Brexit: EU Position Paper on Judicial Cooperation in Civil and Commercial Matters

The European Commission Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU has submitted a Position Paper on Judicial Cooperation in Civil and Commercial Matters on 28 June 2017. It claims to contain the main principles of the EU position in this regard. A closer look, however, reveals that it only deals with the temporal application of the relevant EU instruments, notably the Brussels Ia Regulation, the Rome I Regulation and the Rome II Regulation. It suggests that all EU instruments should continue to apply to all choices of forum and choices of law made prior the withdrawal date and that judicial cooperation procedures that are ongoing on the withdrawal date should continue to be governed by the relevant provisions of Union law applicable on the withdrawal date.

The Position Paper is available here.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2017: Abstracts

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

C. Kohler: **Limits of mutual trust in the European judicial area: the judgment of the ECtHR in Avotin?š v. Latvia**

In Avoti?š v. Latvia the European Court of Human Rights opposes the

consequences of the principle of mutual trust between EU Member States which the Court of Justice of the European Union highlighted in Opinion 2/13. The ECtHR sees the risk that the principle of mutual trust in EU law may run counter to the obligations of the Member States flowing from the ECHR. In the context of judgment recognition the State addressed must be empowered to review any serious allegation of a violation of Convention rights in the State of origin in order to assess whether the protection of such rights has been manifestly deficient. Such a review must be conducted even if opposed by EU law. The author evaluates the Avoti?š judgment in the light of the recent case-law of the CJEU which gives increased importance to the effective protection of fundamental rights. In view of that case-law the opposition between the two European courts seems less dramatic as their competing approach towards the protection of fundamental rights shows new elements of convergence.

S. L. Gössl: **The Proposed Article 10a EGBGB: A Conflict of Laws Rule Supplementing the Proposed Gender Diversity Act (Geschlechtervielfaltsgesetz)**

In 2017 the German Institute for Human Rights published an expertise for the Federal Ministry of Family Affairs, Senior Citizens, Women and Youth on the topic of "Gender Diversity in Law". The expertise proposed several legal changes and amendments, including a conflict of laws rule regarding the determination of the legal sex of a person (art. 10a EGBGB). The proposal follows the current practise to use the citizenship of the person in question as the central connecting factor. In case of a foreigner having the habitual residence in Germany, or a minor having a parent with a habitual residence in Germany, a choice of German law is possible, instead. The rule reflects the change of substantive law regarding the legal sex determination from a binary biological-medical to a more open autonomy-based approach.

R. Geimer: **Vertragsbruch durch Hoheitsakt: „Once a trader, not always a trader?" – Immunitätsrechtlicher Manövrierspielraum für Schuldnerstaaten?**

A debtor state's inability to invoke state immunity: The issuance of bonds constitutes an actus gestionis, which cannot be altered to an actus imperii by legislative changes that unilaterally amend the terms of the bonds.

P. Mankowski: **Occupied and annected territories in private international law**

Private international law and international law are two different cups of tea. Private international law is not bound in the strict sense by the revelations of international law. An important point of divergence is as to whether occupied territories should be regarded as territories reigned by the occupying State or not. Private international law answers this in the affirmative if that State exerts effective power in the said territory. Private parties simply have to obey its rules and must adapt to them, with emigration being the only feasible exit. The State to whom the territory belonged before the occupation has lost its sway. This applies regardless whether UNO or EU have for whichever reasons uttered a different point of view. For instance, East Jerusalem should be regarded as part of Israel for the purposes of private international law, contrary to a recent decision of the Oberlandesgericht München.

F. Eichel: **Cross-border service of claim forms and priority of proceedings in case of missing or poor translations**

In recent times, there has been a growing number of inner-European multifora disputes where the claimant first lodged the claim with the court, but has lost his priority over the opponent's claim because of trouble with the service of the claim forms. Although Art. 32 (1) (a) Brussels Ibis Regulation states that the time when the document is lodged with the courts is decisive on which court is "the court first seised" in terms of Art. 29 Brussels Ibis Regulation, there has been dissent among German Courts whether the same is true when the service has failed due to a missing or poor translation under the EU Service Regulation (Regulation EC No 1393/2007; cf. also the French Cour de Cassation, 28.10.2008, 98 Rev. Crit. DIP, 93 [2009]). Although the claimant is responsible for deciding whether the claim forms have to be translated, the author argues that Art. 32 (1) (a) Brussels Ibis Regulation is applicable so that the claimant can initiate a second service of the document after the addressee has refused to accept the documents pursuant to Art. 8 para. 1 EU Service Regulation. The claimant does not loose priority as long as he applies for a second service accompanied by a due translation as soon as possible after the refusal. In this regard, following the Leffler decision of the ECJ (ECLI:EU:C:2005:665), a period of one month from receipt by the transmitting agency of the information relating to the refusal may be regarded as appropriate unless special circumstances indicate otherwise.

