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

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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.

Out now: Cross-Border Litigation in Europe

Hart Publishing Ltd. (UK) has just announced the release of **Cross-Border Litigation in Europe**, edited by *Paul Beaumont, Mihail Danov, Katarina Trimmings* and *Burcu Yüksel* (ISBN 9781782256762, £90.00). The following description is drawn from the publisher's flyer:

"This substantial and original book examines how the EU Private International Law (PIL) framework is functioning and considers its impact on the

administration of justice in cross-border cases within the EU. It grew out of a major project (ie **EUPILLAR**: European Union Private International Law: Legal Application in Reality) financially supported by the EU Civil Justice Programme. The research was led by the Centre for Private International Law at the University of Aberdeen and involved partners from the Universities of Freiburg, Antwerp, Wroclaw, Leeds, Milan and Madrid (Complutense).
The contributors address the specific features of cross-border disputes in the EU by undertaking a comprehensive analysis of the Court of Justice of the EU (CJEU) and national case law on the Brussels I, Rome I and II, Brussels IIa and Maintenance Regulations. Part I discusses the development of the EU PIL framework. Part II contains the national reports from 26 EU Member States. Parts III (civil and commercial) and IV (family law) contain the CJEU case law analysis and several cross-cutting chapters. Part V briefly sets the agenda for an institutional reform which is necessary to improve the effectiveness of the EU PIL regime. This comprehensive research project book will be of interest to researchers, students, legal practitioners, judges and policy-makers who work, or are interested, in the field of private international law."

For further details, please click here.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 6/2017: Abstracts

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

P. Mankowski: **The German Act on Same-Sex Marriages, its consequences and its European vicinity in private international law**

Finally, Germany has promulgated its Act on Same-Sex Marriages. In the arena of private international law the Act calls for equal treatment of same-sex marriages

and registered partnerships whereas in German substantive law it aligns same-sex marriages with traditional marriages and institutionally abandons registered partnerships pro futuro. In private international law the Act falls short of addressing all issues it should have addressed in light of its purpose. In particular, it lacks provisions on the PIL of kinship and adoption – and does not utter a single word on jurisdiction or recognition and enforcement of foreign judgments. In other respects it is worthwhile to have a closer look at its surroundings and ramifications in European PIL (Brussels IIbis, Rome III, Matrimonial Property, and Partnership Property Regulations), i.e. at the coverage which European PIL exacts to same-sex marriages.

P.F. Schlosser: **Brussels I and applications for a pre-litigation preservation of evidence**

The judgement is revealing a rather narrow finding. An application for a pre-litigation preservation of evidence is within the meaning of Art. 32 Brussels Ia Regulation not tantamount to "the document instituting the proceedings or an equivalent document". The commentator is emphasizing that this solution cannot be subject to any reasonable doubt. He further explains, however, that the Regulation is applicable to such applications and the ensuing proceedings to the effect that the outcome of such a preservation of evidence must be recognized to the same degree as a domestic preservation is producing effects in the main proceedings. In particular is it clear for him, that such recognition must not be restricted by the German numerus clausus of legally recognized means of evidence.

T. Lutzi: **Jurisdiction at the Place of the Damage and Mosaic Approach for Online Acts of Unfair Competition**

Once again, the Court of Justice was asked to determine the place of the damage under Art. 5 No. 3 Brussels I (now Art. 7(2) Brussels Ia) for a tort committed online. The decision can be criticised both for its uncritical reception of the mosaic approach and for the way in which it applied the latter to the present case of an infringement of competition law through offers for sale on websites operated in other member states. Regardless, the decision confirms the mosaic approach as the general rule to identify the place of the damage for torts committed through the internet.

K. Hilbig-Lugani: **The scope of the Brussels IIa Regulation and actions for annulment of marriage brought by a third party after the death of one of the spouses**

The ECJ has decided that an action for annulment of marriage brought by a third party after the death of one of the spouses falls within the scope of Regulation (EC) No 2201/2003. But the third party who brings an action for annulment of marriage may not rely on the grounds of jurisdiction set out in the fifth and sixth indents of Art. 3(1)(a) of Regulation No 2201/2003. The ECJ does not differentiate between actions for annulment brought after the death of one of the spouses and an action for annulment brought by a third party. The decision raises several questions with regard to the application of Art. 3 of Regulation No 2201/2003.

J. Pirrung: **Forum (non) conveniens – Application of Article 15 of the Brussels IIbis Regulation in Proceedings Before the Supreme Courts of Ireland and the UK**

On a reference submitted by the Irish Supreme Court, the ECJ ruled that Art. 15 of Council Regulation (EC) No 2201/2003 (Brussels IIa) is applicable where a child protection application brought under public law concerns the adoption of measures relating to parental responsibility, (even) if it is a necessary consequence of a court of another Member State assuming jurisdiction that an authority of that other State thereafter commence proceedings separate from those brought in the first State, pursuant to its own domestic law and possibly relating to different factual circumstances. In order to determine that a court of another Member State with which the child has a particular connection is better placed, the court having jurisdiction must be satisfied that the transfer of the case to the other court is such as to provide genuine and specific added value to the examination of the case, taking into account the rules of procedure applicable in the other State. In order to determine that such a transfer is in the best interests of the child, the court having jurisdiction must be satisfied that the transfer is not liable to be detrimental to the situation of the child, and must not take into account, in a given case relating to parental responsibility, the effect of a possible transfer of the case to a court of another State on the right of freedom of movement of persons concerned other than the child, or the reason why the mother exercised that right, prior to the court being seised, unless those considerations are such that there may be adverse repercussions on the situation of the child. The judgment is juxtaposed to the decision of the UK Supreme Court

– pronounced some months before that of the ECJ – in re N, an Art. 15 case concerning a different situation without freedom of movement questions. Both jurisdictions have found acceptable results, the UKSC, though happily much faster than the ECJ, perhaps not entirely without one or the other risk concerning its treatment of procedural questions

A.-R. Börner: **News on the competence-competence of arbitral panels under German law – Simultaneously a note on the Federal High Court decision of August 9, 2016, I ZB 1/15**

The Federal Court of Justice of Germany has decided that the arbitration clause even survives the insolvency of a party (severability), unless stipulated to the contrary or in case of the existence of reasons for the nullity or termination of the arbitral agreement, such reasons either existing separately or resulting from the main contract. Under the German Law of Civil Procedure, the challenge to the state court that – contrary to an early decision of the arbitration panel affirming its competency – the panel has no competency, must be raised within the very short timeframe of one month, otherwise the judicial review will be forfeited. The Federal Court of Justice had held until now that in case of a (supervening) final award the state court procedure ended and that the arguments against the competency had to be raised anew in the procedure on the enforceability of the award. The Court has now accepted the criticism by the scientific literature that this places an undue burden on the challenging party. So it now holds that the second procedure (on enforceability) will be stayed until the first procedure (on competency) is terminated, as its result takes precedence.

