Mutual trust and judicial cooperation in the EU's external relations – the blind spot in the EU's Foreign Trade and Private International Law policy?

Further to the splendid conference How European is European Private International Law? at Berlin on 2 and 3 March 2018, I would like to add some thoughts on an issue that was briefly raised by our fellow editor Pietro Franzina in his truly excellent conference presentation on "The relationship between EU and international Private International Law instruments". Pietro rightly observed an "increased activity on the external side", meaning primarily the EU's PIL activities on the level of the Hague Conference.

At the same time, there seems to be still a blind spot for the EU's Private International Law policy when it comes to the design of the EU's Free Trade Agreements (FTAs). Although there is an increasingly large number of such agreements and although "trade is no longer just about trade" (DG Trade) but additionally about exchange or even export of values such as "sustainability", human rights, labour and environmental standards and the rule of law, there seems to be no policy by DG Trade to include in its many FTAs a Chapter on judicial cooperation with the EU's respective external trade partners.

To my knowledge there are only the following recent exceptions: The Association Agreements with Georgia and Moldova. Both Agreements entered into force on 1 July 2016.

Article 21 (Georgia) and Article 20 (Moldova) provide:

"Legal cooperation: 1. The Parties agree to develop judicial cooperation in civil and commercial matters as regards the negotiation, ratification and implementation of multilateral conventions on civil judicial cooperation and, in particular, the conventions of the Hague Conference on Private International Law in the field of international legal cooperation and litigation as well as the

protection of children."

Article 24 of the Association Agreement of 29 May 2014 with the Ukraine reads slightly differently:

"Legal cooperation: 1. The Parties agree to further develop judicial cooperation in civil and criminal matters, making full use of the relevant international and bilateral instruments and based on the principles of legal certainty and the right to a fair trial.2. The Parties agree to facilitate further EU-Ukraine judicial cooperation in civil matters on the basis of the applicable multilateral legal instruments, especially the Conventions of the Hague Conference on Private International Law in the field of international Legal Cooperation and Litigation as well as the Protection of Children."

All other FTAs, even those currently under (re-) negotiation, do not take into account the need for the management of trust in the judicial cooperation of the trade partners in their deepened and integrated trade relations. Rather, foreign trade law and PIL seem to have remained separate worlds, although the business transactions that are to take place and increase within these trade relations obviously rely heavily on both areas of the law.

Some thoughts on why there is no integrated approach to foreign trade and PIL in the EU, why this is a deficiency that should be taken care of and how this could possibly be done are offered here.

Secure your seat at the global Conference "HCCH 125 – Ways Forward: Challenges and

Opportunities in an Increasingly Connected World" at Early Bird Rates by Friday 9 March!

By the Permanent Bureau of the Hague Conference on Private International Law

Get your registration now to have the chance to hear from leading Experts and to discuss with them the opportunities for, and challenges to, private international law and the evolution of the Hague Conference on Private International Law (HCCH).

Our Experts, including Professor Jürgen Basedow, who will deliver the keynote, Lord Collins of Mapesbury, The Hon Diana Bryant AO QC, Professor Richard Fentiman, Professor Horatia Muir-Watts, Professor José Moreno Rodríguez, Justice Fausto Pocar and Professor Burkhard Hess, to name only a few, will discuss a wide range of issues, including:

- global trends in private international law and its importance to globalisation and an "open society";
- the general role of private international law in an increasingly connected world;
- the importance of private international law into facilitating the protection of human rights (with a particular focus on family issues and child protection) and to promoting trade, commerce and investment; and
- the relationship between public and private international law and what, if any, consequences may be the result of a possible convergence.

In addition, the Experts will explore how the HCCH can continue to be the pre-eminent global international organisation that develops innovative private international law solutions.

The draft programme for this global Conference, including all speakers, can be accessed on the Conference website located at: http://www.hcch125.org/programme.php.

The Conference is held in conjunction with the HCCH's 125th Anniversary. It will

take place from 18 to 20 April 2018 in Hong Kong, and is organised by the HCCH with the generous support of the Department of Justice of the Hong Kong SAR.

See you in Hong Kong!

Annual Survey of American Choice-of-Law Cases

Symeon Symeonides has posted on SSRN his 31st annual survey of American choice-of-law cases. The survey covers appellate cases decided by American state and federal courts during 2017. It can be found here https://ssrn.com/abstract=3093709 The table of contents is reproduced below.

Symeonides has also posted his annual Private International Law Bibliography for 2017. It can be found here https://ssrn.com/abstract=3094215.