P. Huber: **A new judgment on a well-known issue: contract and tort in European Private International Law**

The article discusses the judgment of the ECJ in the Granarolo case. The core issue of the judgment is whether an action for damages founded on an abrupt termination of a long-standing business relationship qualifies as contractual or as a matter of tort for the purposes of the Brussels I Regulation. The court held that a contract need not be in writing and that it can also be concluded tacitly. It stated further that if on that basis a contract was concluded, the contractual head of jurisdiction in Art. 5 Nr. 1 Brussels I Regulation will apply, even if the respective provision is classified as a matter of tort in the relevant national law. The author supports this finding and suggests that it should also be applied to the distinction between the Rome I Regulation and the Rome II Regulation.

D. Martiny: **Compensation claims by motor vehicle liability insurers in tractor-trailer accidents having German and Lithuanian connections**

The judgment of the ECJ of 21/1/2016 deals with multiple accidents in Germany caused by a tractor unit coupled with a trailer, each of the damage-causing vehicles being insured by different Lithuanian insurers. Since in contrast to Lithuanian law under German law also the insurer of the trailer is liable, after having paid full compensation the Lithuanian insurer of the tractor unit brought an indemnity action against the Lithuanian insurer of the trailer. On requests for a preliminary ruling from Lithuanian courts, the ECJ held that Art. 14 of the Directive 2009/103/EC of 16/9/2009 relating to insurance against civil liability in respect of the use of motor vehicles deals only with the principle of a "single premium" and does not contain a conflict rule. According to the ECJ there was no contractual undertaking between the two insurers. Therefore, there exists a "non-contractual obligation" in the sense of the Rome II Regulation. Pursuant to Art. 19 Rome II, the issue of any subrogation of the victim's rights is governed by the law applicable to the obligation of the third party – namely the civil liability insurer – to compensate that victim. That is the law applicable to the insurance contract (Art. 7 Rome I). However, the law applicable to the non-contractual obligation of the tortfeasor also governs the basis, the extent of liability and any division of his liability (Art. 15 [a] [b] Rome II). Without mentioning Art. 20 Rome II, the ECJ ruled that this division of liability was also decisive for the compensation claim of the insurer of the tractor unit. A judgment of the Supreme Court of Lithuania of 6/5/2016 has complied with the ruling of the ECJ. It grants compensation and

applies also the rule of German law on the common liability of the insurers of the tractor unit and trailer.

P.-A. Brand: **Jurisdiction and Applicable Law in Cartel Damages Claims**

It can be expected that the number of cartel damages suits in the courts of the EU member states will substantially increase in the light of the EU Cartel Damages Directive and its incorporation in the national laws of the EU member states. Quite often the issues of jurisdiction and the applicable law play a major role in those cases, obviously in addition to the issues of competition law. The District Court Düsseldorf in its judgement on the so-called "Autoglas-cartel" has made significant remarks in particular with regard to international jurisdiction for claims against jointly and severally liable cartelists and on the issue of the applicable law before and after the 7th amendment of the German Act against Restraints of Competition (GWB) on 1 July 2005. The judgement contributes substantially to the clarification of some highly disputed issues of the law of International Civil Procedure and the Conflict of Law Rules. This applies in particular to the definition of the term "Closely Connected" according to article 6 para 1 of the Brussels I Regulation (now article 8 para 1 Brussels I recast) in the context of international jurisdiction for law suits against a number of defendants from different member states and the law applicable to cartel damages claims in cross-border cartels and the rebuttal of the so-called "mosaic-principle".

A. Schreiber: **Granting of reciprocity within the German-Russian recognition practice**

Germany and the Russian Federation have not concluded an international treaty which would regulate the mutual recognition of court decisions. The recognition according to the German autonomous right requires the granting of reciprocity pursuant to Sec. 328 para. 1 No. 1 of the German Code of Civil Procedure. The Higher Regional Court of Hamburg has denied the fulfilment of this requirement by (not final) judgement of 13 July 2016 in case 6 U 152/11. The comment on this decision shows that the estimation of the court is questionable considering the – for the relevant examination – only decisive Russian recognition practice.

K. Siehr: **Marry in haste, repent at leisure. International Jurisdiction and Choice of the Applicable Law for Divorce of a Mixed Italian-American Marriage**

An Italian wife and an American husband married in Philadelphia/Pennsylvania in November 2010. After two months of matrimonial community the spouses separated and moved to Italy (the wife) and to Texas (the husband). The wife asked for divorce in Italy and presented a document in which the spouses agreed to have the divorce law of Pennsylvania to be applied. The Tribunale di Pordenone accepted jurisdiction under Art. 3 (1) (a) last indent Brussels II-Regulation and determined the applicable law according to Rome III-Regulation which is applicable in Italy since 21 June 2012. The choice of the applicable law as valid under Art. 5 (1) (d) Rome III-Regulation in combination with Art. 14 lit. c Rome III-Regulation concerning states with more than one territory with different legal systems. The law of Pennsylvania was correctly applied and a violation of the Italian ordre public was denied because Italy applies foreign law even if foreign law does not require a legal separation by court decree. There were no effects of divorce which raised any problem.

