Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1/2017: Abstracts

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

H.-P. Mansel/K. Thorn/R. Wagner: **European conflict of laws 2016: Brexit ante portas!**
The article provides an overview of developments in Brussels in the field of judicial cooperation in civil and commercial matters from December 2015 until November 2016. It summarizes current projects and new instruments that are presently making their way through the EU legislative process. It also refers to the laws enacted at the national level in Germany as a result of new European instruments. Furthermore, the authors look at areas of law where the EU has made use of its external competence. They discuss both important decisions and pending cases before the ECJ as well as important decisions from German courts pertaining to the subject matter of the article. In addition, the article also looks at current projects and the latest developments at the Hague Conference of Private International Law.

P. Mankowski: **Modern Types of Migration in Private International Law**
Migration has become a ubiquitous phenomenon in modern times. Modern immigration law has developed a plethora of possible reactions and has established many different types of migrants. Private international law has to respond to these developments. The decisive watershed is as to whether a migrant has acquired refugee status under the Geneva Refugees Conventions. If so, domicile substitutes for nationality. A mere petition for asylum does not trigger this. But subsidiary protection as an equivalent status introduced by EU asylum law must be placed on equal footing. Where habitual residence is at stake, it does matter whether a residence has been acquired legally or illegally under the auspices of immigration law. Yet for judging whether a habitual residence exists, the extension of permits might be a factor.

C. Mäsch/B. Gausing/M. Peters: **Pseudo-foreign Ltd., PLC and LLP: Limited in**

liability or rather in longevity? – The Brexit's impact on English corporations having their central administration in Germany

On 23rd of June 2016, the people of the United Kingdom voted in a referendum against the UK staying in the European Union. If, as can be expected, the withdrawal negotiations under Art. 50 of the EU Treaty will not address the issue of pseudo-English corporations operating in the remaining Member States of the EU, the Brexit will have severe consequences for companies incorporated under English law (e.g. a Ltd., PLC or LLP) having their central administrative seat in Germany. No longer protected by the freedom of establishment within the EU (Art. 49, 54 TFEU) these legal entities will be under German PIL and the so-called Sitztheorie subjected to domestic German company law. They will thus be considered simple partnership companies (German GbR or OHG), losing from one day to the next i.a. their limited liability status – an unexpected and unjustified windfall profit for creditors, a severe blow for the company shareholders. In this paper it will be argued that the outcome can and indeed should be rectified by resorting to the legal rationale of Art. 7 para 2 EGBGB (Introductory Act to the German Civil Code). This provision preserves the legal capacity of a natural person irrespectively of whether a change in the applicable law stipulates otherwise. Extending that concept to legal entities will create a "grace period" with a fixed duration of three years during which the English law continues to apply to a "German" Ltd., PLC or LLP, giving the shareholders time to decide whether to transform or re-establish their company.

L. Rademacher: **Codification of the Private International Law of Agency – On the Draft Bill Submitted by the Federal Ministry of Justice**

Based on a resolution adopted by the German Council for Private International Law, the German Federal Ministry of Justice and Consumer Protection has submitted a bill to amend the Introductory Act to the German Civil Code (EGBGB) in the to date uncodified area of agency in private international law. This paper provides an overview of the proposed Art. 8 EGBGB and identifies questions of interpretation as well as remaining gaps. The draft provision applies to agents who were authorized by the principal, i.e. neither to statutory agents nor to representatives under company law. The proposal strengthens party autonomy by allowing a choice of law. Absent a choice of law, the applicable law is determined by objective criteria depending on the type of agent. The respective connecting factors, such as the agent's or principal's habitual residence, require perceptibility for the third party. If these requirements are not met, the applicable

law residually is determined by the identifiable place of the agent's acts or by the principal's habitual residence. For the most part, the proposal can be characterized as a restatement of previous case law and academic writing.

H. Roth: **Rule and exceptions regarding the review of the European Order of Payment in exceptional cases according to art.20 par. 2 of Reg. (EC) 1896/2006**

According to Art. 20 para. 2 of Reg. (EC) 1896/2006, the European Order of Payment can be reviewed in exceptional cases. This additional legal remedy is only applicable in exceptional cases such as collusion or other malicious use of process. It is not sufficient that the defendant would have been able to detect misrepresentations by the claimant.

M. Pika/M.-P. Weller: **Private Divorces and European Private International Law**

Whilst substantive German family law requires a divorce to be declared in court, the instant case addresses the effect of a private divorce previously undertaken in Latakia (Arabic Republic of Syria) under Syrian law. Although, from a German perspective, the Syrian Sharia Court's holding has been merely declaratory, the European Court of Justice considered its effect before German courts to be a matter of recognition. Accordingly, it rejected the admissibility of the questions referred to the Court concerning the Rome III Regulation. This ruling indicates the unexpected albeit preferable *obiter dictum* that the Brussels II bis Regulation applies on declaratory decisions concerning private divorces issued by Member States' authorities. Subsequently, the Higher Regional Court Munich initiated a further, almost identical preliminary ruling concerning the Rome III Regulation. However, the key difference is that it now considered the Regulation to be adopted into national law.

A. Spickhoff: **Fraudulent Inducements to Contract in the System of Jurisdiction – Classification of (contractual or legal) basis of claims and accessory jurisdiction**

Manipulation of mileage and concealment of accidental damage belong to the classics of car law and indicate a fraud. But is it possible to qualify a fraudulent misrepresentation in this context as a question of tort with the meaning of art. 7 no. 2 Brussels I Regulation (recast)? German courts deny that with respect to decisions of the European Court of Justice. The author criticizes this rejection.