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New publications on the Hague Conference (HCCH) and the Global Horizon of Private International

Law

Former Secretary General of the Hague Conference on Private International Law (HCCH), Hans van Loon, has just published an article on the HCCH and a Chinese translation of his inaugural lecture on the global horizon of private international law delivered at the 2015 Session of the Hague Academy:

– Hans van Loon, "At the Cross-roads of Public and Private International Law – The Hague Conference on Private International Law and Its Work", in *Collected Courses of the Xiamen Academy of International Law*, Vol. 11, pp. 1-65, (Chia-Jui Cheng, ed.), Brill/Nijhoff, 2017 (available via Brill).

Contents:

1. Role and Mission of the Hague Conference on Private International Law
2. Origin and Development of the Hague Conference
3. The impact of Contemporary Globalisation
4. Hague Conventions Promoting Global Trade, Investment and Finance
5. Hague Conventions Promoting Administrative and Judicial Cooperation
6. Hague Conventions Promoting Personal Security and Protecting Families in Cross Border Situations
7. Outlook – (Potential) Significance of the Hague Conference and Its work for the Asia-Pacific Region.

– Chinese translation (by Prof. Zhang Meirong and Prof. Wu Yong) of Hans van Loon's Inaugural Lecture, "The Global Horizon of Private International Law" given at the 2015 Session of the Hague Academy of International Law, *Recueil des Cours*, Vol. 380, in *Chinese Review of International Law* 2017, vol. 6, pp. 2-52, vol. 6), for more information see http://www.guojifayanjiu.org/.

Excerpt of table of contents:

Chapter I. The development of private international law against the backdrop of the evolving nation-State

- A. Origins and early development of private international law
- B. Birth of the Hague Conference on private international law
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Chapter II. The impact of globalization on the development of private international law

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- A. People on the move
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Some general conclusions

Politik und Internationales Privatrecht [English: Politics and Private International Law]

edited by Susanne Lilian Gössl, in Gemeinschaft m. Rafael Harnos, Leonhard Hübner, Malte Kramme, Tobias Lutzi, Michael Florian Müller, Caroline Sophie Rupp, Johannes Ungerer

More information at: https://www.mohr.de/en/book/politik-und-internationales-privatrecht-9783161556920

The first German conference for Young Scholars of Private International Law, which was held at the University of Bonn in spring 2017, provides the topical content for this volume. The articles are dedicated to the various possibilities and

aspects of this interaction between private international law and politics as well as to the advantages and disadvantages of this interplay. “Traditional” policy instruments of private international and international procedural law are discussed, such as the public policy exception and international mandatory rules (*loi de police*). The focus is on topics such as human rights violations, immission and data protection, and international economic sanctions. Furthermore, more “modern” tendencies, such as the use of private international law by the EU and the European Court of Justice, are also discussed.

The content is in German, but abstracts are provided in English here:

“Presumed dead but still kicking” – does this also apply to traditional Private International Law?

Dagmar Coester-Waltjen

The opening address defines the concept of “traditional” private international law. Subsequently, it alludes to different possibilities politics have and had to influence several aspects of this area of law. Even the “classic” conflict of laws approach based on Savigny and others 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. Moreover, the paper reviews past actual or presumable “revolutions” of traditional private international law, especially the so-called “conflicts revolution” in the US and, lately, the European Union. The author is critical with the term “revolution”, as many aspects of said “revolutions” should better be regarded as a shy “reform” and further development of aspects already part of the traditional private international law. Finally, the paper concludes with an outlook on present or future challenges, such as questions of globalisation and mobility of enterprises and persons, technical innovations and the delocalisation and diversification of connecting factors.

Politics Behind the “ordre public transnational” (Focus ICC Arbitral Tribunal)

Iina Tornberg

This paper examines transnational public policy as a conflict of laws phenomenon in international commercial arbitration beyond the legal framework of nation-state centered private international law. Taking account of the fact that overriding mandatory rules and public policy rules can be considered as general

instruments of private international law to pursue political goals, this paper analyzes the policies according to which international arbitrators accept them as transnational ordre public. The focus is on institutional arbitration of the ICC (International Chamber of Commerce) International Court of Arbitration. ICC cases that involve transnational and/or international public policy are discussed.

Between Unleashed Arbitral Tribunals and European Harmonisation: The Rome I Regulation and Arbitration
Masud Ulfat

According to prevailing legal opinion, the European Union exempts the qualitatively and quantitatively highly significant field of commercial arbitration from its harmonisation efforts. Free from the constraints that the Rome I Regulation prescribes, arbitral tribunals are supposed to be only subject to the will of the parties when determining the applicable law. This finding is surprising given the express goals of the Rome I Regulation, namely the furtherance of legal certainty in the internal market and the enforcement of mandatory rules, in particular mandatory consumer protection laws. In light of these aims, the prevailing opinion's liberal stance on the applicability of the Rome I Regulation in arbitral proceedings seems at least counterintuitive, which is why the article reassesses whether arbitral tribunals are truly as unbound as prevailing doctrine holds. In doing so, apart from analysing the Rome I Regulation with a view to its genesis and its position within the wider framework of EU law, the article will pay particular attention to the policy considerations underlying the Rome I Regulation.

