Blockchain Networks and European Private International Law

Written by Anton S. Zimmermann, Institute for Comparative Law, Conflict of Laws and International Business Law (Heidelberg)

Blockchain technology and its offspring have recently attracted considerable attention in both media and scholarship. Its decentralised nature raises several legal questions. Among these are, for example, the challenges that blockchain technology poses to data protection laws and the threats it creates with regard to the effective enforcement of legal claims.

This post sheds light on issues of private international law relating to blockchain networks from a European perspective.

The concept of blockchain technology and its fields of application

Blockchain technology – put simply – involves two fundamental concepts. *Firstly*, data is written into so-called "blocks". Each block of data is connected to its respective predecessor using so-called "hashes" that are calculated for each individual block. Consequently, each block does not only include its own hash but also the hash of its predecessor, thereby fixating consecutive blocks to one another. The result is a chain of blocks – hence the name blockchain. *Secondly*, the entire blockchain is decentrally stored by the networks' members. Whenever a transaction concerning the blockchain is requested, it isn't processed by just one member. On the contrary: several members check the transaction and afterwards share their result with the other members in what can best be described as a voting mechanism: From among potentially different results provided by different members, the result considered correct by the majority prevails. This mechanism bears the advantage that any attempt to tamper with data contained in a blockchain is without consequence as long as only the minority of members is affected.

The potential fields of application for blockchain technology are manifold and far from being comprehensively explored. For example, blockchain technology can replace a banking system in the context of cryptocurrencies such as Bitcoin or it can be used to de-personalize monitoring and sanctioning of non-performance within a contractual relation. In short: Blockchain technology is an option whenever data is to be stored unalterably in a certain order without a (potentially costly) centralised monitoring entity.

Applicable rules of private international law

The first issue regarding blockchain technology and private international law concerns the applicable conflict rules. Blockchain technology involves a technical voting mechanism and, hence, requires a certain degree of cooperation between the members of the network. One might, therefore, be tempted to assume that blockchain networks constitute some kind of company. If this were indeed the case, the written conflict rules, especially those of the Rome I Regulation, would not be applicable (cf. Art. 1(1) lit. f) Rome I Regulation) and the unwritten conflict rules relating to international companies would claim application instead. However, this approach presupposes that the factual cooperation within a blockchain network suffices to create a company in the sense of European private international law. This is, however, not the case. The constitution of blockchain networks is only cooperative in a technical way, not in a legal one. The network is not necessarily based on a (written or unwritten) cooperation agreement and, therefore, lacks an essential prequisite of a company. Consequently, the determination of the law applicable to blockchain technology is not necessarily a question of international company law. Parties are, however, not precluded from creating a company statute that reflects the decentral structures of blockchain technology, whereas the mere decision to engage in a blockchain network does not suffice to create such a company.

Thus, the private international law of blockchain technology must also take into account the Rome I Regulation as well as the Rome II Regulation. Unfortunately, blockchain networks *per se* are not suitable as connecting factors: *firstly*, a *de*centralised network naturally escapes the classical European principle of territorial proximity. *Secondly*, the use of blockchain technology is usually not an end in itself but functionally subordinate to the purpose of another act, e.g. a contract, a company or a tort. This factor should, however, not be seen as a problem, but as a hint at a potential solution: although a *super*ordinate act may

render a blockchain network insufficient to determine the substantive law, the superordinate act itself can serve as a connecting factor.

The following two examples illustrate the proposed method of accessory connection and show that the European legal framework relating to private international law is capable to cope with several questions raised by novel phenomena such as blockchain technology. The remaining questions have to be dealt with on the basis of the principle of proximity.

First scenario: blockchain networks within centralised contracts

Blockchain technology often serves to achieve the goal of a centralised act. In this case, legal questions regarding the use, misuse and abuse of blockchain technology, e.g. access rights and permissions to write regarding data contained in a blockchain, should be governed by the substantive law governing the superordinate act.

To give an example: The parties of a supply chain decide to implement a blockchain in order to collectively store data concerning (1) when and in what quantity products arrive at their warehouse and (2) certificates of quality checks performed by them. As a result, production routes and quality control become more transparent and cost-efficient along the supply chain. Blockchain technology can thus be used e.g. to ensure the authenticity of drugs, food safety etc. The legal questions regarding the smart contract should in this scenario be governed by the substantive law governing the respective purchase agreement between the parties in question. The choice of law rules of the Rome I Regulation, hence, also determine the substantive law regarding the question how blockchain technology may or may not be used in the context of the purchase agreement. The application of blockchain technology becomes a part of the respective contract.

If one were to apply the substantive law governing the contract only to the contract itself but not to blockchain technology, one would create unjust distinctions: The applicable law should not depend on whether the parties pay an employee to regularly check on their warehouse and issue certificates in print, or whether they employ blockchain technology, achieving the same result.

Second scenario: blockchain networks within *de*centralised companies

The scenario described above shows that the decentralised nature of blockchain networks does not necessarily require special connecting criteria. This is a consequence of the networks' primarily serving function to the respective superordinate entity.

Difficulties arise when parties agree on a company statute whose content reflects the decentralisation of blockchain technology. In this scenario, there is a decentral company that utilises only decentral technology as its foundation. A much-discussed case of this kind was "The DAO", a former company based on blockchain technology. The DAO's establishment was financed by investors providing financial resources in exchange for so-called tokens. These tokens can be described as the digital counterpart of shares and hence as an expression of the respective investor's voting rights. Within the resulting investment community, voting rights were exercised in order to decide on investment proposals. The results of the votes were implemented automatically. The company thus consisted only of the investors and information technology but had no management body, no administrative apparatus, and no statutory seat.

Hence, the DAO did not only lack a territorial connection on the level of information technology, but also on the level of the companies' legal constitution: it neither had an administrative seat nor a statutory seat. The connecting factors usually applied to determine the law applicable to companies were, therefore, ineffective. Because the DAO was a company, it was also exempt from the scope of the Rome I Regulation (cf. Art. 1 (2) lit. f. Rome I Regulation).

This vacuum of traditional conflict rules necessitates the development of new ones. There is no other valid connecting factor that could result in a uniform *lex societatis*: Especially the habitual residence or nationality of the majority of members is arbitrary as the company is built on a concept of decentralism and territorial detachment. Moreover, possible membership changes would lead to an intertemporally fluctuating statute whose current status could hardly be determined. The lack of a uniform connecting factor raises the question whether or not the ideal of a uniform *lex societatis*can be upheld. The fact that members of the DAO do not provide a feasible uniform connecting factor suggests a fragmentation of the applicable law (*dépeçage*).

Assuming that there is no uniform *lex societatis* for the DAO and that the applicable substantive law has to be fragmented, acts by the company become conceivable connecting factors. One might, for example, assume that preliminary questions concerning the company, i.e. its legal capacity, are subject to the substantive law that would govern the act in question. If the DAO enters into a contract that – given its validity – is governed by German substantive law according to Art. 4 of the Rome I-Regulation, German law should also determine the legal capacity of the DAO with respect to this particular contract. One might object that the Rome I-Regulation exempts both companies and legal capacity from its scope of application. This, however, only means that the Regulation is *not binding* within those fields. As the conflict rules of International company law do not lead to conceivable results, the principle of proximity has to be the guiding factor in the search for a new unwritten conflict rule. As the closest territorial connections of decentral organisations are their respective acts, e.g. contracts, the principle of proximity suggests that the respective act is what determines the closest connection of the company. The resulting conflict rule states an accessory subjection of the *lex societatis* to the law governing the company's respective acts. While the proposed solution does indeed lead to an *indirect* application of the Rome I Regulation, it nonetheless constitutes a self-reliant, unwritten conflict rule which is consequently not precluded by the catalogue of exemptions contained in the Rome I Regulation.