K. Siehr: **In the Labyrinth of European Private International Law. Recognition and Enforcement of a Foreign Decision on Parental Responsibility without Appointment of a Guardian of the Child Abroad**

A Hungarian woman and a German man got married. In 2010 a child was born. Two years later the marriage broke down and divorce proceedings were instituted by the wife in Hungary. The couple signed an agreement according to which the child should live with the mother and the father had visitation rights until the final divorce decree had been handed down and the right of custody had to be determined by the court. The father wrongfully retained the child in Germany after having exercised his visitation rights. The mother turned to a court in Hungary which, by provisional measures, decided that rights of custody should be exclusively exercised by the mother and the father had to return the child to Hungary. German courts of three instances recognized and enforced the Hungarian decree to return the child according to Art. 23 and 31 (2) Brussels IIbis-Regulation. The *Bundesgerichtshof* (BGH) as the final instance decided that the Hungarian court had jurisdiction under Art. 8–14 Brussels IIbis-Regulation and did not apply national remedies under Art. 20 Brussels IIbis-Regulation. In German law, the hearing of the child was neither necessary nor possible and therefore the Hungarian return order did not violate German public policy under Art. 23 (a) or (b) Brussels IIbis-Regulation.

H. Dörner: **Better too late than never – The classification of § 1371 Sect. 1 German Civil Code as relating to matrimonial property in German and European Private International Law**

After more than 40 years of discussion the German Federal Supreme Court finally (and rightly so) has classified § 1371 Sect. 1 of the German Civil Code as relating to matrimonial property. However, the judgment came too late as the European Succession Regulation No 650/2012 OJ 2012 L 201/07 started to apply on 17 August 2015 thus reopening the question of classification in a new context. The author argues that a matrimonial property classification of § 1371 Sect. 1 German Civil Code under European rules is still appropriate. He discusses two problems of assimilation resulting from such a classification considering how the instrument of assimilation has to be handled after the regulation came into force. Furthermore, he points out that a matrimonial property classification creates a set of new problems which have to be solved in the near future (e.g. documentation of the surviving spouse’s share in the European Certificate of Succession, application of different matrimonial property regimes depending of

the Member state in question).

H. Buxbaum: **RICO's Extraterritorial Application: RJR Nabisco, Inc. v. European Community**

In 2000, the European Community filed a lawsuit against RJR Nabisco (RJR) in U.S. federal court, alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). After more than fifteen years and a number of intermediate judicial decisions, the litigation came to its likely close in 2016 with the U.S. Supreme Court's ruling in *RJR Nabisco, Inc.* v. *European Community*. The Court held that RICO's private cause of action does not extend to claims based on injuries suffered outside the United States, denying the European Community any recovery. The case was the third in recent years in which the Supreme Court applied the "presumption against extraterritoriality," a tool of statutory interpretation, to determine the geographic reach of a U.S. federal law. Together, these opinions have effected a shift in the Court's jurisprudence toward more expansive application of the presumption – a shift whose effect is to constrain quite significantly the application of U.S. regulatory law in cross-border cases. The Court's opinion in RJR proceeds in two parts. The first addresses the geographic scope of RICO's substantive provisions, analyzing whether the statute's prohibition of certain forms of conduct applies to acts occurring outside the United States. The second addresses the private cause of action created by the statute, asking whether it permits a plaintiff to recover compensation for injury suffered outside the United States. After beginning with a brief overview of the lawsuit, this essay discusses each of these parts in turn.

T. Lutzi: **Special Jurisdiction in Matters Relating to Individual Contracts of Employment and Tort for Cases of Unlawful Enticement of Customers**

A claim brought against two former employees, who had allegedly misappropriated customer data of the claimant, and against a competitor, who had allegedly used said data to entice some of the claimant's customers, provided the Austrian *Oberster Gerichtshof* with an opportunity to interpret the rules on special jurisdiction for matters relating to individual contracts of employment in Art. 18–21 of the Brussels I Regulation (Art. 20–23 of the recast) and for matters relating to tort in Art. 5 No. 3 of the Brussels I Regulation (Art. 7 (2) of the recast). Regarding the former, the court defined the scope of Art. 18–21 by applying the formula developed by the European Court of Justice in *Brogsitter* concerning the distinction between Art. 5 No. 1 and 3 (Art. 7 (1) and (2) of the

recast); regarding the latter, the court allowed the claim to be brought at the claimant's seat as this was the place where their capacity to do business was impaired. Both decisions should be welcomed.

"And as the fog gets clearer…" – May on Brexit

In her long-awaited speech on what Brexit actually means for the future application of the *acquis communautaire* in the United Kingdom, British Prime Minister *Theresa May*, on 17 January, 2017, stressed that the objective of legal certainty is crucial. She further elaborated:

"We will provide certainty wherever we can. We are about to enter a negotiation. That means there will be give and take. There will have to be compromises. It will require imagination on both sides. And not everybody will be able to know everything at every stage. But I recognise how important it is to provide business, the public sector, and everybody with as much certainty as possible as we move through the process. So where we can offer that certainty, we will do so. […] **And it is why, as we repeal the European Communities Act, we will convert the 'acquis' – the body of existing EU law – into British law.** This will give the country maximum certainty as we leave the EU. The same rules and laws will apply on the day after Brexit as they did before. And it will be for the British Parliament to decide on any changes to that law after full scrutiny and proper Parliamentary debate."