The Applicable Law in Arbitration Proceedings – A *responsio*
Reinmar Wolff

Sect. 1051 German Code of Civil Procedure (ZPO) concisely determines the rules under which the arbitral tribunal shall decide on substance. The article discusses two unwritten limits to the law thus defined that are often postulated, namely the Rome I Regulation and transnational public policy. The Rome I Regulation does not apply in arbitral proceedings since it depends on the chosen dispute resolution mechanism if and which law applies. The law explicitly allows for arbitral decisions on the basis of non-state regulations or even ex aequo et bono. It thereby demonstrates that arbitration is not comprehensively bound by law. There are no gaps in protection, and be it only because the arbitral award is

subject to a public policy examination before enforcement. Consistent application throughout the Union would be out of reach for the Rome I Regulation in any event if for no other reason than the fact that it is superseded by the European Convention in arbitral proceedings. Similarly, transnational public policy – which is little selective – does not restrict the applicable law in arbitral proceedings, as the implication would otherwise be that the arbitral tribunal is being called upon to defend something like the international trade order by applying transnational public policy. The party agreement, as the only source of the arbitral tribunal's power, is no good for this purpose. The arbitral tribunal is rather no more required to test the applicable law for public policy violations under sect. 1051 ZPO than the state court has to test its lex fori. Sufficient protection is again accomplished by the subsequent review of the arbitral award for public policy violation on the recognition level. In contrast to current political tendencies, arbitration ultimately requires more courage to be free, including when determining the applicable law.

How Does the ECJ Constitutionalize the European PIL and International Civil Procedure? Tendencies and Consequences
Dominik Düsterhaus

Politics and law naturally coincide in the deliberations of the highest courts, both at national and international levels. Assessing the relationship of politics and private international law in the EU thus requires us to look at how the Court of Justice of the European Union as the supreme interpreter deals with the matter. In doing so, this contribution portrays three complementary avenues of what may be called the judicial constitutionalisation of EU private international law, i.e. the implementation of principles and values of EU integration by means of a purposive interpretation of the unified private international law rules. It is submitted that, in order to avoid uncertainty such an endeavour should be accompanied by an intensified dialogue with national courts via the preliminary ruling procedure.

Proceedings in a Foreign forum derogatum, Damages in a Domestic forum prorogatum – Fair Balancing of Interests or Unjustified Intrusion into Foreign Sovereignty?
Jennifer Antomo

Parties to international commercial contracts often agree on the exclusive

jurisdiction of a certain state's courts. However, such international choice of court agreements are not always respected by the parties. Remedies, such as anti-suit injunctions, do not always protect the party relying on the agreement from the consequences of being sued in a derogated forum. The article examines its possibility to claim damages for the breach of an international choice of court agreement.

Private International Law and Human Rights – Questions of Conflict of Laws Regarding the Liability for "Infringements of Human Rights"
Friederike Pförtner

The main conflict between private international law (PIL) and the enforcement of human rights through civil litigation consists in the existence of the principle of equality of all the jurisdictions in the world on the one hand and the efforts of some states to create their own human rights due diligence rules for domestic corporations on the other hand. Basically, the principle of equality of jurisdictions has to be strictly defended. Otherwise, PIL is in danger of being excessively used or even misused for policy purposes. However, due to the importance of the state's duty to protect human rights an exception of the principle of equality of jurisdictions might be indicated either by creating a special conflict of laws' rule or by using mandatory rules or even if there is no other way by referring to the public policy exception. Thus, the standards for liability of a corporation's home state can be applied in the particular case concerned. Nevertheless, in the highly controversial issue of transnational violations of human rights the means of PIL mentioned above have to be used very carefully and only in extreme cases.

Cross-Border Immissions in the Context of the Revised Hungarian Regulation for Private International Law
Réka Fuglinszky

This paper has a focus on cross-border nuisances from the perspective of the private international law legislation of an EU Member State with external Community borders. The new Hungarian Act XXVIII of 2017 on the Private International Law from 4 April 2017 gives rise to this essay. The article sketches the crucial questions and tendencies regarding jurisdiction (restriction of the exclusive venue of the forum rei sitae); applicable law (unity between injunctions and damage claims) and the problem of the effects of foreign administrative authorization of industrial complexes from the viewpoint of European and

Hungarian PIL.

