and tutorials are equally welcome (for more information on how to contribute, click here). Articles can be written in either French or English.

What is blog droit européen?

Blog droit européen is a website that provides information with an interactive touch on a broad range of legal topics such as: digital single market, Economic and monetary Union, competition law, and so on. In particular, its purpose is to gather together students, investigators, professors, and legal experts who share a common and enhanced interest for European law at large (EU, ECHR, impact of European law on States' public and private laws). The originality of blog droit européen lies in two essential features: firstly, the blog delivers high quality and varied contents, including interviews (of ECJ members and professors), call for papers and conferences, not to mention working papers and legal columns, which critically analyse EU law. Secondly, the use of e-techniques of information sharing, like Facebook, Twitter, and YouTube make this blog interactive and user friendly. From an organizational perspective, blog droit européeen is run and edited by young investigators from different legal backgrounds in different Universities across Europe (for an overview of our team, click here). Thanks to Olivia Tambou (Lecturer at Université Paris-Dauphine), our dedicated team leader

and creator/editor of the blog, for connecting us and making this project possible.

See you soon on blog droit européen!

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2016: Abstracts

The latest issue of the "Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)" features the following articles:

B. Hess: **The impacts of the Brexit on European private international and procedural law**
This article explores the consequences of the *Brexit* on European private international and procedural law. Although Article 50 TEU provides for a two year transitional period, the (adverse) consequences will affect the London judicial market immediately. Following this transitional period, the Brussels Ibis Regulation and all EU instruments in their area of law will no longer apply to the United Kingdom. A substitution by the Lugano Convention will be difficult, but the United Kingdom might ratify the Hague Choice of Court Convention and the (future) Hague Judgments Convention. In the course of the two-year period, parties should carefully consider whether choice of courts agreements in favour of London will lose their validity after *Brexit*. In international company law, United Kingdom companies operating on the Continent should verify whether their legal status will be recognized after the *Brexit*. In family matters, the legal status of EU (secondary) legislation should be respected even after the *Brexit*. All in all, European private international law will be affected by the cultural loss of the English law. And the same will apply vice versa to English law.

R. Freitag: **Explicit and Implicit Limitations of the Scope of Application of Regulations Rome I and Rome II**
Almost ten years after the enactment of Regulation "Rome II" on the law

applicable to non-contractual obligations and nine years after the publication in the Official Journal of Regulation "Rome I" on the law applicable to contractual obligations, the fundamental question of the material scope of application of the uniform private international law of the EU remains unanswered: Are the aforementioned regulations limited to contracts in the strict sense of voluntarily incurred obligations (governed by Regulation "Rome I") and to torts, unjust enrichment, *negotiorum gestio* and *culpa in contrahendo* (as defined in Regulation "Rome II") or are both regulations to be seen as an ensemble forming a comprehensive regime for the law of obligations (with the exception of the matters explicitly mentioned in art. 1 par. (2) of Regulation Rome I and Rome II respectively)? The answer is of practical importance for a significant number of institutions of national substantive law that are characterized by their hybrid nature positioning them between contracts and legal obligations which cannot be qualified as torts, unjust enrichment etc. The aim of the article is to show that despite the fact that an all-encompassing European regime of conflict of laws is highly desirable, the existing Regulations "Rome I" and "Rome II" remain eclectic. They do not allow for a uniform treatment of all relevant institutions of substantive law and namely their rules on mandatory provisions (art. 9 Regulation "Rome I", art. 16 Regulation "Rome II") cannot be activated to this end.

K. Thorn/C. Lasthaus: **The „CAS-Ruling" of the German Federal Court of Justice – Carte Blanche for Sports Arbitration?**

In its judgement, the German Federal Court of Justice (*BGH*) ruled on the legal validity of an arbitration agreement in favour of the Court of Arbitration for Sport (*CAS*) between an athlete and an international sports federation. Even though sports federations constitute a monopoly and as a result, athletes are not free to choose between arbitration and courts of law without losing their status as a professional, the agreement is legally effective according to the *BGH*, thus precluding the parties from settling their dispute before courts of law. In this legal review, the authors argue that – due to the athletes' lack of freedom – arbitration agreements in sport can only be considered effective if they lead to a court of arbitration constituting a minimum rule of law. With regards to the *CAS* and considering the influence of sports federations in the establishment of the *CAS*' list of arbitrators, they take the view that the *CAS* does not fulfil such minimum legal requirements. Furthermore, they criticise the fact that an arbitrator is not required to disclose previous appointments by one of the parties involved in the current arbitration procedure. This way, the right to refuse an

arbitrator suffers devaluation. Notwithstanding the fact that the international sporting system requires consistent interpretation and application of sporting rules by an international arbitration court in order to establish equal opportunities among the athletes, this must not be achieved at the expense of the athletes' constitutional rights. Due to the aforementioned legal deficits, the *BGH* should have ruled the agreement void.