At the same time, *May* promised that "we will take back control of our laws and **bring an end to the jurisdiction of the European Court of Justice** in Britain."

(The full text of the speech is available here.)

This unilateral approach seems to imply that the EU Regulations on Private International Law shall apply as part of the anglicized "acquis" even after the

Brexit becomes effective. This would be rather easy to achieve for the Rome I Regulation. In addition, a British version of Rome II could replace the Private International Law (Miscellaneous Provisions) Act of 1995, except for defamation cases and other exemptions from Rome II's scope. At the end of the day, nothing would change very much for choice of law in British courts, apart from the fact that the Court of Justice of the European Union could no longer rule on British requests for a preliminary reference. Transplanting Brussels I*bis* and other EU procedural instruments into autonomous British law would be more difficult, however. Of course, the UK is free to unilaterally extend the liberal Brussels regime on recognition and enforcement to judgments passed by continental courts even after Brexit. It is hard to imagine, though, that the remaining EU Member States would voluntarily reciprocate this favour by treating the UK as a *de facto* Member State of the Brussels I*bis* Regulation. Merely applying the same procedural rules in substance would not suffice for remaining in the Brussels I*bis* camp if the UK, at the same time, rejects the jurisdiction of the CJEU (which it will certainly do, according to *May*). Thus, the only viable solution to preserve the procedural acquis seems to consist in the UK either becoming a Member State of the Lugano Convention of 2007 or in concluding a special parallel agreement similar to that already existing between Denmark and the EU (minus the possibility of a preliminary reference, of course). Since only the latter option would allow British courts to apply the innovations brought by the Brussels I recast compared with the former Brussels and the current Lugano regime, it should clearly be the preferred strategy from the UK point of view – but it cannot be achieved unilaterally by the British legislature.

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U. Magnus: **A Special Conflicts Rule for the Law Applicable to Choice of Court and Arbitration Agreements?**

The article examines whether the German legislator should enact a separate conflicts rule which determines the law that is applicable to the conclusion and validity of choice of court and arbitration agreements. With respect to choice of court agreements the national legislator's room for manoeuvre is anyway very limited due to the regulations in Art. 25 Brussels Ibis Regulation and Art. 5 Hague Convention on Choice of Court Agreements of 2005. There is no genuine need for an additional national conflicts rule, in particular since the interpretation and exact scope of the new conflicts rule in Art. 25 (1) Brussels Ibis Regulation still requires its final determination by the CJEU. After weighing all pros and cons the article recommends not to enact a separate conflicts provision. The same result is reached for arbitration agreements. Here, the international practice that in the absence of a choice the law at the place of arbitration applies should be fixed on the international or European level.

K. Bälz: **Failing states as parties in international commercial disputes: public international law and conflict of laws**

In the aftermath of the "Arab Spring" a number of states in the immediate vicinity of Europe have turned into failing states. Using the Libya cases of the English High Court as a starting point, this article examines the practical questions that arise in commercial disputes involving failing states. The key question is how to implement the international law principles on regime change and state failure in international disputes.

U.P. Gruber: **The new international private law on the equalization of pension rights – a critical assessment**

German international private law contains an extremely complicated rule on the equalization of pension rights. Under this rule, the equalization of pension rights of husband and wife shall be subject to the law applicable to the divorce according to the Rome III Regulation; however, an equalization shall only be granted if accordingly German law is applicable and if such equalization is recognized by the law of one of the countries of which the spouses were nationals at the time when the divorce petition was served. If one of the spouses has acquired during the subsistence of the marriage a pension right with an inland pension fund and carrying out the equalization of pension rights would not be inconsistent with equity, the equalization of pension rights of husband and wife

shall be carried out pursuant to German law on application of a spouse.
Lately, Art. 17 (3) *EGBGB* was amended. Whereas in former times, Art. 17 (3) *EGBGB* referred to the law applicable to divorce determined by an autonomous German rule, the provision now makes referral to the Rome III Regulation. In the legislative process, this amendment was neither discussed nor justified. At a closer look, however, the new rule has serious flaws and should be changed.

C. Heinze/B. Steinrötter: **When does a contract fall within the scope of the „directed activity" as provided for in Art. 15 (1) (c) Regulation (EC) No 44/2001 (= Art. 17(1) (c) Regulation [EU] No 1215/2012)?**
This contribution analyses the recent *Hobohm*-judgment of the European Court of Justice (ECJ), which concerns the requirement "contract falls within the scope of such activities" in Art. 15 (1) (c) Regulation (EC) No 44/2001 (= Art. 17 (1) (c) Regulation [EU] No 1215/2012). The CJEU decided that the rules on jurisdiction over consumer contracts are applicable even if the respective contract on its own does not fall within the scope of the professional activity which has been directed to the consumer's home state, provided that it is closely linked to an earlier contract falling under Art. 17 (1) (c). The *authors* analyse the elements of this test of close connection and place it into the more general context of the jurisdiction rules for consumer disputes.

T. Lutzi: **Qualification of the claim for a 'private copying levy' and the requirement of seeking to establish the liability of a defendant under Art. 5 No. 3 Brussels I (Art. 7 (2) Brussels I recast)**
Seized with the question whether a claim for the "blank-cassette levy" under § 42b of the Austrian *Urheberrechtsgesetz* (which transposes Art. 5 (2) b of the European Copyright Directive) qualifies as delictual within the meaning of Art. 5 No. 3 of the Brussels I Regulation (Art. 7 (2) of the recast Regulation), the Court of Justice had an opportunity to refine its well-known *Kalfelis* formula, according to which an action falls under Art. 5 No. 3 if it "seeks to establish the liability of a defendant" and is "not related to a 'contract' within the meaning of Art. 5 No. 1". Holding that the claim in question sought to establish the liability of the defendant "since [it] is based on an infringement […] of the provisions of the UrhG", the Court seems to have moved away from the more restrictive interpretation of this criterion it has applied in the past. Yet, given the implications of such a broad understanding of Art. 5 No. 3, not least for claims in unjust enrichment, a restrictive reading of the decision is proposed.