M. Wietzorek: **Concerning the Recognition and Enforcement of German Decisions in the Republic of Zimbabwe**

The present contribution is dedicated to the question of whether decisions of German courts – in particular, decisions ordering the payment of money – may be recognized and declared enforceable in the Republic of Zimbabwe. An overview of the rules under Zimbabwean statutory law and common law (including a report on the interpretation of the applicable conditions, respectively grounds for refusal, in Zimbabwean case law) is followed by an assessment of whether reciprocity, as required by section 328 subsection 1 number 5 of the German Civil Procedure Code, may be considered as established with respect to Zimbabwe.

A. Anthimos: **Winds of change in the recognition of foreign adult adoption decrees in Greece**

On September 22, 2016, the Plenum of the Greek Supreme Court published a groundbreaking ruling on the issue of the recognition of foreign adult adoption decrees. The decision demonstrates the respect shown to the judgments of the European Court of Human Rights, especially in the aftermath of the notorious Negrepontis case, and symbolizes the Supreme Court’s shift from previous rulings.

Netherlands International Law Review (NILR) 1/2017: Abstracts

In the recent issue of the *Netherlands International Law Review* (NILR) three articles on private international law issues were published.

Peter Mankowski (The European World of Insolvency Tourism: Renewed, But Still Brave?, NILR 2017/1, p. 95-114) discusses the cross border insolvency tourism under the Insolvency Regulation. He also pays attention to the upcoming changes after Brexit to the Recast Insolvency Regulation.

The abstract of his article reads:

"Insolvency tourism and COMI migration have become key features in modern European international insolvency law. Fostered, in particular, by the ingenuity of the English insolvency industry. Yet it has not gone unanswered. The Recast European Insolvency Regulation introduces a not insignificant number of counter-measures as well as an antidote in the shape of a look-back period. Furthermore, as a prospective aftermath of Brexit, the race is on once more in the field of pre-insolvency restructuring measures."

Marek Zilinsky (Mutual Trust and Cross-Border Enforcement of Judgments in Civil Matters in the EU: Does the Step-by-Step Approach Work?, NILR 2017/1, p. 116-139) deals with the question on the implementation of the principle of mutual trust in different EU instruments in the field of cross border recognition and enforcement of judgments. He points out that the EU legislator has chosen different approaches for implementation. Special attention is paid to three instruments: the Brussels I Regulation Recast, the Brussels IIbis Regulation and the Maintenance Regulation.

The abstract of this article reads:

"Mutual trust is one of the cornerstones of cooperation in the field of European

Union private international law. Based on this principle the rules on the cross-border recognition and enforcement of judgments in the European Union are still subject to simplification. The step-by-step approach of the implementation of this principle led to the abolition of the exequatur, often accompanied by a partial harmonization of enforcement law to improve and support the smooth working of cross-border enforcement without exequatur. In this regard, it seems that the Member States still want to have control over the 'import' of judgments which results in maintaining the ground for non-recognition and the possibility of relying on them in the Member State of enforcement. This article considers the implementation of the principle of mutual recognition in three areas of justice: civil and commercial matters, family law and maintenance. In these areas the European Union legislator has chosen three different approaches for the implementation of this principle."

Jacobien Rutgers (NILR 2017/1, p. 163-175) discusses the *VKI/Amazon* Case of the European Court of Justice (Case C-191/15) where the Court gave its interpretation of Art 6(1) of the Rome II regulation and Art 6(1) Rome I Regulation in a procedure started by a consumer organization based on allegedly unfair terms in general terms and conditions of the seller.

The abstract to this article reads:

"In Amazon the CJEU decided which conflict rules applied to a claim in collective proceedings that was initiated by a consumer organization to prohibit allegedly unfair terms contained in the general terms and conditions of a seller. The terms were used in electronic b2c contracts, where the seller targeted consumers in their home country. The CJEU distinguished between the conflict rule concerning collective action, Article 6(1) Rome II, and the conflict rule concerning the fairness of the term, Article 6(2) Rome I. In addition, the CJEU introduced a new test to assess the fairness of a choice-of-law term under Directive 93/13 on unfair contract terms. In the note, it is argued that the CJEU's distinction between those two conflict rules is unnecessary and that the test that the CJEU formulated to assess whether a choice-of-law term is unfair, is less favourable to the consumer than the tests formulated in prior decisions."

The text of the articles is free available on the website of the publisher of the *Netherlands International Review.*

Thanks go to Marek Zilinsky for providing the above-noted abstracts.