Long Live the Principle of Territoriality? The Significance of Private International Law for the Guarantee of Effective Data Protection

Martina Melcher

According to its Article 3, the new General Data Protection Regulation (GDPR) (EU) 2016/679 applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the EU as well as (under certain conditions) to the processing of personal data of data subjects who are in the EU by a controller or a processor not established in the EU. Given that the GDPR contains public and private law, Article 3 must be qualified not only as a rule of public international law, but also as a rule of private international law (PIL). Unfortunately, the PIL nature of Article 3 and its predecessor (Article 4 Data Protection Directive 95/46/EC) is often overlooked, thus (erroneously) limiting the impact of these rules to questions of public law. Besides this relative ignorance, Article 3 GDPR presents further challenges: First, as a special PIL rule it sits uneasily in the context of the general EU PIL Regulations, in particular Rome I and II, and the interaction with these regulations demands further attention. Second, its overly broad scope of application conflicts with the principle of comity. In view of these issues, it might be preferable to incorporate a general (two-sided) PIL rule on data protection into the Rome Regulations. Such a rule could determine the law applicable by reference only to the place where the interests of the data subjects are affected. Concerns regarding potential violations of the EU fundamental right to data protection due to the application of foreign substantive law could be effectively addressed by public policy rules.

Economic Sanctions in Private International Law

Tamás Szabados

Economic sanctions are an instrument of foreign policy. They may, however, affect the legal – first of all contractual – relations between private parties. In such a case, the court or arbitral tribunal seised has to decide whether to give effect to the economic sanction. It is private international law that functions as a ‘filter’ or a ‘valve’ that transmits economic sanctions having a public-law origin to the realm of private law. The uniform application of economic sanctions would be desirable in court proceedings in order to ensure a uniform EU external policy approach and legal certainty for market players. Concerning EU sanctions,

uniformity has been created through the application of EU Regulations as part of the law of the forum. Uniformity is, however, missing among the Member States when their courts have to decide whether to give effect to sanctions imposed by third states. When deciding about non-EU sanctions, private law and private international law cannot always exclude foreign-policy arguments.

The 11th "Luxemburger Expertenforum" on the development of EU law

On 3 and 4 December 2017, the 11th "Luxemburger Expertenforum" on the development of EU law took place at the Court of Justice of the European Union. This forum is a workshop that is organised regularly by the German members of the Court of Justice (including the members of the European Court [formerly of First Instance] and the Advocates General); it is presided by the President of the CJEU, Koen Lenaerts, and attended by non-German members of the Court as well (although the discussions at the meeting are held in German).

This year's forum was divided into four parts. It started on Sunday evening with a dinner speech by the protestant Bishop of Berlin-Brandenburg, Markus Dröge, who looked back at the 500 year anniversary of the reformation and reflected upon the relationship between the church(es) and the state(s) under domestic and European laws. The latter topic was also the general subject of Monday's first morning session, which was titled "Constitutional challenges at the workplace". In this session, which was chaired by Advocate General Juliane Kokott, the tensions between an employee's right to exercise his or her religious freedom and the employer's desire for a neutral and harmonious working environment were discussed. Moreover, the speakers looked at the implications of a case pending before the CJEU for the impact of the Anti-Discimination Directives on employees working in hospitals or schools run by churches (C-68/17). The topics were approached from a constitutional perspective by Monika Hermanns, judge at the

German Constitutional Court, and Rüdiger Stotz, General Director at the CJEU and a member of the working group on EU law set up by the Conference of European Churches. Inken Gallner, judge at the Federal Labour Court, and Felix Hartmann, professor of labour law at the Free University of Berlin, added both practical and academic views from the perspective of labour law. Matthias Bartke, a social-democratic member of the German parliament, commented both on matters of politics and policy.

The second session was chaired by chamber president Thomas von Danwitz and devoted to a subject dear to readers of our blog: "Mutual trust and mutual recognition – are the structural principles of EU law still valid?". This question was approached from various angles: Dirk Behrendt, senator of justice of Berlin and a member of the German Green party, gave an overview over Berlin court practice concerning the recognition and enforcement of foreign judgments. Tim Eicke, a British judge at the European Court of Human Rights in Strasbourg, looked at the implications of the European Convention on Human Rights for mutual recognition between the EU member states. Harald Dörig. judge at the Federal Administrative Law Court, analysed the principle of mutual trust (or rather the lack thereof) in the field of migration and asylum law. Yvonne Ott, judge at the German Constitutional Court, and Alexandra Jour-Schröder, director for criminal justice at the European Commission, discussed tensions between European law on arrest warrants and domestic constitutional guarantees. After the short speeches, Jan von Hein, professor at the University of Freiburg, opened the discussion with a survey on the current state of play with regard to European civil procedure.

During lunch, Luxembourg's Minister of Foreign Affairs, Jean Asselborn, gave a speech on current challenges facing the EU and its member states, in particular with regard to migration politics (you may read the text of his speech here).