B. Köhler: **Dual-use contracts as consumer contracts and no attribution of consumer status of a third party to the proceedings under Brussels-I Regulation**

The determination of the scope of the provisions on jurisdiction over consumer contracts in Art. 15 to 17 Brussels I Regulation is one of the most controversial problems in international procedural law. The German Federal Supreme Court's decision raises two interesting questions in this respect. The first controversial issue concerns the classification of contracts for both professional and private purposes as consumer contracts. In its judgment Gruber, the European Court of Justice had held that such a dual-purpose contract can only be considered a consumer contract if the role of the professional purpose is marginal. However,

the European legislator adopted the criterion of predominant purpose in recital 17 to the Consumer Rights Directive (2011/83/EU). Regrettably, the German Federal Supreme Court missed an opportunity to clarify the classification of dual-purpose contracts within the Brussels I Regulation. The Court applied the criterion laid down by the ECJ in Gruber without further discussion. In a second step, the Court held – convincingly – that Art. 16 (2) Brussels I Regulation presupposes that the consumer is a party to the proceedings. The capacity of consumer of a third party cannot be attributed to a defendant who, him- or herself, is not a consumer.

L. Hübner: **The residual company of the deregistered limited**

The following article deals with the consequences of the dissolution of companies from a common law background having residual assets in Germany. The prevailing case law makes use of the so-called "Restgesellschaft" in these cases. By means of three judgments of the BGH and the Higher Regional Court of Brandenburg, this article considers the conflicts of laws solutions of these courts and articulates its preference for the application of German company law on the "Restgesellschaft". It further analyses the subsequent questions as regards the legal form and the representation of the "Restgesellschaft", and the implications of the restoration of the foreign company.

D. Looschelders: **Temporal Scope of the European Succession Regulation and Characterization of the Rules on the Invalidity of Joint Wills in Polish Law**

Joint wills are not recognized in many foreign legal systems. Therefore, in cross-border disputes the use of joint wills often raises legal problems. The decision of the Schleswig-Holstein Higher Regional Court concerns the succession of a Polish citizen, who died on 15 October 2014 and had drawn up a joint will along with his German wife shortly before his death. The problem was that joint wills are invalid under Polish law of succession. First, the court dealt with the question whether the case had to be judged according to the European Succession Regulation or according to the former German and Polish private international law. The court rightly considered that in Germany the new version of Art. 25 EGBGB does not extend the temporal scope of the European Succession Regulation. Hereafter the court states that the invalidity of joint wills under Polish law is not based on a content-related reason but is a matter of form. Therefore, the joint will would be

valid under the Hague Convention on the Form of Testamentary Dispositions. This decision is indeed correct, but the court's reasoning is not convincing in all respects.

C. Thomale: **The anticipated best interest of the child – Strasburgian thoughts of season on mother surrogacy**

The ECtHR has reversed its opinion on Art. 8 ECHR. The protection of private and family life as stipulated therein is subject to a margin of appreciation far wider than hitherto expected. In stating this view, the ECtHR also takes a critical stand towards mother surrogacy: Restricting the human right to procreate, national legislators are given room to protect the child's best interest inter alia through deterrence against surrogacy. The article investigates some implications of this new landmark decision, which is being put into the context of ongoing debates on international surrogacy.

K. Thorn/P. Paffhausen: **The Qualification of Same-sex Marriages in Germany under Old and New Conflict-of-law Rules**

In its decision in case XII ZB 15/15 (20th April 2016) the German Federal Court of Justice recognized the co-motherhood of a female same-sex couple, registered in South Africa, for a child born by one of the women. While underlining that the result of the decision – the legal recognition of the parenthood – is right, the authors point out the methodological weaknesses of the reasoning. In their opinion, a same-sex marriage celebrated abroad had to be qualified as a "marriage" in Art. 13 EGBGB and not – as the Court held – as a "registered life partnership" in Art. 17b EGBGB (old version). Also, they demonstrate that the Court's interpretation of Art. 17b para. 4 EGBGB (old version) as well as the reasoning for the application of Art. 19 para. 1 s. 1 EGBGB are not convincing. Following the authors' opinion, the right way to solve the case would have been the legal recognition of the parenthood (as an individual case) because of Art. 8 ECHR. As Germany recently legalized same-sex marriage, the authors also show which impacts the new law will have on Germany's international matrimonial law. In particular, they point out the new (constitutional) questions risen by the new conflict-of-law-rule for same-sex marriages in Art. 17b EGBGB (new version).

D. Martiny: **Modification and binding effect of Polish maintenance orders**

The two decisions of the German Courts of Appeal concern everyday problems in

modifying maintenance orders given in the context of Polish divorce decrees. In both cases the Polish district courts ordered the fathers to pay child maintenance. At that point in time, the children already lived in Germany. The foreign orders did not state the grounds for the decision in respect of either the conflict-of-law issue or the substantive law issue. The recognition of the orders under the Maintenance Regulation in the framework of the German modification proceedings (§ 238 Family Proceedings Act – Familienverfahrensgesetz; FamFG) did not pose any difficulty. However, according to established German practice, foreign decisions have a binding effect as to their factual and legal basis. Whereas the Frankfurt court's interpretation of the Polish decision concluded that it was based on German law, the Bremen court assumed in its proceedings that the foreign decision was based on Polish law. The Bremen court stated a binding effect existed even if the foreign decision applied the incorrect law. The Bremen court then gave some hints as to how the assessment of maintenance should be made in the German proceedings under Polish substantive law.

Conference in Macerata (25 October 2017): Freedom of Movement of Persons in the EU and the Continuity of Family Status – Problems concerning Registered Partnerships and Cohabitation

(I am grateful to Prof. Fabrizio Marongiu Buonaiuti for providing this presentation of the Macerata conference)

The European Documentation Centre (EDC) established at the **Department of**

Law of the University of Macerata is hosting a Conference (in Italian) on **Wednesday, 25th October 2017**, as part of a programme of initiatives launched by the European Commission's Permanent Representation to Italy for celebrating the 60th Anniversary of the Treaties of Rome: **"60 anni di libertà di circolazione delle persone nell'Unione europea e continuità degli status familiari: la problematica delle unioni civili e delle convivenze"** (60 Years of Freedom of Movement of Persons in the European Union and the Continuity of Family Status: Problems concerning Registered Partnerships and Cohabitation).

The Conference deals with the implications for the freedom of movement of persons within the EU of the problems related to the continuity of family *status* acquired abroad, with particular regard to registered partnerships and cohabitation. A discussion on this topic appears particularly timely, in consideration of the recent adoption by the Italian legislature of both the substantive regulation of registered parterships (unioni civili) and cohabitation (convivenze) under law No. 76 of 20 May 2016, and the relevant conflict of laws rules, as set out in Legislative Decree No. 7 of 19 January 2017. The parallel developments taking place at the European Union level will also be taken into consideration, with particular regard to the recent adoption, by the implementation of an enhanced cooperation, of Regulation (EU) No. 1104/2016, concerning jurisdiction, applicable law and the recognition and enforcement of judgments in matters of the property consequences of registered partnerships.