C. Mayer: **Judicial determination of paternity with regard to embryos: characterization, private international law, substantive law**

The Higher Regional Court of Düsseldorf had to decide on a motion to determine the legal paternity of a sperm donor with regard to nine embryos, who are currently deep frozen and stored in a fertility clinic in California. The hasty recourse to the German law of decent by the court overlooks the preceding issue whether assessing, as of when the judicial determination of paternity is possible, is to be qualified as a question of procedure or substantive law and is, thus, to be solved according to the *lex fori* or *lex causae*. Furthermore, the court's considerations concerning the conflict-of-laws provisions, denying the analogous application of Art. 19 par. 1 s. 1 *EGBGB* (Introductory Act to the German Civil Code), are not convincing, the more so as it left the question unanswered which conflict-of-laws provision decides on the applicable law instead.

K. Siehr: **Criminal Responsibility of the Father for Abduction of his own Daughter**

A man of Syrian nationality and a woman married in Germany and had a daughter. The couple finally divorced and parental responsibility was given exclusively to the mother. In December 2006 the couple decided to visit the father's relatives in Syria in order to spend Christmas vacation with them, to detract the daughter from bad influences in Germany and to change the daughter's name. The daughter felt very uncomfortable in Syria, because she was not allowed to go to school and could not leave her relatives' home without being accompanied by some elderly person of her relatives. She wanted to go back to Germany, but was not allowed to do so by her father. Her mother tried to enable her to leave Syria with the help of the German embassy, but this could not be realized. The daughter was beaten by her father and the mother was prohibited to have contact with her daughter. After having reached majority age, the daughter managed to go back to Germany, where the mother indicted the father for depriving a minor from the person having exclusive parental responsibility (§ 235

German Criminal Code). The County Court of Koblenz convicted the father of being guilty of dangerous bodily harm (§ 223a German Criminal Code) and of depriving a minor from her mother (§ 235 German Criminal Code). The Federal Court for Civil and Criminal Cases (*Bundesgerichtshof = BGH*) confirmed this decision and rejected the attorney general's and the accused's appeal against it. The Federal Court correctly decided that German criminal law applies, because the person, having exclusive parental responsibility, had her habitual residence in Germany, hence the result of deprivation was also felt in Germany. The Federal Court also correctly held that the private law question of parental responsibility has to be answered by German law, including German private international law.

C.F. Nordmeier: **Acceptance and waiver of the succession and their avoidance according to the Introductory Act to the German Civil Code and to Regulation (EU) No. 650/2012**

In matters of succession, a *renvoi* that results in the scission of the estate causes particular problems. The present contribution discusses acceptance and waiver of the succession and their avoidance in a case involving German and Thai law. The law applicable to the formal validity of such declarations is determined by art. 11 of the Introductory Act to the German Civil Code. It covers the question whether the declaration must be made before an authority or a court if this is provided for by the *lex successionis* without prescribing a review as to its content. In case of the avoidance of the acceptance of the succession based on a mistake about its over-indebtedness, the ignorance of the scission of the estate may serve as a base for voidability. The second part of the present contribution deals with Regulation (EU) No. 650/2012. Art. 13 of the Regulation applies in the case of the scission of the estate even if only a part of the estate is located in a Member State and the declaration at hand does not concern this part. Avoidance and revocation of the declarations mentioned in art. 13 and art. 28 of the Regulation are covered by these norms.

W. Wurmnest: **The applicability of the German-Iranian Friendship and Settlement Treaty to inheritance disputes and the role of German public policy**

Based on a judgment of the District Court Hamburg-St. Georg, the article discusses the conditions under which the applicable law in succession matters has to be determined in accordance with the German-Iranian Friendship and Settlement Treaty of 1929, which takes precedence over the German conflict

rules and those of Regulation (EU) No. 650/2012. The article further elaborates on the scope of the German public policy threshold with regard to the application of Iranian succession law. It is argued that the disinheritance of an heir as a matter of law would be incompatible with German public policy if based on the heir either having a different religion than the testator or having the status of illegitimate child. However, these grounds will be upheld if the discrimination has been specifically approved by the testator.

C. Thole: **Discharge under foreign law and German transaction avoidance**
The judgment of the Federal Court of Justice deals with the question whether recognition of an automatic discharge obtained by the debtor in an English insolvency proceeding excludes a subsequent non-insolvency action based on German law on fraudulent transfers. The Court rightly negates this question, however, the court's reasoning is not completely convincing. In particular, the judgment entails a bunch of follow-up questions with respect to the interdependency between a foreign insolvency or restructuring proceeding and German fraudulent transfer law (outside of insolvency proceedings).