The third and final session was chaired by Alfred Dittrich, judge at the European Court, and dealt with the issue of whether and under which conditions national tax exemptions may qualify as prohibited subsidies under the TFEU. The speakers of this panel were Rudolf Mellinghoff, the president of the Federal Tax Court, Johannes Laitenberger, the General Director of the DG Competition, Kirsten Scholl from the German Ministry of Economics, Johanna Hey, professor at the University of Cologne, and Ulrich Soltész, lawyer at Gleiss Lutz in Brussels. Different views on the relationship between EU law on subsidies and domestic

laws on taxation gave rise to an open and fruitful discussion.

ERA Seminar "Access to Documents in the EU and Beyond: Regulation 1049/2001 in Practice"

By Ana Koprivica, Research Fellow MPI Luxembourg.

On 20th and 21st November 2017 in Brussels, the Academy of European Law (ERA) hosted the seminar: **"Access to Documents in the EU and Beyond: Regulation 1049/2001 in Practice"**, bringing together national and EU civil servants, lawyers, active members of the NGOs and civil society, and academics. The seminar aimed at providing participants with answers to practical questions on access to information and documents in the European Union. The focus in particular was on the practical implementation of Regulation 1049/2001 on access to documents by the EU institutions, on one hand, and by the relevant institutions in Member States, on the other. The seminar further provided for an overview of recent relevant case law of the Court of Justice of the European Union and the opportunity to deliberate about how best to implement those judgments in practice. Lastly, it offered a platform for a discussion of the future development of access to information. This post provides a brief overview of the presentations. For a full report on the presentations and of the discussions on the issues raised, see Full Report.

Following the introductory remarks by the organisers, *Prof. Päivi Leino-Sandberg* (University of Eastern Finland) provided the audience with a comprehensive overview of the diverse European Union legal landscape in which the right to information operates: namely, the EU Treaties, the Charter of Fundamental Rights and the European Convention of Human Rights.

This set the scene for the discussion about the challenges of practical

implementation of the Regulation by the representatives of the European Commission (*Martine Fouwels*), the European Parliament (*Chiara Malasomma*) and the Council of the EU (*Emanuele Rebasti*). The audience was next given a valuable insight into the best practices of several Member States, namely Sweden (*Sara Johanesson*), Finland (*Anna Pohjalainen*), and Poland (*Ewa Gromnicka*), in the application of Regulation 1049/2001 as well as the insight into the common challenges they are confronted with in this context.

Katarzyna Szychowska (General Court of the European Union) provided the audience with a comprehensive overview of the recent case law of the CJEU in matters relating to access to documents under Regulation 1049/2001. In this respect, a distinction was made between the different types of documents to which access has been requested and on which the Court has built its case law.

Day One closed with a stimulating workshop, which was prepared and conducted by *Emanuele Rebasti*. The participants were presented with a hypothetical problem of handling a request for access to documents and asked to apply the information gained during the seminar.

The next morning *Vitor Teixeira* from Transparency International Brussels presented the activities of his organisation, oriented towards creating a new system of EU lobby transparency. The focus in particular was on the idea of a mandatory EU lobby register.

The conference closed with a round table discussion on new ideas with regard to access to documents. *Nick Aiossa* (Transparency International Brussels), *Helen Darbishire* (Access Info Europe), *Graham Smith* (European Ombudsman Cabinet), exchanged their views on the ways in which to improve the dialogue between the citizens and the authorities in the area of access to information. This prompted a lively discussion amongst the participants.

The overall conclusion of the conference was that the debate on transparency and access to documents has become much more sophisticated since the adoption of the Regulation 1049/2001 and that a lot has been done in order to improve its implementation. The importance was stressed of the dialogue among all the stakeholders in order to better the situation.

Jurisdiction, Conflict of Laws and Data Protection in Cyberspace

Report on the Conference held in Luxembourg on 12 October 2017, by Martina Mantovani, Research Fellow MPI Luxembourg

On 12 October 2017, the Brussels Privacy Hub (BPH) at the Vrije Universiteit Brussel and the Department of European and Comparative Procedural Law of the Max Planck Institute Luxembourg held a joint conference entitled "Jurisdiction, Conflicts of Law and Data Protection in Cyberspace". The conference, which was attended by nearly 100 people, included presentations by academics from around the world, as well as from Advocate General Henrik Saugmandsgaard Øe of the Court of Justice of the European Union. The entire conference was filmed and is available for viewing on the YouTube Channel of the Max Planck Institute Luxembourg (first and second parts)

Participants were first welcomed by Prof. Dr. Burkhard Hess, Director of the MPI, and Prof. Dr. Christopher Kuner, Co-Director of the BPH. Both highlighted the importance of considering each of the discussed topics from both a European and a global perspective.