Here is the programme (available as .pdf; all presentations will be delivered in Italian):

Introductory remarks

- *Prof. Francesco Adornato* – Dean of the University of Macerata
- *Prof. Ermanno Calzolaio* – Director of the Department of Law

Ist Session: Freedom of Movement of Persons and Continuity of Personal and Family Status

Chair: *Prof. Angelo Davì*, University of Rome "La Sapienza"

- Registered Partnerships and Freedom of Movement of Persons in the European Space of Freedom, Security and Justice – *Prof. Claudia Morviducci*, University of Rome III

- European Guarantees and Rules concerning Continuity of *Status* as concerns Same-Sex Marriages and Registered Partnerships – *Prof. Francesco Salerno*, University of Ferrara
- Italian Conflict of Laws Rules concerning Registered Partnerships under Legislative Decree No. 7 of 19 January 2017 – *Prof. Cristina Campiglio*, University of Pavia
- Private International Law Rules concerning the Property Consequences of Registered Partnerships under Regulation (EU) No. 1104/2016 – *Prof. Gian Paolo Romano* – University of Geneva

Discussion

2nd Session: The Substantive Regulation of Registered Partnerships and Cohabitation in the Italian Legal System and Unsolved Problems

Chair: *Prof. Enrico del Prato*, University of Rome "La Sapienza"

- The Substantive Regulation of Same-Sex Registered Partnerships under Law No. 76 of 20 May 2016 – *Prof. Michele Sesta*, University of Bologna
- The Substantive Regulation of Cohabitation under Law No. 76 of 20 May 2016 – *Prof. Ubaldo Perfetti*, University of Macerata
- Adoption by Partners of Registered Partnerships – *Prof. Enrico Antonio Emiliozzi*, University of Macerata
- Problems Concerning the Registration of Partnerships Created Abroad in the Italian Civil *Status* Records – *Dr. Renzo Calvigioni* – National Association of Civil Status Officials

Discussion

Concluding Remarks

Book: Marrella, "Manuale di

diritto del commercio internazionale”

Prof. *Fabrizio Marrella*, Chair of International Law (“Cà Foscari” University of Venice & LUISS University of Rome) has recently published “Manuale di diritto del commercio internazionale” (CEDAM, 2017). A presentation has been kindly provided by the author (the complete TOC is available on the publisher’s website):

> *Following the success of previous publication by the same Author, this book provides the first University textbook of International Business Law in Italian designed to introduce students and practitioners to this fundamental field of law. It classifies different sources of law affecting trasnational business operations according to their origin and legal system (National – i.e. Italian, European Union, Intergovernmental and non national – i.e. new lex mercatoria and the Unidroit Principles for international Commercial Contracts, as well as identifies the different actors in the field (companies, States, Intergovernmental Organizations, Non Governmental Organizations).*
>
> *In such a framework, rules of International Economic Law (from WTO to the new EU Customs Code, from economic treaties to embargos) provides the setting into which the core contract are operationals. Thus, the main perspective of the book is that of Private International Law by which different rules are applied according to their sphere of application. Among the topics discussed, there are the main transnational business contracts (i.e. sales, transport, payment methods, insurance, agency and distribution contracts, intellectual property, trade finance, bank guarantees, foreign direct investments) and the most prominent dispute resolution mechanisms such as Arbitration and ADRs.*
>
> *The book takes into proper account, inter alia, the Unidroit Principles for International Commercial Contracts 2016; EU Regulation n. 1215/2012 (Regulation Brussels Ia) and the new ICC Arbitration Rules 2017.*

Title: F. Marrella, “Manuale di diritto del commercio internazionale”, Padua, CEDAM, 2017.

ISBN: 978-88-13-36293-5. Price: EUR 55. Pages: XXXII-800. Available at CEDAM.

Litigación Internacional en la Unión Europea I: el Reglamento Bruselas I-bis

A new book on the Brussels I-bis Regulation, opening a brand new collection of Treaties on European Private International Law, has just seen the light. Entitled "Litigación internacional en la Unión Europea I: el Reglamento Bruselas I-bis" ("International litigation in the European Union I: the Brussels I-bis Regulation"), it is authored by Alfonso-Luis Calvo Caravaca, Javier Carrascosa González and Celia Caamiña Domínguez.

The book is divided into two major parts. The first is devoted to the European system of private international law. It examines the impact of European freedoms of movement on the European rules of private international law and the legal techniques used by the European legislator and the European court of Justice to implement these freedoms: the principle of mutual recognition (*Anerkennungsprinzip*), the doctrine of the "Law of origin" as a general rule of Private International Law and the creation of all-European new conflict rules. The process of europeanisation of Private International Law and its direct relationship with the European judicial area is also set out. To conclude this first part, the legal scenario of European private international law is analyzed, with a particular focus on the "Brussels Regulations" and the "Rome Regulations", as the fundamental pillars of EU private international law.

The second part is devoted to an in-depth study of the Brussels I-bis Regulation. It covers the general aspects of this important bastion of European private international law, as well as the rules of international jurisdiction those regarding extraterritorial validity of judgments and other decisions.

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28/08/2017. Number of pages: 850.

For more information, click here

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Javier Carrascosa González is Professor of Private International Law at the University of Murcia, Spain, as well as the director of the Accursio DIP blog)

Celia Caamiña Domínguez is Lecturer of Private International Law at the University Carlos III, Madrid, Spain. She is currently in charge of the editorial management of CDT.

Opinion of Advocate General Bobek on jurisdiction in cases concerning violations of personality rights on the internet (Bolagsupplysningen, C-194/16)

We have already alerted our readers to the preliminary reference triggered by the Estonian Supreme Court concerning violations of personality rights of legal persons committed via the internet (**Bolagsupplysningen OÜ, Ingrid Ilsjan v. Svensk Handel AB**; *see our previous post here). Recently, AG Bobek has presented his conclusions in this case (see here).* ***Anna Bizer****, doctoral candidate at the University of Freiburg, has kindly provided us with her thoughts on this topic:*

After the case *eDate* (C-509/09 and C-161/10), the CJEU will have to rule on the question of how Art. 7 (2) Brussels I*bis* is to be interpreted when personality

rights are violated on the internet for the second time. This case provides not only the first opportunity to confirm or correct the Court's ruling on *eDate*, but also poses further questions:

1) Which courts have jurisdiction when the claimant seeks removal of the publication in question?
2) Should legal persons be treated the same way as natural persons under Art. 7(2) Brussels I*bis* concerning personality rights?
3) If question 2) is to be answered in the affirmative, where is the centre of interest of a legal person?

AG Bobek holds the following opinion:
•In cases concerning personality rights violations on the internet, the place where the damage occurs is the place where the claimant has his centre of interest – regardless of whether the claimant is a natural or legal person. The same applies to claims of removal.
•The place where a legal person conducts its main professional activities is its centre of interest.
•It is possible that a person has more than one centre of interest.
•The mosaic approach as developed in case *Shevill* should not be applied to personality infringements on the internet at all.

The facts

The claimant is an Estonian company operating mostly in Sweden whose management, economic activity, accounting, business development and personnel department are located in Estonia. The company claims to have no foreign representative or branch in Sweden. A Swedish employers' federation blacklisted the Estonian company for "deals in lies and deceit" on its website, what led to an enormous amount of comments capable of deepening the harm to the company's reputation. All information and comments were published in Swedish and caused a rapid decrease in turnover, which was listed in Swedish kroner.
The Estonian company brought an action before Estonian courts asking for rectification of the published information and removal of the comments from the website as well as damages for pecuniary loss. The referring court doubted its jurisdiction based on the Brussels I*bis* Regulation.