F. Ferrari/F. Rosenfeld: **Yukos revisited – A case comment on the set-aside decision in Yukos Universal Limited (Isle of Man) et al. v. Russia**
In a decision of 20/4/2016, the District Court of The Hague set aside six arbitral awards that had been rendered in the proceedings *Yukos Universal Limited (Isle of Man) et. al.* against *Russia*. The arbitral tribunal had ordered *Russia* to pay compensation for its breach of the Energy Charta Treaty. According to the District Court of The Hague, the arbitral tribunal had erroneously found that the Energy Charta Treaty was provisionally applicable. For this reason, the arbitral tribunal could not base its jurisdiction on the arbitration clause set forth in Art. 26 Energy Charta Treaty. The present case note examines the set-aside decision of the District Court of The Hague as well as its implications for ongoing enforcement proceedings. Various approaches towards the enforceability of annulled arbitral awards will be presented.

P. Mankowski: **Embargoes, Foreign Policy in PIL, Respecting Facts: Art. 9 (3) Rome I Regulation in Practice**
Internationally mandatory rules of third states are a much discussed topic. But only rarely they produce court cases. Amongst the cases, foreign embargoes provide for the highlights. The USA has graced the world with their shades. Yet the *Cour d'appel de Paris* makes short shrift with the (then) US embargo against

the Iran and simply invokes Art. 9 (3) of the Rome I Regulation – or rather the *conclusio a contrario* to be drawn from this rule – to such avail. It does not embark upon the intricacies of conflicting foreign policies but sticks with a technical and topical line of argument. Blocking statutes forming part of the law of the forum state explicitly adds the political dimension.

C. Thomale: **On the recognition of Ukranian surrogacy-based Certificates of Paternity in Italy**
The Italian Supreme Court denied recognition of a Ukrainian birth certificate stipulating intended parents of an alleged surrogacy arrangement as the legal parents of a newborn. The reasoning given by the Court covers fundamental questions regarding the notions of the public policy exception, the superior interest of the child as well as the relationship between surrogacy and adoption. The comment elaborates on those considerations and argues for adoption reform.

M. Zilinsky: **The new conflict of laws in the Netherlands: The introduction of Boek 10 BW**
On 1/1/2012, the 10th book of the Dutch Civil Code (Boek 10 (Internationaal Privaatrecht) Burgerlijk Wetboek) entered into force in the Netherlands. Herewith the Dutch Civil Code is supplemented by a new part by which the different Dutch Conflict of Laws Acts are replaced and are combined to form one legal instrument. The first aim of this legislative process was the consolidation of the Dutch Conflict of Laws. The second aim was the codification of certain developed in legal practice. This article is not a complete treatise on the Dutch Conflict of Laws. The article intends to give only a short explanation of the new part of the Civil Code.

First unalex Conference on European international civil

procedure

Enhancing cooperation between authors from various Member States

University of Zagreb – 29/30 September 2016

The University of Zagreb is organising a conference on 29/30 September 2016 on European international civil procedure and new approaches concerning European legal information. This conference is part of a project, co-financed by the European Commission and organised by the University of Innsbruck together with the Universities of Genoa, Zagreb, Valencia, Prague and Riga and the legal publisher IPR Verlag.

The objective of the unalex project is the creation of solid multilingual information on the application of the European legal instruments of judicial cooperation in civil matters in the European area of justice and to provide the European legal discussion with an important focus of genuinely European legal literature. The project aims at bringing together authors in the area of European international civil procedure and conflict of laws and promoting techniques of joint legal publishing with the objective of creating forms of multilingual legal literature for readers in the entire European Union.

The conference in Zagreb has two parts:

29 September 2016 – Shaping European legal information – new approaches

Thursday afternoon (14:00-17:30) is dedicated to the development of new approaches concerning the shaping of European legal information. A round table discussion with supreme court judges from various Member States is planned on the subject "European Leading Cases series – a project to be developed?". Furthermore innovative strategies for the development of European legal literature and the possible enhancement of cross-border cooperation of European legal authors will be discussed.

30 September 2016 – European international civil procedure – a system in the making

The second day (9:30 – 13:99) will host a conference on "European international

civil procedure – a system in the making". It will discuss common lines of European civil procedure that evolve throughout the multitude of EU civil procedure regulations. The conference will be chaired by Prof. Hrovje Sikiri?, University of Zagreb, and Prof. Andreas Schwartze, University of Innsbruck.

Speakers:

Prof. Rainer Hausmann, Munich – *The European system of international civil procedure*

Prof. Matthijs ten Wolde, University of Groningen – *Third State relations*

Prof. Davor Babi?, University of Zagreb – *Scope of application (in particular temporal scope)*

Dr. Susanne Gössl, University of Bonn – *The role of public policy in the European civil justice system*

Prof. Vesna Rijavec, University of Maribor – *European enforcement of judgments*

Dr. Eva Lein, British Institute of International and Comparative Law – *Exiting an ever closer system – consequences of Brexit*

Prof. Erich Kodek, Wirtschaftsuniversität Vienna, Judge Austrian Supreme Court – *Horizontal harmonisation of instruments of European civil procedure – towards a European Code of Civil Procedure?*

Participation to the conference is free of charge.

For additional information and registration please contact Ms Sara Ricci at IPR Verlag GmbH: sara.ricci@simons-law.com