The first panel was entitled "Data Protection and Fundamental Rights Law: the example of cross-border exchanges of biomedical data – the case of the human genome". The speaker was Dr. Fruzsina Molnár-Gábor of the Heidelberg Academy of Sciences and Humanities, who discussed the regulatory challenges arising in connection to the processing and transfer of biomedical data, including data exchanges between research hubs within the EU and to third-countries (namely the US). The need for innovative regulatory solutions, originating from a bottom-up approach, was discussed against the backdrop of the impending entry into force of the new EU General Data Protection Regulation (GDPR), whose Article 40 encourages the adoption of Codes of Conduct intended to contribute to the proper application of the Regulation in specific sectors. According to Dr. Molnár-Gábor, however, in order to establish an optimal normative framework for biomedical

research, the regulatory approach should be combined with appropriate privacy-enhancing technologies and privacy-by-design solutions (such as the emerging federated clouds, the European Open Science Cloud, and data analysis frameworks bringing analysis to the data). This approach should also be paired with the development of adequate incentives prompting non-EU established companies to express binding and enforceable commitments to abide by EU-approved Codes of Conduct. Her presentation demonstrated the basic problem of data protection and data transfer: The creation of appropriate and applicable legal frameworks often lags behind the necessarily more rapid pace of data exchange seen in successful scientific research.

The second panel was entitled "Territorial Scope of Law on the Internet". According to Prof. Dr. Dan Svantesson of Bond University in Australia, the focus on territoriality, which characterises contemporary approaches to the solution of conflicts of laws, is the result of an inherent "territorial bias" in legal reasoning. A strict application of territoriality would however be destructive when dealing with cyberspace. Here, the identification of the scope of remedial jurisdiction should follow a more nuanced approach. Prof. Svantesson specifically focused on Article 3 of the new GDPR, which he deemed "too unsophisticated" for its intended purposes as a result of its "all-or-nothing approach" In other words, either a data controller is subject to the Regulation in its entirety, or it is totally excluded from its scope of application. As an alternative, he proposed a layered approach to its interpretation, grounded in proportionality. The GDPR, he contended, should be broken down into different sets of provisions according to the objectives pursued, and each of these sets should be assigned a different extraterritorial reach. Against this backdrop, the spatial scope of the application of provisions pertaining to the "abuse prevention layer" may, and should, be different from that of the provisions pertaining to the "rights layer" or "the administrative layer".

A response was made by Prof. Dr. Gerald Spindler of University of Göttingen, who conversely advocated the existence of an ongoing trend toward a "reterritorialization" of the Cyberspace, favoured by technological advance (geo-blocking, Internet filtering). This segmentation of the Internet is, in Prof. Spindler's opinion, the result of a business strategy that economic operators adopt to minimise legal risks. As specifically concerns private international law rules, however, a tendency emerges towards the abandonment of "strict territoriality" in favour of a more nuanced approach based on the so-called

market principle or “targeting”, which is deemed better adapted to the more permeable borders that segment cyberspace.

The third panel was entitled “Contractual Issues in Online Social Media”. The speaker was Prof. Dr. Alex Mills of University College London. A thorough analysis of Facebook’s and Twitter’s general terms and conditions brought to light private international law issues stemming from “vertical contractual relationships” between the social media platform and final users. Professor Mills highlighted, in particular, the difficult position of social media users within the current normative framework. In light of the ECJ case-law on dual purpose contracts, in fact, a characterisation of social media users as “consumers” under the Brussels I bis and the Rome I Regulations may be difficult to support. Against this backdrop, social media users are left at the mercy of choice of court and choice of law clauses unilaterally drafted by social media providers. In spite of their (generally) weaker position vis-à-vis social media giants, European social media users will in fact be required to sue their (Ireland-based) contractual counterpart in Californian courts, which will then usually apply Californian substantive law. In addition to generating a lift-off of these transactions from EU mandatory regulation, these contractual clauses also result in an uneven level of protection of European social media users. In fact, Germany-based social media users seem to enjoy a higher level of protection than those established in other EU countries. Since the contract they conclude with the social media provider usually encompass a choice of law clause in favour of German substantive law, they may in fact benefit from the European standard of protection even before Californian courts.

Prof. Dr. Heike Schweitzer of Freie Universität Berlin, highlighted a fundamental difference between E-Commerce and social media platforms. While the former have an evident self-interest in setting up a consumer-friendly regulatory regime (e.g., by introducing cost-efficient ADR mechanisms and consumer-oriented contractual rights) so as to enhance consumer trust and attract new customers, the latter have no such incentive. In fact, competition among social media platforms is essentially based on the quality and features of the service provided rather than on the regulatory standard governing potential disputes. This entails two main consequences. On the one hand, from the standpoint of substantive contract law, “traditional” contractual rights have to adapt to accommodate the need for flexibility, which is inherent to the new “pay-with-data” transactions and

vital to survival in this harshly competitive environment. On the other hand, from the standpoint of procedural law, it must be noted that within a system which has no incentive in redirecting disputes to consumer-friendly ADR mechanisms (Instagram being the only exception), private international law rules, as applied in state courts, still retain a fundamental importance.