L. Hübner: **Effects of cross-border mergers on bonds**
The article deals with the complex interplay of international contract law and international corporate law exemplified by the ECJ decision in the *KA Finanz* case. Three issues will be focused on: (i) the law applicable to a bond indenture after a cross-border merger of one of the contracting parties with a third party; (ii) the law applicable to the legal consequences of such a merger (legal and asset succession as well as creditor protection); and (iii) the application of Art. 15 of Directive 78/855 to securities to which special rights are attached.

C. Thomale: **Multinational Corporate Groups, Secondary insolvency proceedings and the extraterritorial reach of EU insolvency law**
In its preliminary ruling on the *Nortel Networks* insolvency dispute, the ECJ has made important assertions on procedural and substantive aspects of secondary insolvency proceedings and their coordination with the main proceedings as well as their reach to extraterritorial assets of the debtor. At the same time, the decision fuels the general regulatory debate on corporate group insolvencies. This comment analyses the decision and develops an alternative approach.

D.-C. Bittmann: **Requirements regarding a legal remedy in terms of art. 19 of Regulation (EC) No. 805/2004 and competence for carrying out the certification of a judgment as a European Enforcement Order**
The following article examines a judgment of the ECJ, which deals with several problems regarding the interpretation of Regulation (EC) No. 805/2004 creating a European Enforcement Order (EEO) for uncontested claims. The first part of the decision regards the requirements established by Art. 19 of the regulation. The ECJ rules, that Art. 19 (1) of Regulation (EC) No. 805/2004 requires from the national legal remedy in question that it effectively and without exception allows for a full review, in law and in fact, of a judgment in both of the situations referred to in that provision. Furthermore the EJC rules, that this legal remedy must allow the periods for challenging a judgment on an uncontested claim to be extended, not only in the event of force majeure, but also where other extraordinary circumstances beyond the debtor's control prevented him from contesting the claim in question (Art. 19 (1) (b)). In the second part of the decision the ECJ rules, that the certification of a judgment as an EEO, which may be applied for at any time, can be carried out only by a judge and not by the registrar. The latter is only allowed to carry out the formal act of issuing the standard form according to Art. 9 of Regulation (EC) No. 805/2004 after the

decision regarding certification as an EEO has been taken by the judge.

S. Arnold: **Contract, Choice of Law and the Protection of the Consumer abroad when lured into business premises**

Consumer protection is a cornerstone of European Law – just like party autonomy. Even in consumer contracts, parties can choose the applicable law. Yet the choice must not be to the detriment of the consumer. This is the core idea of Art. 6 (2) Rome I-Regulation. The *OLG Stuttgart* (Higher Regional Court of Stuttgart) addressed the range of that provision which is a central tool of consumer protection through conflict of laws. During a package holiday in Turkey, an 85 year old lady had bought a carpet. Turkish substantive Law did not allow for the lady to withdraw from the contract, German substantial Law, however, did. The *OLG Stuttgart* decided that the lady could withdraw from the contract on the basis of German substantial Law. The *OLG Stuttgart* found that the Turkish seller had worked together with the German travel agency in order to lure tourists from Germany into his business premises.

C. Wendelstein: **Cross-border set-off based on counterclaim governed by Italian law**

In the context of an international set-off the German Federal Court of Justice had to deal with various questions in the field of conflict of laws. For the first time the Court had to adjudicate upon the characterization of the notion of *liquidità* in Italian law (Art. 1243 *Codice civile* = Cc). According to the Federal Court of Justice this question has to be answered by the law designated by Art. 17 Rome I Regulation. The author agrees with this finding.

G. Schulze: **The personal statute in case of ineffective dual nationalities (case note on a judgment given by the Federal Court of Justice of Germany on 24th June 2015 – XII ZB 273/13)**

The applicant had been living in Germany since his birth. As he had a double name (according to Spanish customs) registered in the civil registry in Spain he wanted to go by his Spanish family name in Germany as well. The case raises the question of how to determine the personal statute of a multinational person having both a Spanish and a Moroccan nationality if the person has no connections whatsoever to the countries in question. The Federal Court of Justice of Germany (*Bundesgerichtshof, BGH*) held: That in default of an "effective" citizenship the law of habitual residence shall be applicable, *in casu*: German law. That the "limping" name does not violate EU law. There are doubts about this

solution: The effectiveness of nationality does not form a part of the elements of Art. 10 (1) of the Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch, EGBGB*). Effectiveness serves only to clearly define the personal statute for given connecting factors, viz. in order to choose between several citizenships in Art. 5 (1) sentence 1 or to determine the (closer connected) habitual residence in Art. 5 (2) *EGBGB*. *De lege lata* there is no well-founded basis for a supported rejection of the application of law of nationality. However the general tendency to apply the law of habitual residence is not a reason to apply Art. 5 (2) *EGBGB* in analogy given multiple ineffective nationalities. It is not suitable to extend the escape clause in Art. 5 (2) *EGBGB*. In any case it is not a solution if the nationalities are EU nationalities. A former opportunity for choice of law which was unknown by the tenants does not eliminate an infringement of Art. 18 TEU (discrimination) and 21 TEU (freedom of movement).