The Law

The basic principle in jurisdiction is that claims have to be brought before the courts where the defendant is domiciled (Art. 4 Brussels I*bis*). According to Art. 7 Brussel I*bis*, the claimant can also choose to sue before the courts of a member state that have special jurisdiction, i.e. in tort cases, the place where the harmful event originated as well as the place where the harm was suffered. In *Shevill* (C-68/93), the CJEU ruled that the courts of those member states have jurisdiction where the establishment of the publisher is located as well as the courts of the state in which the newspaper was published and where the claimant asserts to have suffered harm to his reputation. The latter jurisdiction is limited to the harm suffered in this member state. Concerning the violation of personality rights and reputation on the internet (*eDate*), the CJEU transferred the *Shevill*-ruling to online publications and added a third possibility: the courts of the member state where the victim has his centre of interest.

Reasoning of AG Bobek

AG Bobek answers the questions in three parts: First, he explains why the jurisdiction of the courts in the member state where the centre of interest is located should be open to legal persons as well (A). In a second step, he proposes a more strict interpretation of Art. 7 (2) Brussels I*bis* compared to the case *eDate* and gives reasons why the mosaic approach should not be applied to personality infringements on the internet at all (B). In the last part, he aims at giving an alternative solution for claims for an injunction ordering the rectification and removal if the CJEU decides to continue with the mosaic approach (C).

(A) AG Bobek sees the main reason for creating the new head of jurisdiction in *eDate* in the protection of fundamental rights. Examining the case law of the CJEU and the ECtHR, he records that the personality and the reputation of legal persons are protected but restrictions are easier to justify that restrictions to rights of natural persons. In his opinion, fundamental rights should not be valued differently. Hence, the protection of fundamental rights of natural persons as intended by *eDate* should be at the same level as the protection of the fundamental rights of legal persons.
He recommends, however, that the CJEU puts aside the issue of fundamental rights since the Brussels Ibis regulation must be applied to determine jurisdiction as long as a legal person can sue the alleged violator of its personality rights or reputation according to the Member States' law. Therefore, the CJEU has to answer the Estonian court's questions regarding its jurisdiction irrespective of the

level of protection.
As Art. 7 (2) Brussels I*bis* is applicable to claims concerning the violation of personality rights of a legal person, a distinction between legal and natural persons within this regulation might only be justified if natural persons were typically the "weaker party". AG Bobek objects to this general assumption mentioning the diversity of legal persons, on the one hand, and the growth of power that natural persons experience thanks to the medium internet on the other hand. He also points out that special jurisdiction does not aim to protect a weaker party but to "facilitate the sound administration of justice" (Recital 16 Brussels I*bis*). Therefore, natural and legal persons should not be treated differently under Art. 7 (2) Brussels I*bis*.

(B) According to AG Bobek, the mosaic approach is not adequate for cases concerning the violation of personality rights on the internet. As online publications can be accessed worldwide, lawsuits might be brought in all 28 member states. The mosaic approach is based on the idea that the harm in one member state can be measured. But unlike newspapers online publications do not have a number of copies that can be counted. Especially due to the easy access to machine translation it is impossible to measure the harm suffered in one member state. The opportunity to sue in 28 different states leads to the possibility of abuse and is also not compatible with the aim of predictability of jurisdiction. The mosaic approach also provokes difficulties to coordinate the different proceedings, especially concerning *lis pendens* and *res judicata*.
Therefore, AG Bobek proposes the following: The place where the event giving rise to harm took place should be the location of the person(s) controlling the information typically being identical with the domicile of the publisher. The place where the harm occurred should be "where the protected reputation was most strongly hit", i.e. the person's centre of interest.
According to AG Bobek, the centre of interest depends on "the factual and social situation of the claimant viewed in the context of the nature of the particular statement". For natural persons, the habitual residence should be the basic element. Concerning legal persons, the centre of interest is in the member state where it "carries out its main professional activities provided that the allegedly harmful information is capable of affecting its professional situation". That is supposed to be where the legal person records the highest turnover or, in the case of non-profit organisations, where most of the clients can be located.
AG Bobek argues that in respect of a specific claim, a (natural or legal) person

can have more than one centre of interest. Consequently, a claimant with more than one centre of interest can choose between several member states. Each jurisdiction identified that way comprises the entire harm suffered.

(C) Concerning the rectification and removal of a publication, AG Bobek states that those claims are indivisible by nature because of the unitary nature of the source. AG Bobek argues that an alternative solution is actually impossible even if the CJEU prefers to continue with the mosaic approach.
The overall result remains that the mosaic approach is not an adequate solution for personality infringement on the internet.

Assessment of the AG's opinion

AG Bobek raises some important issues concerning the infringement of personality rights on the internet. Following the AG's opinion, the result will typically be that Art. 7 (2) Brussels I*bis* allows the claimant to sue before the courts of the member state where he has his domicile. Thus, it creates a *forum actoris* that is the complete opposite of the basic rule of jurisdiction according to which the claimant has to sue at the domicile of the defendant (Art. 4 Brussels I*bis*). Exceptions to a basic rule should be applied restrictively and only where the law explicitly allows doing so or where the aim of the law requires an exception.

Concerning the place where the event giving rise to harm took place, I can agree with AG Bobek. In internet cases, the crucial place of acting is normally the place where the allegedly infringing publication was uploaded. The disadvantage of this approach is that this place can be random and may lack the specific connection to the place. This applies especially when a natural person uploads the publication while travelling. Thus, the approach of the AG proposing the place where the person normally has control over the publication avoids jurisdiction based on a merely fugitive connection to a member state.

AG Bobek quite rightly points out that the mosaic approach is not adequate for the medium internet due to the worldwide accessibility. And since the European conflict-of-law system excludes personality rights and reputation (Art. 1(2)(g) Rome II), the mosaic approach applied to online cases can provoke forum shopping – especially if applied to claims for an injunction for rectification or removal.

The CJEU maybe should consider determining the centre of interest by other

criteria that take more into account the specific circumstances of the case. Applying the definition of AG Bobek, the place where the harm occurs will almost always be where the claimant has his main administration (or his habitual residence in case of a natural person) irrespective to how strong the connection to another state may be. In the case at hand, the pecuniary damage and the economic consequence are probably in Estonia but the appearance of the company is mainly affected in Sweden. For example, the comments (mainly in Swedish and uploaded from Sweden) can not only be personality violations themselves but also show that the originally published information affected the reputation of the company in Sweden.

Furthermore, it is doubtful whether a person can have various centres of interest. It shifts the balance of interests that was tried to reach in *eDate* to the advantage of the claimant: the claimant may ask for the entire damages in another state than the state of the defendant's domicile (advantage to the claimant) but he cannot choose between different states– and thus between different choice-of-law rules – as it would be possible under the mosaic approach (advantage for the defendant). Of course, there might be cases where the centre of interest is difficult to identify. The approach of the AG, however, implies that in those difficult cases the claimant might just choose. I am not sure if this really fosters predictability. Besides, it is somehow contradictory because the concept of the centre of interest is that even if the person-ality is affected in another state to a considerable extent, the courts in that state should not have jurisdiction.