This fragmentation of applicable laws turns a membership in the DAO into a risky und legally uncertain endeavour, as – neglecting the tremendous practical and legal problems of the enforcement of claims – different legal orders impose different requirements for legal capacity, limitation of liability and other privileges.

Concluding thoughts

Blockchain technology is a novel phenomenon, but it does – in most cases – not necessitate new connecting factors or conflict rules. If, however, the legal entity in question mirrors the decentralised structure of a blockchain network, the legal assessment becomes more complicated.

In those cases, the usually uniform*lex societatis*has to be fragmented which leads to a high chance of personal liability of the members. Whether or not one accepts this fragmentation largely depends on the definition of the hierarchy of technical-

economic progress and the *lex lata*. In my opinion, technical developments may and should act as an impetus to *legislators*for legislative amendments but should not prevail over the existing rules of law. Those who desire legal advantages – such as a limitation of liability or even a uniform statute – must in exchange fulfil and adhere to the laws' requirements.

This post is based on A. Zimmermann, Blockchain-Netzwerke und Internationales Privatrecht – oder: der Sitz dezentraler Rechtsverhältnisse, published in IPRax 2018, 568 ff. containing references to further literature.

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!

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.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2018: Abstracts

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

S.H. Elsing/A. Shchavelev: **The new DIS Arbitration Rules 2018**

On 1/3/2018, the new arbitration rules of the German Arbitration Institute (Deutsche Institution für Schiedsgerichtsbarkeit e.V. – DIS) came into force. The revision process took almost two years and resulted in a comprehensive overhaul of the former arbitration rules which date back to the year 1998. The new rules combine well-tried elements of the former regime with much-anticipated improvements which will help the DIS and the arbitration practice in Germany in general to keep up with the changes and developments in domestic and international arbitration. Notably, the DIS now has two authentic versions of its arbitration rules: a German and an English one. The most relevant amendments include (1) several provisions aimed at enhancing the efficiency of the proceedings and promotion of early settlements; (2) the foundation of a new body, the Arbitration Council, which will now decide, inter alia, on the challenge and removal of arbitrators, the arbitrators’ fees and the amount in dispute; and (3) new comprehensive provisions on consolidation, multi-party and multi-contract proceedings and the joinder of additional parties. In addition, the DIS will now be more closely involved in the administration of the arbitration after the

constitution of the arbitral tribunal. With these amendments, the new arbitration rules will arguably become more accessible and thus more appealing to foreign users and will help the DIS to expand its position beyond the German speaking countries towards a truly international arbitral institution.

E. Jayme: **Draft of a German statute against the validity of polygamous marriages celebrated abroad – critical remarks**

The draft of a German statute against polygamous marriages does not take into account the bilateral treaty on social security between Germany and the Kingdom of Morocco, which presupposes the validity of polygamous marriages: both widows share the social security benefits. In view of current court practice there is no need for a German statute, which in situations in which both spouses have their habitual residence in Germany, provides for court action in order to declare the second marriage null and void. The general clause of public policy (art. 6 of the Introductory Act to the German Civil Code [EGBGB]) seems to be sufficient for dealing with polygamous marriages.

A. Wolf: **Jurisdiction of German Courts for cartelists' recovery claims due to a joint and several liability**

In its decision, the Higher Regional Court Hamm determined under § 36 Sec. 1 No. 3 ZPO on the so-called „Schienenkartell" that the German District Court Dortmund has international jurisdiction for recovery claims between jointly and severally liable cartelists from Germany, Austria and the Czech Republic. Therefor it applied Art. 8 No. 1 Brussels I recast together with German rules on subject matter jurisdiction and interpreted § 32 ZPO following the Court of Justice in its CDC-judgment with regard to Art. 7 No. 2 Brussels I recast.

W. Wurmnest/M. Gömann: **Shaping the conflict of law rules on unfair competition and trademark infringements: The "Buddy-Bots" decision of the German Federal Supreme Court**

On 12 January 2017 the German Federal Supreme Court (Bundesgerichtshof) rendered its judgment on the unlawful distribution of supporting gaming software – so-called "Buddy-Bots" – for the multiplayer online role-playing game "World of Warcraft". This article takes a closer look at the application of Art. 6 and Art. 8 Rome II Regulation by the Supreme Court. The authors argue that the principle of uniform interpretation could be threatened by the Court's tendency to align its

reading of European conflict of law rules with the interpretation of the "old" German law now superseded by the Rome II Regulation, especially with regard to the market effects principle under Art. 6(1) Rome II Regulation.

O.L. Knöfel: **Delegated Enforcement vs. Direct Enforcement under the EU Maintenance Regulation No. 4/2009 – The Role of Central Authorities**

The article reviews a decision of the European Court of Justice (Case C-283/16), dealing with questions of international judicial assistance arising in enforcement procedures under the European Maintenance Regulation No. 4/2009. The Court held that a maintenance creditor is entitled to seek cross-border enforcement directly in a court, without having to proceed through the Central Authorities of the Member States involved. National regulations such as the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, demanding applications to be submitted to the Central Authority of the requested Member State, must be interpreted in the light of the European Maintenance Regulation. The author analyses the relevant issues of cross-border recovery of maintenance and explores the decision's background in European Union law.

R.A. Schütze: **Cautio iudicatum solvi in case of uncertainty of seat of companies**

110 German Code of Civil Procedure requires plaintiffs with an ordinary residence or seat (if a company or other legal entity) outside the European Union or the European Economic Area (EWR) to provide – on request of the defendant – a cautio iudicatum solvi. In two judgments – commented below – the Bundesgerichtshof and the Oberlandesgericht Düsseldorf have decided on the ratio of security for costs under German law and on important issues of proof in case that the seat of the plaintiff (inside or outside EU or EWR) is contested. The Oberlandesgericht Düsseldorf qualifies the right of the defendant to demand security of cost from the plaintiff as an exceptio for which the burden of proof lies with the defendant. But as the plaintiff is more familiar with its organization and activities it has a secondary burden of asserting relevant facts (sekundäre Vortragslast). However, this does not change the burden of proof.

L. Kopcznyski: **Confusion about the reciprocity requirement**

According to domestic German law, the recognition and enforcement of foreign judgments is dependent on the requirement of reciprocity (sec. 328 (1) no. 5 of

the German Code of Civil Procedure). It is, however, not an easy task to assess whether a foreign state would recognise a German judgment in similar circumstances. Courts regularly struggle to apply correctly the specific prerequisites which have to be met in this regard. A recent judgment of the Regional Court in Wiesbaden demonstrates that. In its decision, the court refused to enforce a Russian judgment because it set the bar for reciprocity far too high.