M. Andrae: **The matrimonial property regime of the spouses with former Yugoslav nationality**

For the determination of the law applicable to matrimonial property referring to spouses who had at the time of marriage the Yugoslav nationality, two principles have a special significance: 1. The law of the former Yugoslavia shall not apply, including its interregional law and its conflict of laws principles. 2. An automatic change of the applicable law must be avoided, if possible and if it is not the consequence of a choice of law. Priority is given to the first principle. The connecting factor of the common nationality pursuant to Art. 15 (1) and 14 (1) No. 1 *EGBGB* must be supplemented. For this it is suitable to use the principle of closest connection by analogy to Art. 4 (3) sentence 2 *EGBGB*. Reference is made to the right of a successor State, if the spouses have had at the time of entering the marriage the Yugoslav nationality and a common closest connection to an area of the former Yugoslavia, which is now the territory of successor state. If such a connection is absent, then the applicable law has to be determined in accordance with Art. 15 (1) and 14 (1) No. 2 of the *EGBGB*, if necessary by Art. 14 (1) No. 3 *EGBGB*.

A. Reinstadler/A. Reinalter: **The decision opening the debtor-in-possession proceeding pursuant to § 270a German Insolvency Act is not an insolvency proceeding pursuant to the European Insolvency Regulation (2002)**

The Court of Appeal of Trento, local section of Bolzano (Italy) had to rule on the question whether the debtor-in-possession proceeding/*Verfahren auf*

Eigenverwaltung (§ 270a German Insolvency Act) can be qualified as decision opening an insolvency proceeding pursuant to art. 16 European Insolvency Regulation (2002) and has, therefore, to be recognized automatically by operation of law by the courts of other Member States. Judge-Rapporteur *Elisabeth Roilo* concluded (implicitly referring to the *Eurofood*-formula) that the decision issued by the German district court in which opened the debtor-in-possession proceeding pursuant to § 270a German Insolvency Act is neither listed in Annex A of the Regulation nor is the appointed provisional liquidator (*vorläufiger Sachwalter*) included in Annex C of the Regulation. Since the decision, furthermore, foresees neither the divestment of debtor's assets nor the forfeiture of the powers of management which he has over his assets, the criteria set down in the *Eurofood*-judgment are not fulfilled. The result is that the decision may not be qualified as a decision opening an insolvency procedure under the terms of art. 16 European Insolvency Regulation (2002).

Young Scholars' PIL Conference: "Politics and Private International Law (?)" – Program

The following invitation regarding the upcoming young scholars' PIL conference in Bonn 2017 (see our previous post here) has been kindly provided by Dr. Susanne Gössl, LLM (Tulane), University of Bonn.

We cordially invite all young scholars interested in questions of Private International Law (PIL) to the first young scholars' PIL conference which will be held on April 6th and 7th 2017 at the University of Bonn.

The conference will be held in German.

The general topic will be

Politics and Private International Law (?)

As our call for papers elicited a large number of highly qualified and interesting responses, selecting the presentations for the conference programme was not easy. In a double-blind peer review procedure, we finally identified nine contributions leading to the following program:

Thursday, 6 April, 2017

2:00 pm: welcome

2:15 pm: opening address
Prof. em. Dr. Dagmar Coester-Waltjen, LL.M. (Mich.), University of Göttingen

3:00 pm: Panel I – Arbitration

3:00 pm: Politics Behind the "ordre public transnational" (Focus ICC Arbitral Tribunal)
Iina Tornberg, Helsinki

3:30 pm: Between Unleashed Arbitral Tribunals and European Harmonisation: The Rome I Regulation and Arbitration
Masud Ulfat, Marburg

4:00 pm: The Applicable Law in Arbitration Proceedings – A *responsio*
Dr. Reinmar Wolff, Marburg

4:10 pm: discussion

4:40 pm: coffee break

5:00 pm: Panel II – Procedural Law and Conflict of Laws/Substantial Law

5:00 pm: How Does the ECJ Constitutionalize the European PIL and International Civil Procedure? Tendencies and Consequences
Dominik Düsterhaus, Luxemburg

5:30 pm: Proceedings in a Foreign forum derogatum, Damages in a Domestic forum prorogatum – Fair Balancing of Interests or Unjustified Intrusion into Foreign Sovereignty?
Dr. Jennifer Lee Antomo, Mainz

6 pm: discussion (until ca. 6:30 pm)

8:00 pm: dinner

Friday, 7 April, 2017

9:30 am: opening

9:45 am: Panel III – Protection of Individual Rights and Conflict of Laws

9:45 am: Private International Law and Human Rights – Questions of Conflict of Laws Regarding the Liability for "Infringements of Human Rights"
Friederike Pförtner, Konstanz

10:15 am: Cross-Border Immissions in the Context of the Revised Hungarian Regulation for Private International Law
Reka Fuglinszky, Budapest

10:45 am: discussion

11:15 am: coffee break

11:45 am: Panel IV – Public Law and Conflict of Laws

11:45 am: Long Live the Principle of Territoriality? The Significance of Private International Law for the Guarantee of Effective Data Protection
Dr. Martina Melcher, Graz

12:15 pm: Economic Sanctions in Private International Law
Dr. Tamás Szabados, Budapest

12:45 pm: discussion

1:15 pm: final discussion and conclusion of the conference

ca. 2:00 pm: closing

Participation is free, but a registration is required.