Conference Report: First German conference for Young Scholars in Private International Law

The following report has been kindly provided by Dr. Susanne Gössl, LL.M. (Tulane) and Daniela Schröder.

On April 6th and 7th, 2017, the first German conference for young scholars interested in Private International Law took place at the University of Bonn. The general topic was "Politics and Private International Law (?)".

The conference was organized by Susanne Gössl, Bonn, and a group of doctoral or postdoctoral students from different universities. It was supported by the Institute for German, European and International Family Law, the Institute for Commercial and Economic Law and the Institute for Private International Law and Comparative Law of the University of Bonn the German Research Foundation (DFG), the German Society of International Law (DGIR), the Dr. Otto-Schmidt-Stiftung zur Förderung der Internationalisierung und der Europäisierung des Rechts, the Studienstiftung Ius Vivum, the Verein zur Förderung des Deutschen, Europäischen und Vergleichenden Wirtschaftsrechts e.V., and the publisher Mohr Siebeck.

Professor *Dagmar Coester-Walten*, LL.M. (Michigan), Göttingen, gave the opening speech. She emphasized that the relation between politics and conflict of laws has always been controversial. Even the "classic" conflict of laws approach (Savigny etc.) was never free from political and other substantive values, as seen in the discussion about international mandatory law and the use of the public

policy exception. She outlined the controversy around the “political” Private International Law in the 20th century, resulting in new theories of Private International Law such as Currie’s “governmental interest analysis” and counter-reactions in continental Europe. Even after a review of the more political conflict of laws rules of the EU, Professor Coester-Waltjen came to the conclusion that the changes of the last decades were less a revolution than a careful reform in continuance of earlier tendencies.

The first day was devoted to international procedural law. First, ***Iina Tornberg*, Helsinki**, evaluated more than 20 arbitration awards from the International Chamber of Commerce (ICC). Her focus was on the use of the concept *ordre public transnational*. She came to the result that there is no reference to truly transnational values. Instead, domestic values are read into the concept of the *ordre public transnational*. ***Masut Ulfat*, Marburg**, claimed that the Rome I Regulation should mandatorily determine the applicable law in arbitration proceedings to ensure a high level of consumer protection and enhance EU law harmonization. In his *responsio* ***Reinmar Wolff*, Marburg**, to the contrary, had the opinion that this last statement contradicts the fundamental principles of international arbitration as a private proceeding and its dogmatic basis in party autonomy. In addition, he did not regard the application of Rome I as necessary: the level of consumer protection could be reviewed at the stage of recognition and enforcement of the arbitration award.

In the second panel ***Dominik Düsterhaus***, **Luxemburg**, dealt with the question to what extend EU law and the interpretation through the CJEU lead to a “constitutinalisation” of Private International Law and International Procedure Law. He showed clear tendencies of such a charge with legal policy considerations of apparently objective procedural regulations. He criticized the legal uncertainty, arising from the fact that the CJEU does not always disclose his political considerations. Furthermore, only 4% of the referred cases include questions of Private International Law. Thus, the CJEU has only few possibilities to concretize his considerations. ***Jennifer Lee Antomo***, **Mainz**, dedicated herself to the question whether an agreement of exclusive international jurisdiction is also a contractual agreement with the effect that it is possible to claim compensation for breach of contract. She answered generally in the affirmative in the case a claimant brings a suit in a derogated court. Nevertheless, court authority to adjudicate can be limited, especially within the EU due to the EU

concept of *res iudicata*.

The second day was dedicated to conflict of laws. ***Friederike Pförtner***, **Konstanz**, analysed human rights abuses by companies in third countries. She objected a broad use of "escape devices" such as the public policy exception or *loi de police*. As exceptions they should be applied restrictively. ***Reka Fuglinsky***, **Budapest**, investigated the problem of cross-border emissions with a focus on the CJEU case law and the new Hungarian Private International Law Act. She scrutinized, *inter alia*, under which conditions a foreign emission protection permission has effects on the application or interpretation of national (tort) law. Another more factual problem is the later enforcement of domestic decisions in third countries.
Finally, ***Martina Melcher***, **Graz**, analysed the relation between Private International Law and the EU General Data Protection Regulation, which is combining a private international law approach with a public international one. A separate conflict of laws rule should be introduced in the Rome II Regulation, following the *lex loci solutionis* instead of the territoriality principle. ***Tamas Szabados*, Budapest**, talked about the enforcement of economic sanctions by Private International Law. He characterized economic sanctions as overriding mandatory provisions (Article 9 (1) Rome I). In cases of third state (e.g. US) sanctions, an application was only possible as "being considered" in the sense of Article 9 (3) Rome I. A clear decision by the CJEU is necessary to ensure a transparent approach and a unitary EU foreign policy.

The conference concluded with the unanimous decision to organize further conferences for young scholars in Private International Law, probably every two years. The next conference will be held in Würzburg, Germany, in spring 2019.