The final roundtable dealt with "Future Challenges of Private International Law in Cyberspace". Advocate General Saugmandsgaard Øe discussed the delicate balance between privacy and security in the light of the judgment of the Court of Justice in the case C-203/15, *Tele2 Sverige*, as well as the specifications brought to the protective legal regime applicable to consumers by case C-191/15, *Verein für Konsumenteninformation v Amazon EU Sarl.* Prof. Kevin D. Benish of New York University School of Law illustrated the US approach to extraterritoriality in the protection of privacy, having particular regard to the recent *Microsoft* case (the U.S. Supreme Court recently granted certiorari). Prof. Dr. Gloria Gonzalez Fuster of Vrije Universiteit Brussels pointed to a paradox of EU data protection legislation, which, on the one hand, regards the (geographic) localisation of data as irrelevant for the purpose of the applicability of the GDPR and, on the other hand, establishes a constitutive link with EU territory in regulating data transfers to third countries. Finally, Dr. Cristina Mariottini, Co-Rapporteur at the ILA Committee on the Protection of Privacy in Private International and Procedural Law, provided an overview of the European Court of Human Rights' recent case-law on the interpretation of Article 8 ECHR. Specific attention was given to the conditions of legitimacy of data storage and use in the context of criminal justice and intelligence surveillance, namely with respect to the collection of biological samples in computerised national databases (case *Aycaguer v. France*), the use as evidence in judicial proceedings of video surveillance footage (*Vukota-Bojic v. Switzerland*) and the telecommunication service providers' obligation to store communications data (case Breyer v. Germany and case C?alovic? v. Montenegro, concerning specifically the police's right to access the stored data).

Overall, the conference demonstrated the growing importance of private international and procedural law for the resolution of cross-border disputes related to data protection. The more regulators permit private enforcement as a complement to the supervisory activities of national and supranational data protection authorities, the more issues of private international law become compelling. As of today, conflict of laws and jurisdictional issues related to data

protection have not been sufficiently explored, as the discussion on private law issues related to the EU General Data Protection Regulation demonstrates. With this in mind, both Brussels Privacy Hub and MPI have agreed to regularly organize conferences on current developments in this expanding area of law.

Codification in International and EU Law – Call for Papers

The XXIII Annual Conference of the Italian Society of International and EU Law (SIDI-ISIL) will take place at the University of Ferrara on 7 and 8 June 2018.

The conference's theme is *Codification in International and EU Law*.

One session of the Conference will deal with *The coordination between different codification instruments* (8 June 2018, 9 am – 1 pm). Speakers will be selected through a call for papers.

Scholars of any affiliation and at any stage of their career are invited to submit proposals relevant to the session topic, including (but not limited to) the following:

- Relationship between codification instruments covering the same topics and promoted by different organizations or entities (e.g., the ECHR and the EU Charter of Fundamental Rights; uniform private international law instruments promoted by the Hague Conference on Private International Law and by the European Union; international environmental law and transnational criminal law instruments promoted at UN and regional levels)
- Relationship between codification instruments covering different fields (eg, human rights and other areas of international or EU law; law of international responsibility and other areas of international law)
- Succession of codification instruments in the same field.

The deadline for submitting proposals is 10 January 2018.

Cuadernos de Derecho Transnacional vol. 9 (2)

Cuadernos de Derecho Transnacional, vol. 9, nr. 2, has just been released. *Cuaderno*s is a bi-annual electronic law journal specialized in International Private Law, Uniform Law and Private Comparative Law, open to contributions in different languages. It is edited by the Private International Law Department of the University Carlos III, Madrid.

All contents can be freely downloaded. Here is the index of the section "Estudios":

> Miguel Gómez Jene, *El convenio arbitral: statu quo* (The arbitration agreement: statu quo)
>
> Hilda Aguilar Grieder, *Problemas de Derecho Internacional Privado en la contratación de seguros: especial referencia a la reciente directiva (UE) 2016/97 sobre la distribución de seguros* (Private International Law problems of the international insurance contracts: the new directive (UE) 2016/1997 about distribution of insurance)
>
> Isabel Antón Juárez, *La oposición del régimen económico matrimonial y la protección del tercero en Derecho Internacional Privado* (The opposition of the matrimonial property regime and the protection of the third party in Private International Law)
>
> Ilaria Aquironi, *L'addebito della separazione nel diritto internazionale privato dell'Unione Europe*a (Judicial decisions as to the causes of separation under EU private international law)
>
> Naiara Arriola Echaniz, *La Unión Europea y la Organización Mundial del Comercio: comenzando un diálogo proto- constitucional* (The European Union and the World Trade Organization: a budding proto-constitutional dialogue)