In order to register for the conference, please use this link: https://nachwuchstagungipr.typeform.com/to/qy1Obh. The registration deadline is February 28th 2017. Please be aware that the number of participants is limited and registrations will be processed in the order in which they are received. For reserving a hotel from our hotel contingent, please use the following link

(http://www.bonn-region.de/events/nachwuchs-ipr.html).

For more information, please visit https://www.jura.uni-bonn.de/institut-fuer-deutsches-europaeisches-und-internationales-familienrecht/ipr-tagung/.

If you have any further questions, please contact Dr. Susanne Gössl (sgoessl@uni-bonn.de).

We are looking forward to welcoming many participants to a lively and thought-provoking conference!

Yours faithfully,
Susanne Gössl, Rafael Harnos, Leonhard Hübner, Malte Kramme, Tobias Lutzi, Michael Müller, Caroline Rupp, Johannes Ungerer

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And Then There Were … Seventeen!

Estonia has recently joined the Rome III Regulation (EU) No. 1259/2010 on enhanced cooperation in the area of the law applicable to divorce and legal separation, increasing the number of participating Member States to seventeen. The Decision of the Commission of 10 August 2016 has been published in (2016) OJ L 216/13. Before, Lithuania and Greece had already joined the original fourteen participating Member States. Contrary to some dire forecasts made at the time when the Rome III Regulation was adopted, this instrument has turned out to be rather successful, being now in force in a clear majority of Member States. Rome III shall apply to Estonia from 11 February 2018. Article 3 of the said Council's decision contains specific transitional provisions, in particular with regard to choice-of-law agreements.

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

R. Freitag: **Explicit and Implicit Limitations of the Scope of Application of Regulations Rome I and Rome II**
Almost ten years after the enactment of Regulation "Rome II" on the law applicable to non-contractual obligations and nine years after the publication in the Official Journal of Regulation "Rome I" on the law applicable to contractual obligations, the fundamental question of the material scope of application of the uniform private international law of the EU remains unanswered: Are the

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

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

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

athletes' constitutional rights. Due to the aforementioned legal deficits, the *BGH* should have ruled the agreement void.

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

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

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

A man of Syrian nationality and a woman married in Germany and had a daughter. The couple finally divorced and parental responsibility was given exclusively to the mother. In December 2006 the couple decided to visit the father's relatives in Syria in order to spend Christmas vacation with them, to detract the daughter from bad influences in Germany and to change the daughter's name. The daughter felt very uncomfortable in Syria, because she was not allowed to go to school and could not leave her relatives' home without being accompanied by some elderly person of her relatives. She wanted to go back to Germany, but was not allowed to do so by her father. Her mother tried to enable her to leave Syria with the help of the German embassy, but this could not be realized. The daughter was beaten by her father and the mother was prohibited to have contact with her daughter. After having reached majority age, the daughter managed to go back to Germany, where the mother indicted the father for depriving a minor from the person having exclusive parental responsibility (§ 235 German Criminal Code). The County Court of Koblenz convicted the father of being guilty of dangerous bodily harm (§ 223a German Criminal Code) and of depriving a minor from her mother (§ 235 German Criminal Code). The Federal Court for Civil and Criminal Cases (*Bundesgerichtshof = BGH*) confirmed this

decision and rejected the attorney general's and the accused's appeal against it. The Federal Court correctly decided that German criminal law applies, because the person, having exclusive parental responsibility, had her habitual residence in Germany, hence the result of deprivation was also felt in Germany. The Federal Court also correctly held that the private law question of parental responsibility has to be answered by German law, including German private international law.

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

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

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

Based on a judgment of the District Court Hamburg-St. Georg, the article discusses the conditions under which the applicable law in succession matters has to be determined in accordance with the German-Iranian Friendship and Settlement Treaty of 1929, which takes precedence over the German conflict rules and those of Regulation (EU) No. 650/2012. The article further elaborates on the scope of the German public policy threshold with regard to the application of Iranian succession law. It is argued that the disinheritance of an heir as a matter of law would be incompatible with German public policy if based on the

heir either having a different religion than the testator or having the status of illegitimate child. However, these grounds will be upheld if the discrimination has been specifically approved by the testator.

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

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

P. Mankowski: **Embargoes, Foreign Policy in PIL, Respecting Facts: Art. 9 (3) Rome I Regulation in Practice**
Internationally mandatory rules of third states are a much discussed topic. But only rarely they produce court cases. Amongst the cases, foreign embargoes provide for the highlights. The USA has graced the world with their shades. Yet the *Cour d'appel de Paris* makes short shrift with the (then) US embargo against the Iran and simply invokes Art. 9 (3) of the Rome I Regulation – or rather the *conclusio a contrario* to be drawn from this rule – to such avail. It does not embark upon the intricacies of conflicting foreign policies but sticks with a technical and topical line of argument. Blocking statutes forming part of the law

of the forum state explicitly adds the political dimension.

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

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

Out now: Matthias Weller (ed.), Europäisches Kollisionsrecht (2016)

Professor Dr. Matthias Weller, European Business Law School-University of Wiesbaden (Germany), has edited and co-authored a new volume on European Conflict of Laws (in German): Europäisches Kollisionsrecht (Nomos; Baden-Baden, 2016). The volume contains contributions by Weller himself (on the

general principles of European private international law), by Dr. Carl Friedrich Nordmeier (on Rome I, marital property and succession) and by Dr. David Bittmann (on Rome II and III as well as on the Maintenance Regulation and the Hague Protocol). The Book provides the reader with a survey on the current state of the art in European choice of law that is both up-to-date and analytical. Weller's introduction in particular offers a fascinating treatment of the emerging general part of European PIL. Highly recommended!