The full texts of the presentations will be published in a forthcoming book by Mohr Siebeck. The presentations of the conference are available here (all in German).

Brexit, again: White Paper on the Great Repeal Bill

Since Wednesday it is official: The UK will leave the EU. What this means for judicial cooperation in cross-border matters has been the subject of an intense debate over the last months. The UK government, however, has thus far not indicated how it plans to proceed. A White Paper that was released yesterday now gives some basis for speculation:

- The UK will adopt a Great Repeal Bill that will convert the current body of EU law, notably directly applicable EU Regulations, into UK domestic law (para. 2.4).
- When applying the EU-derived body of law UK courts will be required to give "historic" CJEU decisions, i.e. decisions that the CJEU will render up until the day of Brexit, the same binding, or precendent status as decisions of the UK Supreme Court (para. 2.14).
- To the extent that EU law cannot simply be converted into domestic law, because it is based on reciprocity, the UK will seek to secure reciprocal arrangements as a part of the new relationship with the EU (para. 3.3).

Applied to conflict of laws this suggests that the UK will most likely convert the non-reciprocal regulations, notably the Rome I and the Rome II Regulations, into domestic law and apply them unilaterally. UK courts will then be required to follow and apply relevant CJEU decisions that have been and will be rendered up to the date of Brexit. As regards regulations that rest on the principle of reciprocity, notably the Brussels Ia Regulation but also the Service and Evidence Regulation, the UK will most likely seek to secure their continued reciprocal application.

Of course, this leaves a lot of questions open. What will, for example, happen to post-Brexit CJEU decisions relating to the Rome I and the Rome II Regulation? Will they have any meaning for UK courts? And what happens to the Brussels Ia Regulation if the UK and the EU do manage to reach agreement on its continued reciprocal application?

So, stay tuned.

JuristenZeitung, Issue 2 (2017): Two More Articles on the Effects of Brexit

The current issue of the JuristenZeitung features two articles dealing with the effects of Brexit on private and economic law, including private international law.

The first article, authored by Matthias Lehmann, University of Bonn, and Dirk Zetzsche, University of Liechtenstein, discusses the various options to bring about Brexit and analyses their consequences for the law of contractual and non-contractual obligations (including choice of law), corporate law, insolvency law and procedural law (*Die Auswirkungen des Brexit auf das Zivil- und Wirtschaftsrecht, pp. 62-71*).

The second article, authored by myself, sheds light on the effects Brexit will have on London as a place for settling international legal disputes (*Die Wahl englischen Rechts und englischer Gerichte nach dem Brexit. Zur Zukunft des Justizstandorts England, pp. 72-82*). It shows that Brexit creates substantial uncertainty (1) as regards the enforcement of English choice of law and English choice of forum clauses and (2) as regards the recognition and enforcement of English judgments abroad. Unless the UK and the EU agree on the continued application of the Rome I Regulation, the Rome II Regulation and the (recast) Brussels I Regulation (or enter into a new treaty designed to enhance judicial cooperation in civil matters), Brexit will, therefore, make it less attractive to settle international disputes in London.

Both articles can be downloaded here and here (behind pay wall, unfortunately).

PIL and IP: Special Issue 2016.4 of the Dutch Journal on Private International Law (NIPR)

The fourth issue of 2016 of the Dutch Journal on Private International Law, Nederlands Internationaal Privaatrecht, is dedicated to Private International Law and Intellectual Property. It includes papers on the law applicable to copyright infringements on the Internet, how to handle multiple defendants in intellectual property litigation, the incorporation of the Unified Patent Court into the Brussels I bis regulation, principles of private international law and aspects of intellectual property law and the territoriality principle in intellectual property.

Sierd J. Schaafsma, 'Editorial: Private International law and intellectual property', p. 685-686 (guest editor)

Paul L.C. Torremans, 'The Law applicable to copyright infringement on the Internet', p. 687-695

> *This article looks at the law applicable to copyright infringement on the Internet. In order to do so we need to look first of all at the rules concerning the applicable law for copyright infringement in general. Here the starting point is the Berne Convention. Its provisions give an indication of the direction in which this debate is going, but we will see that they merely provide starting points. We then move on to the approach in Europe under the Rome II Regulation and here more details become clear. Essentially, the existing rule boils down to a lex loci protectionis approach, which is in conformity with the starting point that is found in the Berne Convention. It is however doubtful whether such a country by country approach can work well in an Internet context and suggestions are made to improve the legal framework by adding a rule for ubiquitous infringement and a de minimis rule. Finally, we also briefly look at the issues surrounding the cross-border portability of online content*

services and the impact that the current focus on these may have in terms of the choice of law.