M. Gebauer: **Compulsory recognition procedure according to Section 107 FamFG in order to determine the validity of a divorce registered at a foreign consulate located in Germany**

German law requires that foreign decisions (originating beyond the EU) affecting the status of a marriage, e.g. divorce judgements, are subject to a compulsory recognition procedure (Anerkennungsverfahren), according to paragraph 107 of the Act on Proceedings in Family Matters and in Matters of Non-Contentious Jurisdiction (FamFG). This requires a free-standing application by an interested party to the relevant state authority which is responsible for determining the application. The decision, rendered by the Court of Appeal (Oberlandesgericht) in Nuremberg, reinforced long-standing judicial reasoning, albeit made with reference to a previous similarly worded statute, that the recognition procedure is also required where a foreign diplomatic mission situated in Germany is responsible for an official act potentially affecting the parties' marriage in Germany. The Court of Appeal in Nuremberg correctly reasoned by way of analogy that while the paragraph does not specifically deal with circumstances where a divorce is registered by a foreign diplomatic mission situated in Germany, the legislator had not intended for the previous judicial approach to be reviewed. Thus, courts should continue to treat divorces in which a foreign diplomatic mission situated in Germany has been involved in the same way as judgements issued in foreign countries. This meant that the local court had no jurisdiction to determine the validity of a divorce registered at the Thai consulate located in Frankfurt. An application to the relevant state authority in terms of the compulsory recognition procedure must first be disposed of before matters can be considered by the local court

K. Siehr: **„Wrongful Retention" of a Child According to Article 3 of the Hague Abduction Convention of 1980**

A couple habitually resident in South Africa had two children living with them.

The couple separated but had joint custody for the children. The mother travelled to Senegal with the children but did not return them until January 3, 2016. In August 2016 mother and children took refuge in Germany. On January 2, 2017 the father in South Africa asked German authorities to return the wrongfully retained children to South Africa. The court of first instance (Amtsgericht Pankow-Weißensee) refused to do so because the children were not wrongfully retained because Senegal is no State Party of the Hague Abduction Convention of 1980. The Court of Appeal in Berlin (Kammergericht) reversed the decision of first instance and correctly interpreted Art. 3 Hague Abduction Convention as not requiring abduction wrongfully committed in a State Party. According to Art. 4 Hague Abduction Convention, the abducted or retained child must have had his/her habitual residence in a State Party immediately before the removal or retention. Art. 3 and 4 Hague Abduction Convention are discussed and analyzed, also with respect to the more restricted wording of Art. 2 No. 11 Hague Custody Convention of 1996. Finally, it is stressed that it does not matter whether the wrongfully abducted child spent some time in States not being State Parties to the Hague Abduction Convention as soon as the one year time limit for the application of return (Art. 12 sec. 1 Hague Abduction Convention) has been met.

A. Piekenbrock: **Jurisdiction for damage claims regarding forum shopping in European Insolvency Law: commentaries on Court of Cassation, Social Chamber, 10.1.2017**

The paper deals with a decision delivered by the French Court of Cassation regarding damage claims within the context of the initiation of English administration proceedings for all EU companies of the Canadian Nortel Networks Group including the French Nortel Networks SA in January 2009. The Social Chamber has come to the conclusion that English Courts have exclusive jurisdiction regarding damage claims of a former employee of the French company based on alleged falsehood by the opening of the main insolvency proceedings in England. The decision emphasises correctly the binding force of the English opening decision. Yet, the reasoning seems erroneous insofar as the claim is not directed against the insolvent company itself or its liquidator, but rather against another company of the same group (the British Nortel Networks UK Limited) and the insolvency practitioners involved (Ernst & Young). At least the Court of Cassation as a court of last resort should have referred the case to the C.J.E.U. pursuant to Art. 267(3) TFEU.

K. Lilleholt: **Norwegian Supreme Court: The Law of the Assignor's Home Country is Applicable to Third-Party Effects of Assignments of Claims**

In its judgment of 28/6/2017, the Norwegian Supreme Court held that the effects in relation to the assignor's creditors of an assignment of claims by way of security was governed by the law of the assignor's home country under Norwegian choice of law rules. This issue has not been dealt with in Norwegian legislation, and earlier case law is sparse and rather unclear. Application of the law of the assignor's home country has been recommended by legal scholars, but these views are not unanimously held. The Supreme Court's decision is in line with the later proposal for an EU regulation on the law applicable to the third-party effects of assignments of claims. The proposed regulation will not be binding on Norway, as it will not form part of the EEA agreement. This is also the case for other EU instruments regarding private international law, like the Rome I and Rome II Regulations and the Insolvency Regulation. In several recent judgments, however, the Supreme Court has stated that EU law should provide guidance where no firm solution can be found in Norwegian choice of law rules (IV.). The case also raised a jurisdiction issue. The Supreme Court found that the insolvency exception in the Lugano Convention Art. 1(2)(b) applied and that Norwegian courts had jurisdiction because the insolvency proceedings were opened in Norway. This article will record the facts of the case (II.) and present the jurisdiction issue (III.) before the Supreme Court's discussion of the choice of law rule is presented and commented upon (IV.).

K. Thorn/M. Nickel: **The Protection of Structurally Weaker Parties in Arbitral Proceedings**

In its judgment, the Austrian Supreme Court of Justice (OGH) ruled on the legal validity of an arbitration agreement between an employer based in New York and a commercial agent based in Vienna acquiring contracts in the sea freight business. The court held that the arbitration agreement was invalid and violated public policy due to an obvious infringement of overriding mandatory provisions during the pending arbitral proceedings in New York. The authors support the outcome of the decision but criticize the OGH's reasoning that failed to address key elements of the case. In the light of the above, the article discusses whether the commercial agent's compensation claim relied on by the court constitutes an overriding mandatory provision although the EU Commercial Agents Directive does not cover the sea freight. Further, the article identifies the legal basis for a

public policy review of arbitration agreements and elaborates on the prerequisites for a violation of public policy. In this regard, the authors argue that arbitration agreements can only be invalidated due to a violation of substantive public policy if a prognosis shows that it is overwhelmingly likely and close to certain that the arbitral tribunal will neglect applicable overriding mandatory provisions.

Consequences of Brexit for Private International Law and International Civil Procedure Law

What are the consequences of Brexit for Private International Law and International Civil Procedure Law? In the very first monograph in German concerning the legal ramifications of Brexit, Michael Sonnentag discusses these questions (Die Konsequenzen des Brexits für das Internationale Privat- und Zivilverfahrensrecht, Mohr Siebeck, 2017).

In the first part, the author analyses the possible options after Brexit: the Norwegian model (leaving the EU, but re-joining the EEA); the Swiss model (tailor-made solutions in all fields); the Turkish model (staying in the Customs Union); the Canadian model (free trade agreement); and finally the no-deal Brexit. It is also pointed out that with the British exit from the EU, not only will the Treaty of the European Union (TEU) and that of the Functioning of the European Union (TFEU) no longer be in force in the UK, but regulations and directives will also follow suit. Only in the exceptional case where directives have been implemented in UK Law by acts of Parliament, shall they stand after Brexit. In contrast, it is shown that, if directives have been implemented by Statutory Instruments, the SI's will fall with Brexit, because the European Communities Act 1972 as their legal basis will cease to exist.

Concerning Private International Law, the Rome I as well as the Rome II Regulations will end in the UK after Brexit since they are EU-law irrespective of

whether they are kept in force as part of British law. Sonnentag goes on to explain how, in the case of a hard Brexit, there will be an impact on the field of International Company Law: British companies will not benefit from freedom of movement anymore. Therefore, a limited company which had been founded in the UK, but moved its headquarters to Germany – whose courts traditionally apply the so-called seat theory – risks not being recognised in this Member State; consequently, the owner or shareholders could be personally liable for the debts of the company.

In the field of International Civil Procedure Law, the Brussels Ia, the Brussels IIa and the Maintenance Regulations will fall in the UK with Brexit. Sonnentag explains that the Brussels Convention will not be revived after Brexit. Furthermore, the Lugano Convention will not be applicable anymore; the UK could join it, but only as a Member State of EFTA or following an invitation by Switzerland, with support from the other Member States. In contrast, the UK could – and should – join the Hague Choice of Court Convention of 2005. Moreover, the effects on exorbitant jurisdiction, jurisdiction agreements and recognition and enforcements of judgments are described in detail. Not only does the monograph outline which rules will be applicable in Germany, but also in the UK.