For further information, click here.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2/2016: Abstracts

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

R. Wagner, **A new attempt to negotiate a Hague Convention on Recognition and Enforcement**

In 1992 the United States of America proposed that the Hague Conference for Private International Law should devise a worldwide Convention on Recognition and Enforcement of Judgments in Civil and Commercial Matters. Especially the states of the European Union were in favor of harmonizing also the bases of jurisdiction. At the very end the Hague Conference was not able to finalize the negotiations of a convention with a broad scope including rules on bases of jurisdiction and on enforcement and recognition. On the lowest common denominator the conference concluded the Convention of 30 June 2005 on Choice of Court Agreements (Choice of Court Convention). This convention came into force on 1 October 2015 for Mexico and the European Union (without Denmark). The original idea of a convention with a broad scope has never been forgotten. The following article provides an overview of new developments in the Hague

Conference and presents a preliminary draft text of the Working Group on the judgments project.

M.-Th. Ziereis/S. Zwirlein, **Article 17 (2) EGBGB and the Rome III Regulation**

According to Art. 17 (2) German Introductory Act to the Civil Code (EGBGB) within Germany a divorce may only be decreed by a state court. This prohibits private divorce. This essay shows that Art. 17 (2) EGBGB is a conflict of laws rule concerning the law applicable to the formal requirements of a divorce and can therefore be applied alongside the Rome III regulation.

A. Staudinger/C. Bauer, **The concept of contract pursuant to Art. 15 (1) lit. c Brussels I Regulation (Art. 17 (1) lit. c Brussels Ia Regulation) in cases where usually intermediaries are involved – a de-limitation between package travel- and investment contracts**

This contribution deals with a judgement of the ECJ referring to the concept of contract in the field of International Civil Procedure Law according to Art. 15 (1) lit. c Brussels I Regulation (Art. 17 (1) lit. c Brussels Ia Regulation). The decision is about the liability of an issuing bank based on the investment contract. It offers an occasion both to discuss the current jurisprudence and comparable constellations in law on package travel where intermediaries are involved, especially the *Maletic*-case. This jurisdiction anyway is not "overruled". The European legal qualification of the relation between the consumer and the intermediary further on should be understood depending upon the certain circumstances, although a trend can be observed for a contractual comprehension. The judgement illustrates the division of labor between European and national judges and underlines the importance of the choice of the defendant. Depending on whether the claimant sues only one or both of the involved parties it might affect the possible place of jurisdiction. In the light of the present as well as of the *Maletic*-judicature it becomes apparent the mutual influence of the respective relations regarding the scope of application of Brussels Ia-Regulation respectively of the jurisdiction over consumer contracts.

Th. Pfeiffer, **Tort claims as contractual obligations under the Brussels jurisdictional regime – Characterizing the main claim according to a preliminary question?**

This article analyzes the ECJ's recent *Brogsitter*-judgment. It explains that, under previous case law relating to art. 5 no. 1 Brussels I-Regulation 44/2001, this provision was applicable only if the underlying claim itself was based on a contractual obligation, whereas, under *Brogsitter*, it is also sufficient that an interpretation of the contract is indispensable for determining the lawfulness of the allegedly tortuous conduct. The article points out that this new concept amounts to a characterization of the main claim based on the nature of a preliminary question. In particular, the article analyzes the practical advantages and disadvantages of the ECJ's new position with special regard to cases of concurring contractual and tort-related disputes. In its conclusions, the article favors recognizing that – contrary to the ECJ's existing case law – the special headings of jurisdiction in article 5 should be interpreted as to permit the court to also adjudicate on other claims resulting from the same facts, even if the latter, because of their nature, are not directly covered by this particular jurisdictional heading.

P. Kindler, **Jurisdiction and Directors' Liability vis-a-vis the Company**

In its sentence of 10 September 2015, the ECJ held that the application of Article 5 (1) and (3) of the Brussels I Regulation is precluded, provided that the defendant, in his capacity as director and manager of a company, performed services for and under the direction of that company in return for which he received remuneration (cf. Articles 18 to 21 of the Regulation). Furthermore, pursuant to Article 5 (1) of the Regulation an action brought by a company against its former manager on the basis of an alleged breach of his obligations under company law comes within the concept of "matters relating to a contract". It is for the court to determine the place where the manager in fact, for the most part, carried out his activities in the performance of the contract. Finally, under Article 5 (3) of the Regulation, an action based on an allegedly wrongful conduct is a matter relating to tort or delict where the conduct complained of may not be considered to be a breach of the manager's obligations under company law. The author welcomes the judgment as it points out clearly under which circumstances a manager is to be classified as a "worker" for the purposes of Article 18 (2) of the Regulation. The judgment is less clear with respect to Article 5 (3) of the Regulation.

M.-P. Weller/C. Harms, **The shareholder's liability for pre-entry charges in the light of Brussels I and EuInsVO**

According to the German jurisprudence, the shareholders of a German Limited Liability Company are liable for all debts and pre-entry charges of the company arising in the period between the establishment of the company, i.e. the signing of the articles of association, and the subsequent registration in the company's register. The following article discusses the international jurisdiction for claims of the company against its shareholders resulting out of the liability for pre-entry charges (= Vorbelastungshaftung).