Sierd J. Schaafsma, 'Multiple defendants in intellectual property litigation', p. 696-705

One of the key provisions in international intellectual property litigation is the forum connexitatis in Article 8(1) of the Brussel I bis Regulation. This jurisdiction provision makes it possible to concentrate infringement claims against various defendants, domiciled in different EU Member States, before one court: the court of the domicile of any one of them. The criteria of Article 8(1) are, however, complicated and the case law of the Court of Justice is not always very clear. This contribution seeks to explore, evaluate and comment on the current state of affairs in respect of Article 8(1) in the context of intellectual property litigation.

Michael C.A. Kant, 'The Unified Patent Court and the Brussels I *bis* Regulation', p. 706-715

According to the Agreement on a Unified Patent Court (UPCA), the establishment of a Unified Patent Court (UPC) for the settlement of disputes relating to European patents and European patents with unitary effect also depends upon amendments to the Brussels I bis Regulation (BR) concerning its relationship with the UPCA. In light of this, the European legislator established new Articles 71a to 71d BR. Unfortunately, these provisions have effected uncertainties and schematic inconsistencies within the Brussels system. Besides, inconsistencies have been established between jurisdiction rules of the BR and competence rules of the UPCA. The most notable flaws in this respect are discussed in this contribution.

Michelle van Eechoud, 'Bridging the gap: Private international law principles for intellectual property law', p. 716-723

This past decade has seen a veritable surge of development of 'soft law' private international instruments for intellectual property. A global network has been formed made up of academics and practitioners who work on the intersection of these domains. This article examines the synthesizing work of the International

Law Association's Committee on intellectual property and private international law. Now that its draft Guidelines on jurisdiction, applicable law and enforcement are at an advanced stage, what can be said about consensus and controversy about dealing with transborder intellectual property disputes in the information age? What role can principles play in a world where multilateral rulemaking on intellectual property becomes ever deeply politicized and framed as an issue of trade? Arguably, private international law retains it facilitating role and will continue to attract the attention of intellectual property law specialists as a necessary integral part of regulating transborder information flows.

Dario Moura Vicente, 'The territoriality principle in intellectual property revisited', p. 724-729

This essay revisits territoriality as the founding principle of international IP law. Both copyright and rights in patents and trademarks were essentially conceived by the drafters of the Berne and Paris Conventions as territorial rights which should be governed by the law of the country for which their protection is claimed. This is still the starting point of the relevant provisions in several recent soft law instruments adopted, inter alia, by the American Law Institute and the European Max Planck Group on Conflict of Laws in IP. An important deviation therefrom has, however, been enshrined in conflict of jurisdictions rules that allow for the extraterritorial enforcement of IP rights. Other relevant developments in this respect concern Internet uses of protected works, with regard to which certain restrictions to territoriality have been adopted in order to promote the applicability of a single law to online infringements. The liability of Internet service providers should, in turn, be governed by the law of the country where the centre of gravity of their activities is located, not necessarily the lex protectionis. Other alternatives to the lex protectionis, such as the lex originis or the lex contractus, have gained prominence concerning the initial ownership of unregistered IP rights. And a choice of the applicable law by the parties has been allowed in respect of remedies for infringement acts, as well as of contracts providing for the creation or the transfer of securities in IP rights. A mitigated form of territoriality has thus emerged in recent IP law instruments, which allows for greater diversity and flexibility in conflict of laws solutions in this field.

The EUPILLAR Database is live

The EUPILLAR Database, one of the outputs of the EUPILLAR Project funded by the European Union within the scope of the European Commission Civil Justice Programme (JUST/2013/JCIV/AG/4635) and led by the Centre for Private International Law at the University of Aberdeen, is now live. The Database contains summaries in English of over 2300 judgments that were rendered between 1 March 2002 and 31 December 2015 concerning the Brussels I (Brussels I Recast), Brussels IIa, Maintenance, Rome I and Rome II Regulations and the Hague Maintenance Protocol in the Court of Justice of the European Union and in Belgium, Germany, England and Wales, Italy, Poland, Scotland and Spain.

The EUPILLAR Database, established and maintained by the University of Aberdeen, is available at https://w3.abdn.ac.uk/clsm/eupillar/#/home.

Out Now: Proceedings of the German EUPILLAR Conference on "The Assessment of European PIL in Practice – State of the Art and Future Perspectives" (Freiburg, 14-15 April 2016)

The most recent issue of the *Zeitschrift für Vergleichende Rechtswissenschaft* (German Journal of Comparative Law; Vol. 115 [2016], No. 4) features the

contributions to the conference on the application of EU private international law in German legal practice that was held at the University of Freiburg (Germany) on 14 and 15 April 2016 (see our previous post here). This event was part of the EUPILLAR („European Private International Law – Application in Reality“) project funded by the EU Commission (see the project's homepage here); it was organized by the German branch of the project team, Prof. Dr. Jan von Hein, University of Freiburg.