Sonnentag evidences that many benefits in the fields of Private International Law and International Civil Procedure Law will end with Brexit. Furthermore, it is demonstrated that all possible Brexit scenarios will have drawbacks in comparison to a no-Brexit situation. Therefore, according to the author, the best solution for both sides would be the avoidance of Brexit altogether.

Praxis des Internationalen Privat-

und Verfahrensrechts (IPRax) 4/2018: Abstracts

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

A. Dickinson: **Tough Assignments: the European Commission’s Proposal on the Law Applicable to the Third-Party Effects of Assignments of Claims**

In March 2018, the European Commission published its long awaited Proposal on the law applicable to the third-party effects of assignments of claims. The proposal aims to fill the gap left in EU private international law following the adoption of the Rome I Regulation, when it was not possible to reach a settlement of this difficult and controversial issue. It is a welcome, and overdue, step. This article seeks to address two aspects of the Commission Proposal, which give rise to issues of some complexity. The first point involves questions of characterisation, and the second questions concerning the definition of the connecting factor. Unfortunately, neither the Proposal nor the accompanying Impact Assessment provide a clear indication as to the Commission’s drafting intentions with respect to these questions.

M. Gebauer: **The German-Turkish bilateral succession treaty in the wake of developments in European private international law**

The EU Succession Regulation, in terms of Art. 75 (1), afforded priority to those existing treaties concerning international succession already entered into by one or more EU member states. This provision has been particularly relevant for Germany in so far as the long-standing German-Turkish bilateral succession treaty of 1929 is concerned. The treaty’s choice of law rules differ starkly from those found in the EU Succession Regulation. The article primarily considers the interplay between the EU Succession Regulation and the German-Turkish bilateral succession treaty. Despite the treaty appearing, on the face of it, to have continuing relevance in cases with Turkish elements, the article demonstrates that the EU Succession Regulation’s choice of law rules will nonetheless often be applicable in Germany, and in important situations. The reason for this is that the scope of the German-Turkish bilateral succession treaty is limited. The problem is

particularly acute in so far as the interplay between matrimonial property law and succession law is concerned, both in terms of German-Turkish couples and dual nationals. In light of this background, the article questions whether the treaty's continued existence can be justified.

B. Hess: **Abgrenzung der acta iure gestionis und acta iure imperii: Der BGH verfehlt die völkerrechtliche Dimension der Staatenimmunität**

This article reviews a recent German decision on state immunity. In this judgment, the *Bundesgerichtshof* delineated *acta iure gestionis* from *acta iure imperii* according to the *lex fori*. Although the judgment follows a longlasting line of reasoning in German case law, the article demonstrates that international law has developed more sophisticated criteria. These are found in the UN Convention on State Immunity of 2004. Although the convention has not yet entered into force, it is of great importance as it has the ambition to codify and clarify the state of customary international law. Unfortunately, the *Bundesgerichtshof* mainly refers to a decision of the German Constitutional Court of 1963 which today seems to be outdated. Furthermore, the *Bundesgerichtshof* does not sufficiently consider the case-law of foreign and international courts which consider state loans as *acta iure gestionis* – even in the case of subsequent state intervention. All in all, a more international and comparative approach is needed to comprehensively assess the modern state of customary international law.

P. Mankowski: **Orthodoxy and heresy with regard to exclusive jurisdiction for registered IP rights and ownership claims**

All quiet on the Luxembourgian front: Ownership claims regarding trademarks are not subject to exclusive jurisdiction under Art. 24 No. 4 Brussels Ibis Regulation, following the footsteps of *Duijnstee* ./. Goderbauer of 1983 on ownership claims regarding patents. Yet closer scrutiny reveals that some parts of the underlying fundament have changed since *GAT* ./. *LuK* and its legislative offspring. Even a surprise candidate might enter the ring: namely Art. 24 No. 3 Brussels Ibis Regulation, hitherto rather not in the spotlight, but worth to be reconsidered and reconstrued heretically, taking into account Art. 1 (1) Brussels Ibis Regulation.

D. Looschelders: **Jurisdiction for Actions Brought by the Injured Party Against Compensation Bodies and Green Card Bureaus Located in Foreign**

States

Since the ECJ judgment in the *Odenbreit* case, it has been acknowledged that according to the Brussels I Regulation, the injured party can assert its direct claim against the insurer of the injuring party before the court of jurisdiction of his own residence. In the event of traffic accidents that display a cross-border element, the injured party may also approach the compensation body in his country of residence established in accordance with the Motor Insurance Directive or the Bureau in the accident state according to the Green Card System. Against the background of a decision of the Regional Court of Darmstadt, the article deals with the question of whether the injured party can also sue a compensation body or a Green Card Bureau located in a foreign state at its own place of residence according to the Brussels I Regulation, answering it in the negative.

V. Pickenpack/A.-G. Zimmermann: **Translation requirements for the service of judicial documents to legal entities**

According to Art. 8 (1) lit. a of the Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13/11/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, the addressee has a right to refuse the acceptance of judicial documents in case that the document is not drafted in a language which the addressee understands. However, the Regulation does not itself stipulate who the authorized addressee is. In particular, in case of service to legal entities and companies the question arises whose linguistic knowledge is decisive. It is also unregulated whether the addressee of the document is allowed to decide for himself whether he has appropriate language skills or that this has to be decided by the court on the basis of indications. The District Court of Berlin-Mitte has – in its decision of 8/3/2017 – recently dealt with the right to refuse acceptance of judicial documents under Art. 8 (1) lit. a Council Regulation (EC) No 1348/2000 in case of service to legal entities. The Court has assessed the right of the Irish-based Facebook Ireland Limited to refuse acceptance of the service on the basis of objective criteria and based on the actual language skills of its legally trained employees. The Court applied the criteria in a convincing manner. However, a more specific legal framework would nevertheless be favorable as this would avoid existing uncertainties in the application of the rules for the serving party especially in case

of service to legal entities. Unnecessary translations as well as time and costs incurred would become redundant.

A. Staudinger/S. Friesen: **International jurisdiction and applicable law concerning a road traffic accident abroad with debtors from several countries**

The article at hand deals with the judgement of the Higher Regional Court Brandenburg of 18/2/2016 (reference number: 12 U 118/15). The ruling refers to a traffic accident abroad. Apart from the place of general jurisdiction (Art. 2 [1] Brussels I Regulation) the court discussed the option of a coherence action (Art. 6 No. 1 Brussels I Regulation) as well as of a direct claim (Art. 11 [2] in conjunction with Art. 9 [1] lit. b Brussels I Regulation). Moreover, the issue of the scope of the consumer protection jurisdiction (Art. 16 [2] in conjunction with 15 [1] lit. c Brussels I Regulation) was raised. In addition, the article illustrates the advantages of the supranational jurisdictional regime in cases where the damaged party claims directly against the liability insurer.

Even though the ruling refers to the legal situation before the unification of international tort law by the Rome II Regulation. The points made by the court of appeal can be cautiously transferred on this act of law. In particular, the case demonstrates that not all claims of a damaged party against different drivers and vehicle owners are necessarily governed by a uniform national tort law even if the damage is caused by a single accident.