I cannot agree with the AG concerning the relevance of fundamental rights. Of course, the level of protection is not relevant to the question whether the Brussels I*bis* Regulation is applicable or not – including special jurisdiction. Nevertheless, the fundamental rights can influence how jurisdictional rules have to be interpreted. AG Bobek himself states that *eDate* can be understood as the protection of fundamental rights. Thus, the CJEU should consider whether the decision on *eDate* offering a claimant-friendly approach is owed to the fact that it is necessary to protect fundamental rights of the affected natural persons. If that is the case, the reasoning cannot simply be transferred to legal persons. It is rather necessary to check if the personality rights and the reputation of a legal person can justify the restrictions to the rights of the defendant, e.g. freedom of speech.

Conference on the "Codification of Private International Law" – Cologne, 23-24 September 2016: Proceedings now published in IPRax 2/2017

The year 2016 did not only mark 30 years since the great reform of German private international law in 1986, but it was also the 35th anniversary of the foundation of the *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)*. Therefore, Professor *Heinz-Peter Mansel*, President of the German Council for Private International Law and editor-in-chief of IPRax, and Professor *Jan von Hein*, chairman of the Council's 2nd Commission, organized a celebratory conference on **23-24 September 2016** at the University of Cologne (Germany) under the title: **"Codification of Private International Law: German Experience and European Perspectives Thirty Years After the PIL-Reform of 1986"** (see our previous post here). The conference was (mostly) held in German and generously supported by Gieseking, the publisher of IPRax. After being welcomed by Dr. Johannes C. Wichard (Federal Ministry of Justice and for Consumer Protection), the speakers – members of the German Council and a guest from Switzerland – both analyzed how private international law has evolved in the past and provided an outlook on current and future challenges of the field, particularly in the European context. The conference proceedings have now been published in IPRax 2/2017. The abstracts (kindly provided by the publisher) read as follows:

D. Henrich: **The Deutsche Rat für Internationales Privatrecht and the genesis of the Rearrangement Act of International Private Law**

The article shows the different stages on the way to the so-called IPR-Neuregelungsgesetz (Rearrangement Act of International Private Law) 1986.

Starting point was Art. 3(2) of the German Grundgesetz: Men and women having equal rights. Consequently, the rules of applicable law could no longer prefer husband or father over wife or mother. Above all, the article describes the role of the Deutscher Rat für Internationales Privatrecht constituted in 1953 in developing proposals not only to fill the gaps opened by Art. 3(2) GG but also for the formulation of a modern Act of Private International Law.

J. Pirrung: **International and European Influence on the 1986 Reform of Private International Law**

The 1986 reform of German Private International Law did not neglect international solutions, essentially such as proposed by the Hague Conference on PIL. But, in the main issues, determination of the law to be applied concerning the person, family relationships and succession, as well as in international procedural questions with regard to these matters, the reform largely followed the proposals of the German Council on PIL, namely application of the law of the nationality of the persons concerned, with some attenuations by applying the law of the State of habitual residence and admitting, to a certain extent, party autonomy. The relatively short provisions on these matters are in contrast to the rather detailed Articles of the 1980 Rome Convention on contractual obligations. Nevertheless, the incorporation of the rules of the Convention into the Introductory Provisions to the Civil Code (EGBGB) followed strong practical interests. This solution, though criticized by the EEC Commission and the Max-Planck-Institute on PIL, convinced the Law Committee of the Parliament. After 30 years, some important parts of the reform have, up to now, survived – Art. 4–7, 9, 11–16 EGBGB; but PIL on divorce, childhood, succession and obligations has undergone many changes, mainly because of the influence of the EU.

P. Mankowski: **The principle of nationality – in the past and today**

Since 1986, when the EGBGB was promulgated, the principle of nationality has lost ground in PIL. European PIL has switched over to the principle of habitual residence. The most recent examples are the PIL of successions and the PIL of matrimonial property. The principle of nationality can be based on the links between a State and its citizens, in particular the right to vote. Furthermore, nationality appears to be a pragmatic and practical connecting factor for nationality can be evidenced by ID documents like passports or ID cards. Yet, factual developments challenge this assumption: allegedly lost or burnt ID

documents, forgery, States not issuing ID documents. All these challenges demand subsidiary answers or solutions.

A. Dutta: **Habitual residence – Success and future of a connecting factor**

The battle over the appropriate personal connecting factor in private international law appears to be over, at least on the continent where nationality has been increasingly ousted by habitual residence. The paper shows that, from a German perspective, this development did not start with the activities of the European legislature in the area of private international law. Rather, the Hague Conventions and also national law had already laid the basis for a shift from a purely legal to a more factually oriented connecting factor in order to identify the law which is most closely connected to a natural person. The article sketches the advantages of habitual residence from the perspective of the European Union before addressing some future challenges, in particular the danger of a domicilisation of habitual residence and the limits of personal connecting factors in general, especially as to "new" family status relations.

S. Corneloup: **On the loss of significance of renvoi**

The moderately "renvoi-friendly" attitude of the German legislator of 1986 contrasts with the evolutions having taken place on the European level, where principle and exception are clearly reversed. Today the question whether renvoi is to be observed has become rather negligible. Several reasons may explain this reality. Significant changes in PIL over the last decades have rarefied the practical need for renvoi, as the latter presupposes a specific constellation of the case, which has become less frequent in today's practice. Moreover, the objectives of renvoi are increasingly implemented through functional equivalents, which stem mainly from the field of international and European civil procedure, resulting in a further loss of significance of renvoi. In addition, the aim of international uniformity of decision, which is the main rationale behind renvoi, no longer expresses the overall priority of legislators and courts, as considerations based on substantive law increasingly take precedence over the uniformity of decision. This frequently results in an exclusion of renvoi.

T. Helms: **Public policy – The influence of basic and human rights on private international law**

On the occasion of the 30th anniversary of the extensive German private

international law reform of 1986, this article seeks to determine the influence of basic and human rights on public policy. It demonstrates how the national public policy exception in Art. 6 of the Introductory Act to the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch/EGBGB) is, by and large, substantially identical to the specific public policy exceptions that are enshrined in the European regulations on private international law. Impetus in favor of a European public policy has been provided by the jurisprudence of the European Court of Human Rights in particular. Recent decisions of the ECtHR which have had especially wide-ranging consequences for German law include the Mennesson and Labassee cases, which determined to whom a child born to a surrogate abroad is related under parentage law.