The issue starts with a concise introduction by Jan von Hein into the EUPILLAR project (p. 483) and continues with an in-depth analysis of the problems involved in evaluating EU PIL Regulations by Prof. Dr. Giesela Rühl (University of Jena; p. 499). It then contains three articles dealing with pervasive problems inherent in the application of EU PIL: firstly, the challenges it poses for the organization of domestic courts (by Prof. Dr. Hannes Rösler, University of Siegen; p. 533); secondly, the challenges for the CJEU (by Prof. Dr. Martin Gebauer, University of Tübingen; p. 557); and thirdly, the application of foreign law designated by PIL rules (by Prof. Dr. Oliver Remien, University of Würzburg; p. 570). In the following contributions, the handling of the EU PIL Regulations in German case-law is scrutinized, starting with the application of Rome I by ordinary civil courts (Prof. Dr. Dennis Solomon, University of Passau; p. 586) and by labour courts (Prof. Dr. Dr. h.c. Monika Schlachter, University of Trier; p. 610). Moreover, Prof. Dr. Wolfgang Wurmnest (University of Augsburg) analyzes how German courts have interpreted the Rome II Regulation (p. 624). Finally, German court practice regarding international family law is evaluated as well, Brussels II*bis* and Rome III by Prof. Dr. Peter Winkler von Mohrenfels (University of Rostock; p. 650), and the Maintenance Regulation resp. the Hague Protocol by Prof. Dr. Wolfgang Hau (University of Passau; p. 672).

The *Zeitschrift für Vergleichende Rechtswissenschaft* was founded in 1878 and is Germany's oldest continuously published periodical on comparative and private international law. Its current editor-in-chief is Prof. Dr. Dres. h.c. Werner F. Ebke, University of Heidelberg. Content is available online either through the website of the Deutscher Fachverlag or via beck online.

Conference Report: “The Impact of Brexit on Commercial Dispute Resolution in London”

By Stephan Walter, Research Fellow at the Research Center for Transnational Commercial Dispute Resolution (TCDR), EBS Law School, Wiesbaden, Germany.

On 10 November 2016, the Academy of European Law (ERA), in co-operation with the European Circuit, the Bar Council and the Hamburgischer Anwaltverein, hosted a conference in London on “The Impact of Brexit on Commercial Dispute Litigation in London”. The event aimed to offer a platform for discussion on a number of controversial issues following the Brexit referendum of 23 June 2016 such as the future rules governing recognition and enforcement of foreign judgements in the UK, the impact of Brexit on the rules determining the applicable law and London’s role in the international legal world.

Angelika Fuchs (Head of Section – Private Law, ERA, Trier) and Hugh Mercer QC (Barrister, Essex Court Chambers, London) highlighted in their words of welcome the significant impact of Brexit on business and the practical necessity to find solutions for the issues discussed.

In the first presentation, Alexander Layton QC (Barrister, 20 Essex Street, London) scrutinised Brexit’s “Implications on jurisdiction and circulation of titles”. He noted that the Brussels I Regulation Recast will cease to apply to the UK after its withdrawal from the EU and examined possible ways to fill the resulting void. Because an agreement between the UK and the EU on retaining the Brussels I Regulation Recast seemed very unlikely, not least because of the ECJ’s jurisdiction over questions of interpretation of the Regulation, he favoured a special agreement between the UK and the EU in regard to the application of the Brussels I Regulation Recast based on the Danish model. The ECJ’s future role in interpreting the Regulation could be addressed by adopting a provision similar to Protocol 2 to the 2007 Lugano Convention. Yet it was disputed whether or not the participation of the UK in the Single Market would be a political prerequisite for such an arrangement. He argued that there would be no room for a revival of the 1988 Lugano Convention since the 2007 Lugano Convention terminated its

predecessor. Furthermore, neither a revival of the 1968 Brussels Convention nor the accession to the 2007 Lugano Convention would lead to a satisfactory outcome as this would result in the undesired application of outdated rules. In a second step Layton discussed from an English point of view the consequences on jurisdiction and on the recognition and enforcement of judgements if at the end of the two year period set out in Article 50 TEU no agreement would be reached. Concerning jurisdiction the rules of the English law applicable to defendants domiciled in third States would also apply to cases currently falling under the Brussels I Regulation Recast. In regard to the recognition and enforcement of judgements rendered in an EU Member State pre-Brussels bilateral treaties dealing with these questions would revive, since they were not terminated by the Brussels I Regulation and its successor. Absent a treaty between the UK and the EU Member State in question the recognition and enforcement would be governed by English common law. Likewise, the recognition and enforcement of English judgements in EU Member States would be governed by bilateral treaties or the respective national laws. In Layton's opinion, the application of these rules might lead to legal uncertainty. He concluded that both the 2005 Hague Choice of Court Convention and arbitration could cushion the blow of Brexit, but limited to certain circumstances.