Irene Blázquez Rodríguez, *Libre circulación de personas y Derecho Internacional Privado: un análisis a la luz de la jurisprudencia del Tribunal de Justicia de la Unión Europea* (Free movement of persons and International Private Law: an analysis in the light of the case law of the European Court of Justice)

María Asunción Cebrián Salvat, *La competencia judicial internacional residual en materia contractual en España* (The Spanish rules of residual jurisdiction in matters related to contract)

Silvia Pilar Badiola Coca, *Algunas consideraciones sobre el régimen de la responsabilidad civil del porteador en la legislación marítima de Emiratos Árabes Unidos* (Some considerations regarding the maritime carrier liability under the United Arab Emirates maritime law)

Clara Isabel Cordero Álvarez, *Incidencia de las normas imperativas en los contratos internacionales: especial referencia a las normas de terceros estados desde una aproximación europea* (Overriding mandatory provisions in international contracts: a special reference to foreign overriding mandatory provisions from a European approach)

Eva de Götzen, *Recognition of same-sex marriages, overcoming gender barriers in Italy and the Italian law no. 76/2016 on civil unions. First remarks* (Riconoscimento dei matrimoni omosessuali, superamento delle barriere di genere in Italia e legge n. 76/2016 sulle unioni civili. Prime riflessioni)

Carlos Manuel Díez Soto, *Algunas cuestiones a propósito del derecho de participación del autor de una obra de arte original sobre el precio de reventa (droit de suite)* (Some questions concerning the artist's resale right (droit de suite)

Dorothy Estrada Tanck, *Protección de las personas migrantes indocumentadas en España con arreglo al Derecho Internacional y Europeo de los derechos humanos* (Protection of undocumented migrant persons in Spain under international and European human rights law)

Ádám Fuglinszky, *Hungarian law and practice of civil partnerships with special regard to same-sex couples* (Das Ungarische Recht und praxis von lebenspartnerschaften mit besonderer rücksicht auf gleichgeschlechtliche

pare)

Natividad Goñi Urriza, *El sometimiento de las adquisiciones minoritarias que no otorgan el control a las normas sobre el control de las concentraciones* (The control under merger rules of acquisitions of non-controlling minority shareholdings)

Luis Ignacio Gordillo Pérez, *El TJUE y el Derecho Internacional: la defensa de su propia autonomía como principio constitucional básico* (The CJEU and International Law: the defence of its own autonomy as a basic constitutional principle)

Thais Guerrero Padrón, *Sobre los funcionarios de la Unión Europea y su régimen de seguridad social: los tributos como cotizaciones sociales a efectos del TJUE* (Issues about officials of the European Union and its social security regime: taxes as social contributions to the effects of the CJEU)

Carlos María López Espadafor, *Lagunas en el Derecho Tributario de la Unión Europea* (Gaps in the tax law of the European Union)

Isabel Lorente Martínez, *Brexit y cláusulas de sumisión en los contratos internacionales* (Brexit and prorrogation clauses in international contracts)

Diana Marín Consarnau, L*as uniones registradas en España como beneficiarias del derecho de la UE a propósito de la Directiva 2004/38/CE y del Reglamento (UE) 2016/1104* (Spanish "registered partnerships" as beneficiaries of EU law according to the Directive 2004/38 (EC) and the Regulation (EU) 2016/1104)

Fabrizio Marongiu Buonaiuti, *La disciplina della giurisdizione nel Regolamento (UE) n. 2016/679 concernente il trattamento dei dati personali e il suo coordinamento con la disciplina contenuta nel regolamento "Bruxelles I-bis"* (Jurisdiction under Regulation (EU) no. 2016/679 concerning the processing of personal data and its coordination with the "Brussels I-bis" regulation)

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Spain)

Marta Requejo Isidro, *La protección del menor no acompañado solicitante de asilo: entre Estado competente y Estado responsable* (The protection of unaccompanied minors asylum-seekers: between competent state and responsible state)

Mercedes Sánchez Ruiz, *La regulación europea actual sobre emplazamiento de producto y la propuesta de reforma de la directiva de servicios de comunicación audiovisual* (The current European rules governing product placement and the new legislative proposal amending the audiovisual media services directive)

Stella Solernou Sanz, *Los límites a la autonomía privada en el marco del contrato de transporte de mercancías por carretera* (Limits on private autonomy in the framework of the contract for carriage of goods by road)

Lenka Válková, *The interplay between jurisdictional rules established in the EU legal instruments in the field of family law: testing functionality through simultaneous application with domestic law* (L'interazione tra le regole di giurisdizione all'interno degli strumenti giuridici dell'UE nell'ambito del diritto di famiglia: la prova del funzionamento attraverso l'applicazione simultanea del diritto nazionale)