B. Heiderhoff: **The autonomous German Private International Law in family matters**

Following the order of provisions contained in the EGBGB, from Art. 13 to Art. 24, the essay gives an overview over the most important changes of German international family law since 1986. Some topical issues, such as the validity of marriages with minor refugees and the application of the Rome III-Regulation to the recognition of private divorces are discussed. It is demonstrated that the existing legal framework does not solve all issues in a satisfactory, contemporary manner. Some newer subjects, such as the treatment of same-sex marriages or of children born by surrogate mothers, require further reforms of international family law. In summary, it can be observed that the importance of the nationality of the parties for the determination of the applicable law is diminishing, while the habitual residence has gained substantially in importance. At the same time, party autonomy has been strengthened. While this may partly raise concerns about the protection of the weaker party, it is clearly a necessary complement to the habitual residence as connecting factor. It is the only way to reach stability for legal relationships. These changes have been caused mainly by EU-law and the principle of free movement of persons. However, the reforms, both those already implemented and those yet to come, are not simply triggered by Europeanisation, but have been and will be reactions to modifications in the material family law and to changes in human behavior in familial contexts.

M.-P. Weller: **The German autonomous International Company Law**

The following article presents the state of the art of German autonomous

International Company Law. It discusses the real seat theory, which is applied in cases concerning third state companies. In consequence of this approach, companies from third states (e.g. from Switzerland) are converted into domestic partnerships. In addition, the article shows that the applicable company law is superposed by international mandatory rules. Furthermore, it has to be delimited from company insolvency law by the method of classification. Finally, the article highlights mechanisms to impose creditor protection and domestic public interests vis-à-vis foreign companies.

E. Jayme: **The future relevance of national codifications of private international law**

The European Union has enacted many regulations concerning conflict of laws and international civil procedure. In addition, there are many international conventions which contain conflicts rules. National codifications of private international law, however, retain their relevance for many questions which have not been regulated by European Acts and international conventions. We may mention the whole area of property, the law concerning the conclusion of marriage as well as some parts of the law of parents and children such as the establishment of paternity. The European conflicts rules, sometimes, state expressly not being applicable to certain questions such as invasion of privacy or agency. Here, national codifications remain in force. In addition, also methods and instruments of national conflicts law such as "characterization" will still be of some relevance, particularly with regard to the borderline between private international law and international civil procedure.

A. Bonomi: **European Private International Law and Third States**

Articulated in a number of sectorial regulations, the European private international law system has not always grown in a very systematic way. After years of swift development towards a more extensive coverage of different civil law areas and an increased integration of the national systems, the time has probably come to improve the coordination among the single instruments. The regulation of third-country relationships is undoubtedly one of those issues that call for a more consistent approach. While the universal application of choice-of-law rules is a constant feature of all adopted regulations, unjustified disparities persist with respect to jurisdiction and lis pendens. The national rules of the Member States have been entirely replaced by uniform European rules in certain

areas, whereas they are still very relevant in others. Parallel proceedings pending in a third country are dealt with under one regulation, but ignored by the others. And while the recognition and enforcement of third-country judgments is consistently left to national law, this might seem at odds with the far-reaching European coverage of jurisdiction and choice-of-law issues. Hopefully, the Hague Judgments Project will result in a successful convention in the near future. But the external relations of the EU in the area of private international law should not depend entirely on the prospects for a Hague instrument. Whether this prospect materializes or not, the EU institutions should take advantage of the negotiation process in order to elaborate on a coherent set of unilateral European law rules for disputes involving parties of third countries

(This contribution is published in English.)

J. Basedow: **EU Conflicts Legislation and the Hague Conference – A Difficult Relationship**

The transfer of legislative competence for the conflict of laws to the EU by the Treaty of Amsterdam has compelled the Hague Conference to aim at new goals. It was necessary to strengthen the universal character of this organization. As shown by the institutional development of EU and Hague Conference this goal has come closer. However, the legislative activities throughout the last 15 years indicate that the Europeans still exercise a controlling influence on the projects of the Hague Conference; this emerges from the judgements project, the maintenance project and the Principles on Choice of Law. For the future, the author advocates the adoption of more non-binding texts such as principles or model laws, that it cares more for the functioning of existing conventions and that it commits itself more to the dissemination of knowledge on the conflict of laws.

E.-M. Kieninger: **Towards a Codification of European Private International Law?**

In the first part, the article focuses on those areas of commercially relevant private international law which so far have not been touched by the European legislator, i.e. the law applicable to companies and to property law issues. In the second part, the author argues that an overall codification of European Private International Law, although perhaps desirable, might not be feasible and suggests a more moderate approach

House of Lords EU Committee on Judicial Cooperation post-Brexit

On 20 March 2017 the European Union Committee of the House of Lords has published its Report on Judicial cooperation post-Brexit ("Brexit: Justice for families, individuals and Businesses?"). The full Report is available here. The summary reads as follows (emphasis added):

"The Brussels I Regulation (recast)

1. We acknowledge and welcome the UK's influence over the content of these three EU Regulations which are crucial to judicial cooperation in civil matters and reflect the UK's influence and British legal culture. We urge the Government to keep as close to these rules as possible when negotiating their post-Brexit application. (Paragraph 23)

2. The predictability and certainty of the BIR's reciprocal rules are important to UK citizens who travel and do business within the EU. We endorse the outcome of the Government's consultations, that an effective system of cross-border judicial cooperation with common rules is essential post-Brexit. (Paragraph 37)

3. We also note the Minister's confirmation, in evidence to us, that the important principles contained in the Brussels I Regulation (recast) will form part of the forthcoming negotiations with the remaining EU Member States. (Paragraph 38)

4. While academic and legal witnesses differed on the post-Brexit enforceability of UK judgments, it is clear that **significant problems will arise for UK citizens and businesses if the UK leaves the EU without agreement on the post-Brexit application of the BIR.** (Paragraph 52)

5. The evidence provided to us suggests that the **loss of certainty and predictability resulting from the loss of the BIR and the reciprocal rules it engenders** will lead to an inevitable increase in cross-border litigation for UK based citizens and businesses as they continue to trade and interact with the

remaining 27 EU Member States**.** (Paragraph 53)

6. We are concerned by the Law Society of England and Wales' evidence that the current uncertainty surrounding Brexit is already having an **impact on the UK's market for legal services and commercial litigation, and on the choices businesses are making as to whether or not to select English contract law as the law governing their commercial relationships.** (Paragraph 54)

7. The Government urgently needs to address this uncertainty and take steps to mitigate it. We therefore urge the Government to consider whether any interim measures could be adopted to address this problem, while the new UK-EU relationship is being negotiated in the two year period under Article 50. (Paragraph 55)

8. The evidence we received is clear and conclusive: **there is no means by which the reciprocal rules that are central to the functioning of the BIR can be replicated in the Great Repeal Bill, or any other national legislation. It is therefore apparent that an agreement between the EU and the UK on the post-Brexit application of this legislation will be required, whether as part of a withdrawal agreement or under transitional arrangements.** (Paragraph 60)

9. The Minister suggested that the Great Repeal Bill will address the need for certainty in the transitional period, but evidence we received called this into question. **We are in no doubt that legal uncertainty, with its inherent costs to litigants, will follow Brexit unless there are provisions in a withdrawal or transitional agreement specifically addressing the BIR.** (Paragraph 61)

10. The evidence suggests that jurisdictions in other EU Member States, and arbitrators in the UK, stand to gain from the current uncertainty over the post-Brexit application of the BIR, as may other areas of dispute resolution. (Paragraph 69)