Y. Diehl: **Transnational Skiing Accidents in Private International Law**

The present article criticizes the higher regional Court *(Oberlandesgericht)* Munich's decision regarding the interpretation and use of the so-called FIS rules for conduct. The court had to deal with an accident of two German citizens in the Austrian alps. German law was applicable. Art. 17 Rome II states independently that rules of safety and conduct at the place of conduct must be taken into account. Therefore, the court based its decision on rule 3 of the FIS rules for conduct presuming local Austrian law to appeal the FIS rules. Besides the complicated methodical problems arising by the need to take the rules and norms into account, Art. 17 Rome II harbors difficulties in defining the scope of the term "rules of safety and conduct". According to some scholars this term should be interpreted in a very broad way, including "private" or even non-binding norms.

Therefore, most of the authors plead for the possibility of taking into account the FIS rules in transnational Skiing-accidents under Art. 17 Rome II. As it is debatable whether the FIS rules are binding at all, the article at hand first defines the legal nature of those rules by investigating different possibilities in national law. The author's conclusion that there is not a binding character of the FIS rules at all subsequently raises the question whether they can fit in the scope of Art. 17 Rome II after all. According to the author, there is neither a possibility nor a need for private international law to take into account the FIS rules. Therefore, national law applies. The national tort law systems provide a general clause for judging tortfeasor's behavior and conduct. Accordingly the FIS rules therefore function as aid in interpretation.

S.L. Gössl: **A further piece in the mosaic regarding the recognition of a status acquired abroad or: under which circumstances is a name "legally acquired"?**

In *"Freitag"* the CJEU again had to deal with the question whether and under what condition a name acquired in a Member State has to be recognised in another Member State. The decision clarifies one question in the ongoing debate: only "legally acquired" names have to be recognised. Whether a name has been "legally acquired" has to be determined via a referral en bloc to the law of the country in which the name potentially has been acquired. Furthermore, the Court hints indirectly at an exception of such an obligation to recognize, i.e. in the case of circumvention of law when there is no connection to the original Member State at all.

M. Andrae/U. Ising: **Modalities of choice of law under Art. 10 (2) EGBGB**

Under Art. 10 (2) EGBGB (Introductory Act to the Civil Code) the spouses may choose the law applicable to their married name. By their choice, the parties can determine 1. the law of the country which one of the spouses is a national of or 2. German law given one of them has their habitual residence in Germany. Requirements as to time and proper form of their choice are specified by law. In addition, the choice of law shall be declared to the Registrar's Office *(Standesamt)*. The law does not lay out any additional details. This problem led to two decisions by the *Kammergericht* and the *Oberlandesgericht* (Higher Regional Court) Nürnberg dealing with the legitimacy and the requirements for a tacit choice of law, the law applicable to its validity, contractual annulment or change

ex nunc and its voidability by the spouses. This review focuses on these problems.

C. Thole: Art. 16 EIR 2017 (Art. 13 EIR 2002) between lex causae and lex fori concursus

In its judgment, the ECJ strengthens the procedural autonomy of the Member States in the context of the objection to an avoidance claim pursuant to Art. 16 EIR 2017 (Art. 13 EIR 2002). The Court decided on the applicability of Art. 3 para. 3 Rome I Regulation with respect to determining the applicable law *(lex causae*) and thus whether a choice of law clause may be validly relied upon if any other elements relevant to the situation in question are not located in the state whose law is chosen. *Christoph Thole* finds the judgment to be only partly convincing.

A. Piekenbrock: The treatment of assets situated abroad in local insolvency proceedings

The paper deals with two recent decisions delivered by the German Federal Court of Justice *(BGH)* regarding the treatment of assets situated abroad in insolvency proceedings opened in Germany. The Court has correctly stated that notwithstanding Art. 7 EIR 2015 the debtor's rights in rem regarding real estate situated in another Member State are governed by the *lex rei sitae*. As far as pensions in Switzerland are concerned, the Court has correctly come to the conclusion that the question whether or not the claim is attachable and thus part of the debtor's insolvency estate has to be answered in accordance with the *lex fori concursus*. Unfortunately, the Court has only applied German conflict law. Yet, the preliminary question to answer would have been whether or not Art. 7 EIR also applies in cases concerning third countries such as Switzerland. That question should have been referred to the E.C.J.

H. Wais: Compatibility of damages for willful litigation under Italian law with the German ordre public

Pursuant to Art. 91 (3) c.p.c. (Italy), a party who unjustifiably files a claim or unjustifiably defends himself can, under certain conditions, be ordered to pay to the other party a certain sum the amount of which is established by the court. In a case litigated before the courts of Milan the claimant was ordered to pay the defendant € 15.000 on the basis of the aforementioned provision. The defendant subsequently sought recognition and enforcement of the judgment in Germany. The claimant argued that the judgment was against the German *ordre public*

since Art. 91 (3) c.p.c. provided for punitive damages and deterred the parties from seeking judicial relief. The *Bundesgerichtshof*, however, rightly held that the judgment was compatible with the German *ordre public*.

P. Franzina/E. Jayme: **The International Protection of Reproduction Rights Claimed by Museums Over their Works of Art: Remarks on the Decision Given by the Tribunal of Florence on 26/10/2017 in the 'David' Case**

The law of some countries, like Italy, explicitly grants museums and other cultural institutions exclusive reproduction rights over works of art exhibited or stored therein. In 2017, at the request of the Italian Ministry for Culture and Heritage, the Tribunal of Florence issued an injunction prohibiting a travel agency based in Italy from further using "in Italy and in the rest of Europe" an unauthorised reproduction of the "*David*", a statue by Michelangelo, which the agency had included in its website and in advertising material distributed in Italy and abroad. The paper discusses the issues surrounding the protection of reproduction rights in cross-border cases under the Rome II Regulation. It also hints at the advantages that the adoption of harmonised substantive standards at EU level regarding the exploitation of these rights would entail for the effective protection of cultural heritage, while giving due account to competing rights, such as the so-called freedom of panorama, i.e., the right to take and reproduce pictures of works of art located in, or visible from, a public place.

O.L. Knöfel: **Cross-Border Online Defamation Claims Cases in Austrian Civil Procedure: The Austrian Supreme Court on the Autocomplete Function of Search Engines**

The article reviews a decision of the Supreme Court of the Republic of Austria (Case 6 Ob 26/16s), dealing with questions of cross-border litigation raised by the autocomplete function of a search engine. The mere accessibility of a website normally does not suffice for conferring international jurisdiction on any State's courts. But in the case at hand, the Supreme Court applied domestic Austrian rules on jurisdiction, namely sec. 83c *Jurisdiktionsnorm* (JN). If an online statement brought about by a search engine is considered defamatory, Austrian Courts are said to gain jurisdiction to entertain lawsuits against the alleged perpetrator, simply by assuming that a tort was committed in Austria. What the Supreme Court's decision boils down to is that Austrian procedural law opens an exorbitant head of jurisdiction. The Supreme Court also held that Austrian

substantive law applied. The author analyses the relevant issues of Austrian law and explores the decision's relation to international case-law on the autocomplete feature of search engines.

L. Hübner: **Substitution in French Mortgage Law**

The following article deals with the requirements of the substitution in French and German PIL. In the specific judgment, the *Cour de cassation* applies the method of *équivalence*. The ruling concerns the substitution of a French notary by an Australian notary public as regards the authorisation to create a mortgage *(Hypothek)* by formal act. This case offers the opportunity to sketch not only the PIL solution in the French and German legal order but also solutions provided by each substantive law.

H. Odendahl: **New international regulations on conflict of law and their impact in the field of family and inheritance law in relation to Turkey**

At the international level, a number of new regulations have entered into force over the past six years, relating – *inter alia* – to the conflicts of law provisions regarding divorce, custody, alimony, matrimonial property and inheritance law. Even to the extent Turkey is not directly bound by such regulations, they have an effect on Turkey and Turkish nationals – in particularly in the context of substantive law provisions providing for choice of law rules. Any migration event, in one direction or the other, may trigger an assessment of the effects due to such statutory changes.