Matthias Lehmann (Professor at the University of Bonn) analysed the "Consequences for commercial disputes" laying emphasis on the impact of Brexit on the rules determining the applicable law to contracts and contracts related matters, its repercussions on pre-referendum contracts and potential pitfalls in drafting new contracts post-referendum. Turning to the first issue, he summarised the current state of play, meaning the application of the Rome I Regulation and Rome II Regulation, and stated that these Regulations would cease to apply to the UK after its withdrawal from the EU. In regard to contractual obligations this void could be filled by the 1980 Rome Convention, since the Rome I Regulation had not replaced the Convention completely. Still, this would lead to the application of outdated rules. He therefore recommended to terminate the 1980 Rome Convention altogether. Regarding non-contractual obligations the Private International Law (Miscellaneous Provisions) Act 1995 would apply. Lehmann noted that – unlike the Rome II Regulation – this Act contained no clear-cut rules on issues such as competition law or product liability. Because of these flaws he scrutinised three alternative solutions and favoured a new treaty between the UK and the EU on Private International Law. Even though disagreements over who

should have jurisdiction over questions of interpretation could hinder the conclusion of such an arrangement the use of a provision similar to Protocol 2 to the 2007 Lugano Convention could be a way out. If this option failed, the next best alternative would be to copy the rules of the Rome I Regulation and the Rome II Regulation into the UK's domestic law and to apply them unilaterally. As a consequence, the UK courts would not be obliged to follow the ECJ's interpretations of the Regulations causing a potential threat to decisional harmony. Furthermore, the implementation could cause some difficulties because the Regulations' rules are based on autonomous EU law concepts. Finally, he rejected a complete return to the common law as this would lead to legal uncertainty and potential conflicts with EU Member States' courts. Lehmann subsequently discussed Brexit's repercussions on pre-referendum contracts governed by English law. He submitted that in principle Brexit would not lead to a frustration of a contract. By contrast, hardship, force majeure or material adverse change clauses could cover Brexit, depending on the precise wording and the specific circumstances. Concerning the drafting of new contracts he pointed out that it would be unreasonable not to take Brexit into account. Attention should be paid not only to drafting provisions dealing with legal consequences in the case of Brexit but also to Brexit's implications on the contract's territorial scope when referring to the "EU". If the contract contained a choice-of-law clause in favour of English law, Lehmann suggested using a stabilization clause because English law might change significantly due to Brexit.

The conference was rounded off by a round table discussion on "The future of London as a legal hub", moderated by Hugh Mercer QC and with the participation of Barbara Dohmann QC (Barrister, Blackstone Chambers, London), Diana Wallis (Senior Fellow at the University of Hull; President of the European Law Institute, Vienna and former Member of the European Parliament), Burkhard Hess (Professor and Director of the Max Planck Institute for International, European and Regulatory Procedural Law, Luxembourg), Alexander Layton QC, Matthias Lehmann, Ravi Mehta (Barrister, Blackstone Chambers, London) and Michael Patchett-Joyce (Barrister, Outer Temple Chambers, London). Regarding the desired outcome of the Brexit negotiations and London's future role in international dispute resolution the participants agreed on the fact that a distinction had to be made between the perspectives of the UK and the EU. Concerning the latter, the efforts of some EU Member States to attract international litigants to their courts were discussed and evaluated. Moreover,

Hess stressed London's role as an entry point for international disputes into the Single Market – an advantage London would likely lose after the UK's withdrawal from the EU. Patchett-Joyce argued that Brexit was not the only threat to London's future as a legal hub but that there were global risks that had to be tackled on a global level. In regard to the Brexit negotiations there was widespread consensus that the discussion on the future role of the ECJ would be decisive for whether or not an agreement between the UK and the EU could be achieved. Wallis argued that Brexit might have a very negative impact on access to justice, not least for consumers. To mend this situation, Lehmann expressed his hope to continue the judicial cooperation between the EU Member States and the UK even post-Brexit. An accession to the 2005 Hague Choice of Court Convention was also advocated, though the Convention's success was uncertain. Turning to arbitration, since, as Mehta noted, its use increased significantly in numerous areas of law, and on a more abstract level to the privatisation of legal decision-making, Wallis and Patchett-Joyce addressed the problem of confidentiality and its repercussions on the development of the law. Furthermore, Dohmann stated that it was the duty of the state to provide an accessible justice system to everybody. It would not be enough to refer parties to the possibility of arbitration. Finally, Layton argued that in contrast to the application of foreign law which would create significant problems in practise, the importance of judgement enforcement would be overstated because most judgements were satisfied voluntarily.

It comes as no surprise that these topics sparked lively and knowledgeable debates between the speakers and attendees. Though these discussions indicated possible answers to the questions raised by the Brexit referendum it became clear once more that at the moment one can only guess how the legal landscape will look like in a post-Brexit scenario. But events like this ensure that the guess is at least an educated one.