11. With regard to arbitration, we acknowledge that the evidence points to a gain for London. But, we are also conscious of the evidence we heard on the importance of the principles of justice, in particular openness and fairness, underpinned by the publication of judgments and authorities, which are fundamental to open law. It is our view that greater recourse to arbitration does not offer a viable solution to the potential loss of the BIR. (Paragraph 70)

The Brussels IIa Regulation and the Maintenance Regulation

12. In dealing with the personal lives of adults and children, both the Brussels IIa Regulation and the Maintenance Regulation operate in a very different context from the more commercially focused Brussels I Regulation (recast). (Paragraph 81)

13. These Regulations may appear technical and complex, but the practitioners we heard from were clear that in the era of modern, mobile populations they bring much-needed clarity and certainty to the intricacies of cross-border family relations (Paragraph 82)

14. We were pleased to hear the Minister recognise the important role fulfilled by the Brussels IIa Regulation and confirm that the content of both these Regulations will form part of the forthcoming Brexit negotiations. (Paragraph 83)

15. We have significant concerns over the impact of the loss of the Brussels IIa and Maintenance Regulations post-Brexit, if no alternative arrangements are put in place. We are particularly concerned by David Williams QC's evidence on the loss of the provisions dealing with international child abduction. (Paragraph 92)

16. **To walk away from these Regulations without putting alternatives in place would seriously undermine the family law rights of UK citizens and would, ultimately, be an act of self-harm.** (Paragraph 93)

17. **It is clear that the Government's promised Great Repeal Bill will be insufficient to ensure the continuing application of the Brussels II and Maintenance Regulations in the UK post-Brexit:** we are unaware of any domestic legal mechanism that can replicate the reciprocal effect of the rules in these two Regulations. We are concerned that, when this point was put to him, the Minister did not acknowledge the fact that the Great Repeal Bill would not provide for the reciprocal nature of the rules contained in these Regulations. (Paragraph 97)

18. We are not convinced that the Government has, as yet, a coherent or workable plan to address the significant problems that will arise in the UK's family law legal system post-Brexit, if alternative arrangements are not put in place. **It is therefore imperative that the Government secures adequate alternative arrangements, whether as part of a withdrawal agreement or under**

transitional arrangements (Paragraph 98)

Options for the future

19. The balance of the evidence was overwhelmingly against returning to the common law rules, which have not been applied in the European context for over 30 years, as a means of addressing the loss of the Brussels I Regulation (recast). We note that a return to the common law would also not be the Government's choice. (Paragraph 114)

20. A return to the common law rules would, according to most witnesses, be a recipe for confusion, expense and uncertainty. In our view, therefore, the common law is not a viable alternative to an agreement between the EU and the UK on the post-Brexit application of the Brussels I Regulation (recast). (Paragraph 115)

21. Nonetheless, in contrast to key aspects of the two Regulations dealing with family law, Professor Fentiman was of the opinion that in the event that the Government is unable to secure a post-Brexit agreement on the operation of the Brussels I Regulation (recast), a return to the common law rules would at least provide a minimum 'safety net'. (Paragraph 116)

22. **The combination of UK membership of the Lugano Convention, implementation of the Rome I and II Regulations through the Great Repeal Bill, and ratification of the Hague Convention on choice-of-court agreements, appears to offer at least a workable solution to the post-Brexit loss of the BIR.** (Paragraph 126)

23. The inclusion in the Lugano Convention of a requirement for national courts to "pay due account" to each other's decisions on the content of the Brussels I Regulation, without accepting the direct jurisdiction of the CJEU, could be compatible with the Government's stance on the CJEU's status post-Brexit, as long as the Government does not take too rigid a position. (Paragraph 127)

24. This approach will come at a cost. In particular, it will involve a return to the Brussels I Regulation, with all its inherent faults, which the UK as an EU Member State succeeded, after much time and effort, in reforming. (Paragraph 128)

25. In contrast to the civil and commercial field, we are particularly concerned that, save for the provisions of the Lugano Convention on cases involving

maintenance, there is no satisfactory fall-back position in respect of family law. (Paragraph 135)

26. Our witnesses were unanimous that a return to common law rules for UK- EU cases would be particularly detrimental for those engaged in family law litigation. The Bar Council also suggested that an already stretched family court system would not be able to cope with the expected increase in litigation. (Paragraph 136)

27. The Bar Council specifically called for the EU framework in this field to be sustained post-Brexit. But while this may be the optimal solution in legal terms we cannot see how such an outcome can be achieved without the CJEU's oversight. (Paragraph 137)

28. Other witnesses suggested the UK rely on the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children. But the evidence suggests that this Convention offers substantially less clarity and protection for those individual engaged in family law based litigation. (Paragraph 138)

29. The Minister held fast to the Government's policy that the Court of Justice of the European Union will have no jurisdiction in the UK post-Brexit. We remain concerned, however, that if the Government adheres rigidly to this policy it will severely constrain its choice of adequate alternative arrangements. (Paragraph 142)

30. Clearly, if the Government wishes to maintain these Regulations post-Brexit, it will have to negotiate alternative arrangements with the remaining 27 Member States to provide appropriate judicial oversight. But the Minister was unable to offer us any clear detail on the Government's plans. When pressed on alternatives, he mentioned the Lugano Convention and "other arrangements". We were left unable to discern a clear policy. (Paragraph 143)

31. The other examples the Minister drew on, Free Trade Agreements with Canada and South Korea, do not deal with the intricate reciprocal regime encompassed by these three Regulations. We do not see them as offering a viable alternative. (Paragraph 144)

32. We believe that the Government has not taken account of the full implications of the impact of Brexit on the areas of EU law covered by the three civil justice Regulations dealt with in this report. In the area of family law, we are very concerned that leaving the EU without an alternative system in place will have a profound and damaging impact on the UK's family justice system and those individuals seeking redress within it. (Paragraph 145)

33. In the civil and commercial field there is the unsatisfactory safety net of the common law. But, at this time, it is unclear whether membership of the Lugano Convention, which is in itself imperfect, will be sought, offered or available. (Paragraph 146)

34. **We call on the Government to publish a coherent plan for addressing the post-Brexit application of these three Regulations, and to do so as a matter of urgency. Without alternative adequate replacements, we are in no doubt that there will be great uncertainty affecting many UK and EU citizens.** (Paragraph 147)"

Conference Report: Scientific Association of International Procedural Law, University of Vienna, 16 to 17 March 2017

On 16 and 17 March 2017 the *Wissenschaftliche Vereinigung für Internationales Verfahrensrecht* (Scientific Association of International Procedural Law) held its biennial conference, this time hosted by the Law Faculty of the University of Vienna at the Ceremony Hall of the Austrian Supreme Court of Justice (*Oberster Gerichtshof*).

After opening and welcoming remarks by the Chairman of the Association, Prof. Burkhard Hess, Luxemburg, the Vice President of the Supreme Court Dr.