Draft Withdrawal Agreement 19 March 2018: Still a Way to Go

Today, the European Union and the United Kingdom have reached an agreement on the transition period for Brexit: from March 29 of next year, date of disconnection, until December 31, 2020. The news are of course available in the press, and the Draft Withdrawal Agreement of 19 March 2018 has already been

published… coloured: In green, the text is agreed at negotiators' level and will only be subject to technical legal revisions in the coming weeks. In yellow, the text is agreed on the policy objective but drafting changes or clarifications are still required. In white, the text corresponds to text proposed by the Union on which discussions are ongoing as no agreement has yet been found. For ongoing judicial cooperation in civil and commercial matters (Title VI of Part III, to be applied from December 31, 2020: see Art. 168), this actually means that subject to "technical legal revisions", the following has been accepted:

- Art. 62: The EU and the UK are in accordance as to the application by the latter (no need to mention the MS for obvious reasons) of the Rome I and Rome II regulations to contracts concluded before the end of the transition period, and in respect of events giving rise to damage, and which occurred before the end of the transition period.
- Art. 64: There is also agreement as to the handling of ongoing cooperation procedures, whereby requests for service abroad, the taking of evidence and in the frame of the European Judicial Network are meant.
- Art. 65: There is agreement as well as to the way Council Directive 2003/8/EC (legal aid), Directive 2008/52/EC on certain aspects of mediation in civil and commercial matter, and Council Directive 2004/80/EC (relating to compensation to crime victims) will apply after the transition period.

Conversely, no agreement has been found regarding Art. 63, i.e., how to deal with jurisdiction, recognition and enforcement of judicial decisions, and related cooperation between central authorities (but whatever is agreed will also be valid in respect of the provisions of Regulation (EU) No 1215/2012 as applicable by virtue of the agreement between the European Community and the Kingdom of Denmark, see Art. 65.2, in green).

In the light of this it may be not really worth to start the analysis of the Title as a whole: Art. 63 happens to be the less clear provision. Some puzzling expressions such as "as well as in the Member States in situations involving the United Kingdom" are common to approved texts, but may change in the course of the technical legal revision. So, let's wait and see.

NoA: Another relevant provision agreed upon – in green- is Art. 124, Specific arrangements relating to the Union's external action. Title X of Part III, on

pending cases and new cases before the CJEU, remains in white.

And: On the Draft of February 28, 2018 see P. Franzina's entry here. The Draft was transmitted to the Council (Article 50) and the Brexit Steering Group of the European Parliament; the resulting text was sent to the UK and made public on March 15.

The impact of Brexit on the operation of the EU legislative measures in the field of private international law

On 28 February 2018, the European Commission published the draft Withdrawal Agreement between the EU and the UK, based on the Joint Report from the negotiators of the two parties on the progress achieved during the first phase of the Brexit negotiations.

The draft includes a Title VI which specifically relates to judicial cooperation in civil matters. The four provisions in this Title are concerned with the fate of the legislative measures enacted by the EU in this area (and binding on the UK) once the "transition of period" will be over (that is, on 31 December 2020, as stated in Article 121 of the draft).

Article 62 of the draft provides that, in the UK, the Rome I Regulation on the law applicable to contracts and the Rome II Regulation on the law applicable to non-contractual obligations will apply, respectively, "in respect of contracts concluded

before the end of the transition period" and "in respect of events giving rise to damage which occurred before the end of the transition period".

Article 63 concerns the EU measures which lay down rules on jurisdiction and the recognition and enforcement of decisions. These include the Brussels I *bis* Regulation on civil and commercial matters (as "extended" to Denmark under the 2005 Agreement between the EC and Denmark: the reference to Article 61 in Article 65(2), rather than Article 63, is apparently a clerical error), the Brussels II *bis* Regulation on matrimonial matters and matters of parental responsibility, and Regulation No 4/2009 on maintenance.

According to Article 63(1) of the draft, the rules on jurisdiction in the above measures will apply, in the UK, "in respect of legal proceedings instituted before the end of the transition period". However, under Article 63(2), in the UK, "as well as in the Member States in situations involving the United Kingdom", Article 25 of the Brussels I *bis* Regulation and Article 4 of the Maintenance Regulation, which concern choice-of-court agreements, will "apply in respect of the assessment of the legal force of agreements of jurisdiction or choice of court agreements concluded before the end of the transition period"(no elements are provided in the draft to clarify the notion of "involvement", which also occurs in other provisions).

As regards recognition and enforcement, Article 63(3) provides that, in the UK and "in the Member States in situations involving the United Kingdom", the measures above will apply to judgments given before the end of the transition period. The same applies to authentic instruments formally drawn up or registered, and to court settlements approved or concluded, prior to the end of such period.

Article 63 also addresses, with the necessary variations, the issues surrounding, among others, the fate of European enforcement orders issued under Regulation No 805/2004, insolvency proceedings opened pursuant to the Recast Insolvency Regulation, European payment orders issued under Regulation No 1896/2006, judgments resulting from European Small Claims Procedures under Regulation No 861/2007 and measures of protection for which recognition is sought under Regulation No 606/2013.

Article 64 of the draft lays down provisions in respect of the cross-border service

of judicial and extra-judicial documents under Regulation No 1393/2007 (again, as extended to Denmark), the taking of evidence according to Regulation No 1206/2001, and cooperation between Member States' authorities within the European Judicial Network in Civil and Commercial Matters established under Decision 2001/470.

Other legislative measures, such as Directive 2003/8 on legal aid, are the object of further provisions in Article 65 of the draft.

Out now: Issue 4 of RabelsZ 81 (2017)

The new issue of "Rabels Zeitschrift für ausländisches und internationales Privatrecht – The Rabels Journal of Comparative and International Private Law" (RabelsZ) has just been released. It contains the following articles:

Marc-Philippe Weller, *Vom Staat zum Menschen: Die Methodentrias des Internationalen Privatrechts unserer Zeit* (Referral, Recognition and Consideration: New Methodological Approaches in Private International Law):

> *This article draws attention to new methodological challenges posed by an increasingly globalized world: In modern European societies, individual interests are becoming more and more important, demanding private international law to no longer only determine the legal order closest connected to the respective case, but to consider individual interests and substantive arguments as well. To cope with these current developments, private international law must find a balance between individuals' and states' interests, while ensuring international consistency at the same time. This article aims at showing that these challenges can, however, be met if the existing system of referral was complemented by methods of recognition and consideration of local and moral data.*

Dorothee Einsele, *Kapitalmarktrecht und Internationales Privatrecht* (Capital Market Law and Private International Law)

Claims for damages in the case of capital market offences not only grant compensation to market participants but also play an important role in the enforcement of market regulations. Hence, the question of which law is applicable to capital market offences becomes relevant. In this regard, one must make the following differentiation: If a (pre-)contractual relationship between the injuring party and the damaged person already exists at the time of the infringement, claims for damages are covered by the Rome I Regulation. Otherwise, the applicable law is determined by the Rome II Regulation. This means that the place of injury, which usually coincides with the place of habitual residence of the injured party, is, in principle, the decisive connecting factor (Art. 4(1)). However, this connecting factor, by focusing on the individual injured party, does not correspond with the character of capital market law as market organisation law. With regard to competition law, another set of rules regulating the organisation of markets, Art. 6 of the Rome II Regulation provides for the application of the law of the affected market. Since Recital 23 of the Rome II Regulation qualifies Art. 6 as a mere clarification of the general rule of Art. 4(1), the place of injury may be clarified accordingly for capital market offences and be interpreted as the law of the affected market. Capital market rules of conduct, however, are mostly overriding mandatory rules. Therefore, they are not covered by the general conflict-of-law rule for torts but are governed by special provisions, especially Art. 17 of the Rome II Regulation. The rationale of Art. 17 is to protect the legitimate expectations of the injuring party that the rules of conduct he had to comply with at the time the harmful act was committed will also be relevant to whether he has to pay damages. Therefore, the rules of conduct of the country in which the harmful act was committed, while often coinciding with the law of the affected market, may be taken into account when applying the substantive law. The rationale of Art. 17 even allows for primarily the rules of the affected market to be taken into account when market participants could expect this law and not the rules of the country where the harmful act was committed to be relevant for damage claims. Ultimately, this means that the rules of conduct of the affected market will usually be relevant, albeit not automatically but rather taking into account their nature as overriding mandatory rules. The differentiation between the applicable tort law and the relevant rules of conduct is already necessary for

those rules that follow the country-of-origin principle. By contrast, it would not be consistent with the principles of the Rome I and Rome II Regulations to apply the tort law of the violated rule of conduct, as this would mean that overriding mandatory rules would determine the applicable tort law.

Hannes Wais, *Einseitige Gerichtsstandvereinbarungen und die Schranken der Parteiautonomie* (Unilateral Jurisdiction Agreements and the Limits of Party Autonomy)

1. Unilateral jurisdiction agreements may seem unfair when viewed from a purely procedural perspective. However, the mere imbalance of jurisdictional options between the parties may be counterbalanced by a financial or other benefit for the (procedurally) disadvantaged party. The regulation does not provide for a standard of review against which the implied unfairness can be measured.

2. Unilateral jurisdiction agreements may constitute an abuse of law. Such an abuse of law is generally prohibited under the Brussels I Regulation. Thus, where an abuse of law is ascertained, the unilateral jurisdiction agreement is void. An abuse of law exists where the sole purpose of the unilateral jurisdiction agreement is to render it impossible for the disadvantaged party to file a lawsuit or to appear in court.

3. Unilateral jurisdiction agreements may infringe substantive national law. Article 25(1) Brussels I Regulation provides for the application of the law of the prorogated forum for questions concerning the agreement's substantive validity. Notwithstanding the still unclear definitive scope of Art. 25(1) Brussels I Regulation, the rules of lex fori prorogatiwill, in any case, apply where their purpose is to safeguard the existence of real party autonomy.

4. With regard to German substantive law, the provisions on the admissibility of standard contract terms (Secs. 305 ff. German Civil Code (BGB)) mostly fulfil these requirements. Due to the inherent imbalance in the procedural options, unilateral jurisdiction agreements differ from the conceptual approach to jurisdiction underlying the Brussels I Regulation. For this reason, where Secs. 305 ff. BGB are applicable, unilateral jurisdiction agreements are generally presumed to be void.

5. Article 31(2) Brussels I Regulation does not apply to unilateral jurisdiction agreements. Hence, these types of agreements are not immune to so-called "torpedo claims" that are filed with the sole purpose of delaying trial in the chosen court.

Johan Meeusen, Fieke van Overbeeke, Lore Verhaert, *The Link Between Access to Justice and European Conflict of Laws after Lisbon, Much Ado About Nothing?*

Since the Treaty of Lisbon, the access to justice principle has become "serious business". Its insertion in the Treaty implies a certain gravity. The inclusion of conflict of laws within that realm provokes many questions. As has been explained in this paper, access to justice is not easy to define within the framework of the EU Treaty and is primarily understood in a procedural sense. It is therefore rather odd that European conflict of laws harmonisation should be approached in its light, as a procedural concept of access to justice does not seem apt to impose a substantive, policy-inspired direction upon conflict of laws, apart then from promoting the benefits served by harmonisation as such. Also, one could read in the strong emphasis by Articles 67(4) and 81(1) TFEU on mutual recognition of judicial and extrajudicial decisions in civil matters another confirmation of this procedural approach towards conflict of laws in the EU, which could eventually result in its completely auxiliary position.

From a conflict of laws perspective, yet paradoxically even more so from a broader EU perspective, such limited understanding of the purpose which choice-of-law rules can serve, would be unfortunate as some specific and valuable features of conflict of laws might remain unused. Appropriate choice-of-law rules may in their way contribute to the attainment of substantive policy goals. It should be noted however that not only this ability to incorporate policy objectives in choice-of-law rules pleads for a well-balanced approach between mutual recognition and European conflict of laws as developed by the EU legislature. Harmonised choice-of-law rules in important or delicate fields tend to create more legal certainty as well as inspire more political and judicial acceptance, one must assume, than a system solely based on mutual recognition. The Rome I, II and III Regulations and those on Maintenance and Succession illustrate the advantages of an elaborated, legislative system of conflict of laws very well. The AFSJ, however broad and vague this concept still

may be, can certainly serve as an appropriate framework for the elaboration of private international law within the EU with ample space for the establishment of such a well-balanced system. The prominent place of the AFSJ, enhanced by the Treaty of Lisbon and paralleled with the clear categorisation of conflict of laws in this area, can be very instrumental in both preventing an isolated approach to conflict of laws and providing a framework which would fit its proper characteristics. Possibly, the somewhat enigmatic link with access to justice, in a modern understanding which includes substantive policies, could even stimulate this process.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2017: Abstracts

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

D. Coester-Waltjen: **Fighting Child Marriages – even in Private International Law**

The article describes the newly enacted German law against “child marriages” and analyses the critical points. This law raises the minimum marriage age to 18 years without any option for younger persons to conclude a valid marriage. The former possibility of a dispensation by the family court has been abolished. Even more important and critical at the same time are the new provisions with regard to cases where foreign law governs the ability to marry. Despite the principal application of the spouses’ national law, German law will always govern the question of the minimum marital age. This applies to marriages formed in Germany as well as to those already validly concluded elsewhere. Thus,

irrespective of the applicable national law of the spouses a marriage cannot be concluded in Germany by persons who are younger than 18. If such a marriage has been formed nevertheless, it will be null and void from the beginning if one spouse was younger than 16 at the time of the marriage. If the spouses had attained the age of 16, but at least one of them was younger than 18, the marriage will be voidable (and must be declared void) in Germany. This is true also for heterosexual marriages of minors concluded elsewhere and valid under the otherwise applicable law. German law invalidates these marriages either directly (one spouse under 16) or through annulment proceedings (one spouse over 16 but under 18). The law provides only few exceptions and applies to all persons under 18 at the time the new law entered into force.

C. F. Nordmeier: **The German Law on the Modification of Rules in the Area of Private International Law and Private International Procedural Law – New Provisions for Cross-Border Civil Proceedings**

By the recently enacted law on the modification of rules in the area of Private International Law and Private International Procedural Law the German legislator created several alterations for civil procedures involving crossborder elements. The present contribution critically analyses the new rules. As far as service is concerned, the prohibition to demand the designation of an authorized recipient within the scope of application of the EU Service Regulation, the competence of judicial officers to handle incoming requests for service and new one-month periods for certain procedural measures are discussed. Also, the annulment of a European order for payment in the event that the applicant fails to indicate the competent court for the adversary proceedings is examined – as well as the possibility for the States of the Federal Republic of Germany to concentrate proceedings under the European Small Claims Regulation before certain courts. Finally, the consequences of the continued non-admission of judicial assistance for pre-trial discoveries in Germany are subject to discussion.