Elisabeth Lovrek, and Prof. Paul Oberhammer, speaking both as Dean of the Law Faculty of the University of Vienna and chair of the first day, the first session of the conference dealt with international insolvency law:

Prof. Reinhard Bork, Hamburg, compared the European Insolvency Recast Regulation 2015/848 and the 1997 UNCITRAL Model Law on Cross-Border Insolvency Law in respect to key issues such as the scope of application, international jurisdiction and the coordination of main and secondary proceedings. Bork made clear that both instruments, albeit one is binding, one soft law, have far-reaching commonalities on the level of guiding principles (e.g. universality, mutual trust, cooperation, efficiency, transparency, legal certainty etc.) as well as many similar rules whereas in certain other points differences occur, such as e.g. the lack of rules on international jurisdiction and applicable law as well as on groups of companies and data protection in the Model Law. In particular in respect to the rules on the concept of COMI Bork suggested updating the Model Law given a widespread reception of this concept and its interpretation by the European Court of Justice far beyond the territorial reach of the European Insolvency Regulation.

Prof. Christian Koller, Vienna, then focused on communication and protocols between insolvency representatives and courts in group insolvencies. Koller explained the difficulties in regulating these forms of cooperation that mainly depend of course on the good-will of those involved but nevertheless should be and indeed are put under obligation to cooperate. In this context, Koller, inter alia, posed the question if choice of court-agreements or arbitration agreements in protocols are possible but remained skeptical with a view to Article 6 of the Regulation and objective arbitrability. In principle, however, Koller suggested using and, as the case may be, broadening the exercise of party autonomy in cross-border group insolvencies.

In contrast to the harmonizing efforts of the EU and UNCITRAL Prof. Franco Lorandi, St. Gallen, described the Swiss legal system as a rather isolationist “island” in cross-border insolvency matters, yet an island “in motion” since certain steps for reform of Chapter 11 on cross-border insolvency within the Federal Law on Private International Law of 1987 (*Bundesgesetz über das Internationale Privatrecht, IPRG)* are being currently undertaken (see the Federal Governments Proposal; see the Explanatory Report).

In the following Pál Szirányi, DG Justice and Consumers, Unit A1 – Civil Justice, reported on accompanying implementation steps under e.g. Article 87 (establishment of the interconnection of registers) and Article 88 (establishment and subsequent amendment of standard forms) of the European Insolvency Recast Regulation to be undertaken by the European Commission as well as on the envisaged harmonization of certain aspects of national insolvency laws within the EU (see Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, see also post by Lukas Schmidt on conflictoflaws.net) and finally on the EU's participation in the UNCITRAL Working Group V on cross-border insolvency. Szirány further explained that it is of interest to the EU to align and coordinate the insolvency exception in the future Hague Judgments Convention with EU legislation, see Article 2 No. 1 lit. e covering "insolvency, composition and analogous matters" of the 2016 Preliminary Draft Convention.

Prof. Christiane Wendehorst, Vienna, reported on the latest works of the European Law Institute, in particular on the ELI Unidroit Project on Transnational Principles of Civil Procedure, but also on the project on "Rescue of Business in Insolvency Law", that is drawing to its close, potentially by the ELI conference in Vienna on 27 and 28 April 2017 as well as on the project on "The Principled Relationship of Formal and Informal Justice through the Courts and Alternative Dispute Resolution".

Finally, Dr Thomas Laut, German Federal Ministry of Justice (*Bundesministerium der Justiz*) reported on current legislative developments in Germany including works in connection with the Brussels IIbis Recast Regulation, human rights litigation in Germany and the Government Proposal for legislative amendments in the area of conflict of laws and international procedural law (*Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz, Entwurf eines Gesetzes zur Änderung von Vorschriften im Bereich des Internationalen Privat- und Zivilverfahrensrechts*). This Proposal aims at, inter alia, codifying choice of law rules on agency by inserting a new Article 8 into the Introductory Law of the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch, EGBGB)* and enhancing judicial cooperation with non-EU states, in particular in respect to service of process.

On the second day, Prof. Hess, Luxemburg, introduced the audience to the second session's focus on methodology in comparative procedural law and drew attention to the growing demand and relevance – reminding the audience, inter alia, of the influence of the Austrian law of appeal on the civil procedure reforms in Germany – but also to certain unique factors of the comparison of procedural law.

Prof. Stefan Huber, Hannover, took up the ball and presented on current developments of comparative legal research and methodology in general as well as possible particularities of comparing procedural law such as e.g. a strong lex fori-principle, the supplementing character of procedural law supporting the realization of private rights, a typically compact character of a procedural legal system, areas of discretion for the judge and the central role of the state – features which might make necessary a more "contextual" approach and a stronger focus on "legal concepts" as a layer between macro and micro perspectives. Huber also argued for a more substantive approach in regard to the latest efforts of the EU to compare the quality of justice systems of the Member States by its annual Justice Scoreboards since 2013. Indeed, the mere collection of economic and financial figures and other "juridical" data leaves unanswered questions of legal backgrounds and concepts in the various legal orders that might very well explain certain particularities in the data. Yet, it must be welcomed that the EU has started to embark on the delicate and methodically demanding but inevitable task of comparing the justice systems linked together under a principle of mutual trust.

Prof. Fernando Gascón Inchausti, Complutense de Madrid, continued the deep reflections on comparative procedural law with a view to the EU and illustrated the relevance in case law both of the European Court of Justice as well as the European Court of Human Rights and in the EU's law-making and evaluations of existing instruments, see recently e.g. Max-Planck-Institute Luxemburg, "An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumer law, JUST/2014/RCON/PR/CIVI/0082, to be published soon.

Prof. Margaret Woo, Northeastern University Boston, closed the session with a global perspective on comparative procedural law from a US and Chinese perspective and particularly drew attention to portectionist tendencies in the US such as e.g. the recent (not entirely new) "foreign law bans" (for a general report

from 2013 see here) to be observed in more and more state legislations that put the application of foreign law under the condition that the foreign law in its entirety, i.e. its "system", does not conflict in any point of law with US guarantees and state fundamental rights. Obviously, this overly broad type of public policy clause is directed against Sharia laws and the like but goes far beyond in that it compares the entire legal system rather than the result of the point of law relevant to the case at hand. In the EU, Article 10 Rome III Regulation might have introduced a "mini" foreign law ban in case of abstract discrimination: "Where the law applicable pursuant to Article 5 or Article 8 makes no provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the forum shall apply". It remains of course to be seen whether the ECJ interprets this provision in the sense of an ordinary public policy clause requiring a concrete discrimination with effect on the result in the particular case at hand.

In the closing discussion, the audience strongly confirmed the need and benefits of comparative research and studies in particular in times of doubts and counter-tendencies against further cooperation and integration amongst states, their economies and judicial systems. The event ended with warm words of thanks and respect to the organizers and speakers for another splendid conference. If everything goes well, interested readers will be able to study the contributions in the forthcoming conference publication before the international procedural community will meet again in two year's time – the last conference's volume has just been published, see Burkhard Hess (ed.), Band 22: Der europäische Gerichtsverbund – Gegenwartsfragen der internationalen Schiedsgerichtsbarkeit – Die internationale Dimension des europäischen Zivilverfahrensrechts, € 68,00, ISBN: 978-3-7694-1172-0, 2017/03, pp. 236.