F. Maultzsch: **International Jurisdiction and Jointly Committed Investment Torts (Art. 5 No. 3 Lugano Convention 2007/Brussels I Regulation, Art. 7 No. 2 Brussels I*bis* Regulation)**

The German Federal Supreme Court (BGH) has denied an attribution of acts among joint participants of cross-border investment torts for the purposes of Art. 5 No. 3 of the Lugano Convention 2007/Brussels I Regulation, Art. 7 No. 2 of the

Brussels I*bis* Regulation. The judgment is based on a broad reading of the Melzer-decision of the CJEU. This article gives a critical assessment of the BGH's judgment. First of all, the Melzer-decision with its restrictive position as to attribution of tortious acts seems to be problematic in itself. Furthermore, the BGH does not consider that the case law of the CJEU has been developed for situations different from those to be judged by the BGH. The issue of attribution of tortious acts under Art. 5 No. 3 of the Lugano Convention 2007/Brussels I Regulation, Art. 7 No. 2 of the Brussels I*bis* Regulation should be approached in a nuanced way that accounts for the nature of the tort in question. This may also include a resort to the lex causae for specific protective laws (Schutzgesetze). In the case at hand where a foreign financial service provider had relied purposefully on acts of procurement carried out by a third party in Germany, jurisdiction of the German courts should have been approved under Art. 5 No. 3 of the Lugano Convention 2007/Brussels I Regulation, Art. 7 No. 2 of the Brussels I*bis* Regulation.

W.-H. Roth: **Private international law and consumer contracts: data protection, injunctive relief against unfair terms, and unfairness of choice-of-law provisions**

In its Amazon judgment, C-191/15, the European Court of Justice deals with three conflict-of-laws issues. Firstly, it determines the international applicability of data protection laws of the Member States in the light of Directive 95/46/EEC: A Member State may apply its law to business activities of an out-of-state undertaking directed at its territory if it can be shown that the undertaking carries out its data processing in the context of the activities of an establishment situated in that Member State. Secondly, it holds that an action for an injunction directed against the use of unfair terms in general terms and conditions, pursued by a consumer protection association, has to be classified as non-contractual. The law applicable to the action and the remedy has to be determined on the basis of Article 6 (1) of the Rome II Regulation, being related to an act of unfair competition, whereas the (incidental) question of unfairness of a specific term in general terms and conditions shall be classified as a contractual issue and has to be judged on the basis of the law applicable to contracts according to the Rome I Regulation. Thirdly, the Court holds that the material scope of Directive 93/13/EEC extends to choice-of-law clauses in pre-formulated consumer contracts. Such a choice-of-law clause may be considered as unfair if it leads the

consumer into error as far as the laws applicable to the contract is concerned.

C. Thomale: **Refusing international recognition and enforcement of civil damages adjunct to foreign criminal proceedings due to irreconcilability with a domestic civil judgment**

The German Supreme Court refused to enforce a civil claim resulting from criminal proceedings seated in Italy for reasons of irreconcilability with a German judgment given between the same parties. The case illustrates the considerable legal uncertainty that persists with the application of this ground for refusal of recognition and enforcement. The paper argues for a narrow interpretation in order to strengthen free movement of judgments within the European judicial area.

U. P. Gruber: **Recognition of provisional measures under Brussels lla**

In Purrucker, the ECJ established criteria for the recognition of provisional measures in matters of parental responsibility. Pursuant to the ECJ, if the court bases its jurisdiction on Art. 8 to 14 of the Brussels IIa Reg., the judgement containing provisional measures will be recognized and enforced in other Member States by way of Art. 21 et seqq. of the Regulation. If, however, the judgement does not contain an unambiguous statement of the grounds in support of the substantive jurisdiction of that court pursuant to Art. 8 to 14 Brussels IIa, the judgement does not qualify for recognition and enforcement under Art. 21 et seqq. Nevertheless, recognition and enforcement of the judgement are not per se excluded in this case. Rather, it has to be examined whether the judgement meets the prerequisites of Art. 20 Brussels IIa. If this is the case, the judgement can be recognized by use of other international instruments or national legislation. In a new decision, the Bundesgerichtshof applied this two-step-approach established by the ECJ to a Polish judgement, consequently denying any possibility to recognize the Polish judgement in Germany.

W. Hau: E**nforcement of penalty orders protecting parental rights of access within the European Union**

A dispute over the enforcement in Finland of a Belgian penalty order protecting parental rights of access has uncovered a loophole in the European law of international civil procedure: The Brussels I resp. Brussels I*bis* Regulation deals with the preconditions of the enforcement of foreign penalty orders (especially as

regards the final determination of the payable amount), but only in the context of civil and commercial matters, excluding family matters. The Brussels II*bis* Regulation, on the other hand, covers disputes over parental rights of access but remains silent about penalty orders. The CJEU proposes an appropriate solution, bridging the gap in the regulations.

R. Geimer: **Ordre public attenué de la reconnaissance in adoption law**

The relevance of timing by reason of recognizing child adoptions of foreign states despite violation of public order in the original proceedings.

C. A. Kern: **The enforceability of foreign enforcement orders arising from family relationships**

In Germany, various regimes govern the enforceability of foreign enforcement orders arising from family relationships. The traditional way is to have the foreign enforcement order declared enforceable on the basis of adversarial proceedings. Various supranational texts and international treaties provide for a more advanced solution under which the foreign enforcement order is declared enforceable ex parte. The most progressive solution is automatic enforceability. Moreover, depending on the applicable regime, the remedies and the requirements governing their admissibility differ. Two recent decisions of the German Federal Supreme Court (Bundesgerichtshof) illustrate how complex the situation is. It is advisable to unify the applicable procedural rules at least insofar as the complexity is the consequence of diverging national rules.

R. Schaub: **Traffic Accidents with an International Element: The Complex Interaction of European and National Rules in two Cases from the Austrian Supreme Court**

Traffic accidents with an international element are common occurrences but still raise a lot of questions as to the applicable law. In Europe, different sets of rules have been created to facilitate the compensation of victims in such cases. The complex interaction of EU and national rules on substantive law as well as private international law can be seen in two cases from the Austrian Supreme Court.

M. Andrae: **Again on the term „obligations arising out of matrimonial property regimes“**

The article deals with the characterization of claims between spouses living apart, which concern the joint property marital home and its financing through a credit. It involves: (1) compensation between spouses, in case they are jointly and severally liable for their obligations from the contract; (2) reimbursement of expenses for the matrimonial home, in case of the sole use of the matrimonial home by one of the spouses and (3) cases in which one spouse may demand from the other compensation for use of the matrimonial home. The main problem is whether this claim can be subsumed as "obligations arising out of matrimonial property regimes" with the consequence that it would be excluded from the scope of the Rome I and Rome II Regulation. For this the article presents a number of arguments. Finally, a solution will be discussed, insofar as the Brussels I*bis* Regulation for the jurisdiction and the Rome I and Rome II Regulations referring to conflict-of-laws rules are not applicable.

L. M. Kahl: **Differences in dealing with foreign law in German and Italian jurisprudence**

The article compares two cases in which the German Federal Court of Justice (BGH) and the Italian Supreme Court had to decide on the requirements for dealing with foreign law. The BGH only reviews whether the court of lower instance correctly determined the foreign law under Section 293 German Code of Civil Procedure (ZPO), whereas the Corte di Cassazione reviews if the court correctly applied foreign law under Art. 15 Italian law on Private International Law (legge numero 218/1995). In practice, the criteria set out by the BGH provide for a more in-depth review of judgments on foreign law than the criteria of the Corte di Cassazione. The BGH's approach on review of judgments on foreign law promotes international harmony of judgments.