M.-P. Weller/I. Hauber/A. Schulz, **Equality in international divorce law – talaq and get in the light of Art. 10 Rom III Regulation**

The following article discusses the principle of non-discrimination in international divorce proceedings. It especially focuses on Article 10 of the Rom III Regulation and draws attention to the question of whether the provision is meant to safeguard the principle of equal gender treatment in general or whether a case-by-case analysis is required in order to establish if the one of the parties has actually been treated unequally. Answering this question is of great importance with regard to both the Islamic *"talaq"* and divorce under Jewish Law.

D. Coester-Waltjen, **Co-motherhood in South African Law and the German birth registry**

Several legal systems – within and outside Europe – introduced rules which allow two partners of the same sex to be registered in the birth certificate as legal parents of a child. The number of these jurisdictions is growing – just recently being joined by Austria – up to then a system, which was relatively reluctant in the area of medically assisted reproduction and same sex unions. Although German criminal law does not forbid the artificial insemination of a woman living in a registered same sex partnership, family law rules do not provide a parental role for the female partner of the child's mother except by step-child adoption. Nevertheless, German registrars and judges have to deal with birth certificates naming two women as parents of a child – more frequently in recent times. In almost all cases the birth certificates were issued in a foreign country. Do these documents have to be recognized, which questions of private international law are concerned, and which consequences may follow from this kind of parenthood, especially with regard to the nationality of the child?

The Berlin Court of Appeal had to deal with these issues. The facts of the case

differ from those which had been presented to the Court of Appeal in Celle and in Cologne before. And this is true for the reasoning and the finding of the learned judges too. This article addresses the questions which conflict rules are applicable to a "parentage of choice", which limitations have to be observed, and which consequences will follow from the established parentage.

A. Dutta, **Trusts in Schleswig-Holstein? – A didactic play on transferring property under the wrong law?**

The case note addresses the question of how a testamentary trust has to be interpreted in the applicable German succession law as a system without a trust tradition, considering also the new Succession Regulation and possible implications of the European fundamental freedoms on the recognition of foreign trusts.

C. Thomale, **On the recognition of Californian Judgments of Paternity regarding surrogacy arrangements in Switzerland**

The Swiss Supreme Court denied recognition of a Californian Judgment of Paternity, which declared an ordering parent lacking any genetic connection with the child to be the child's legal father. The opinion feeds into current debates on surrogacy, notably reshaping the meaning of "best interest of the child". The comment analyses the decision, based upon which a transnational need for reform is identified.

F. Temming, **The qualification of the rules granting dismissal protection of employees according to sections 105, 107 of the Austrian Arbeitsverfassungsgesetz – is there finally a change of position regarding the case-law of the Austrian High Court of Vienna?**

The Austrian High Court of Vienna has published two judgments on the topic of dismissal protection of employees. The cases deal with collective preventive dismissal protection and repressive individual dismissal protection granted by sections 105, 107 of the Austrian Arbeitsverfassungsgesetz. These rules cause problems in the realm of international jurisdiction and conflict of laws because they combine co-determination rights together with the rights of individual employees. The resulting question is how to qualify the pertinent sections for the purposes of international jurisdiction and conflict of laws. The two judgements are noteworthy because they put an end to the Court's long standing case-law of

qualifying these sections as being totally part of the law of co-determination. Instead, the applicable law is labour law. However much these new development can be welcomed the way of dealing with the works council right to be consulted before the employer terminates the employment contract is still subject to dogmatic criticism. There is a good case of characterising this matter as being only part of the law of co-determination and thus applying neither Art. 8 nor Art. 9 of the Rome I Regulation. With regards to the substantive law these two judgements give a good opportunity to revisit the prerequisites regarding the personal scope of the German Betriebsverfassungsgesetz in cross-border and external situations.

M. Dregelies, **The lex auctoritatis in Polish and German law**

Although agency is important and necessary in modern business life, a codification of the lex auctoritatis is missing in the Rome I Regulation and the German Private International Law (EGBGB). As a result, the lex auctoritatis has been developed by judicial lawmaking and the doctrine. In 2011 the Polish parliament passed a new code on private international law, including the first Polish codification of a lex auctoritatis. After a short overview of the Polish substantive law, this article illustrates the need for a change in the German court ruling by comparing the Polish with the German solution and pointing out their problems. The Polish codification is recommended as the start of a new discussion of a uniform European lex auctoritatis.

Commission presents new proposals for fully harmonised directives on e-commerce

As already announced in its Digital Single Market Strategy adopted on 6 May 2015, the Commission has, on 9 December 2015, finally presented a legislative initiative on harmonised rules for the supply of digital content and online sales of

goods. The Commission explains: “This initiative is composed of (i) a proposal on certain aspects concerning contracts for the supply of digital content (COM(2015)634 final), and (ii) a proposal on certain aspects concerning contracts for the online and other distance sales of goods (COM(2015)635 final). These two proposals draw on the experience acquired during the negotiations for a Regulation on a Common European Sales Law. In particular, they no longer follow the approach of an optional regime and a comprehensive set of rules. Instead, the proposals contain a targeted and focused set of fully harmonised rules” (COM(2015)634, p. 1). From the perspective of legal policy, this change of approach can only be applauded (see already in this sense *von Hein*, Festschrift Martiny [2014], p. 365, 389: “Die beste Lösung dürfte aber eine effektive Harmonisierung des europäischen Verbraucherrechts auf einem verbindlichen Niveau darstellen, das optionale Sonderregelungen für den internationalen Handel überflüssig machen würde.”) According to the Commission, “[t]he proposals also build on a number of amendments adopted by the European Parliament in first reading concerning the proposal for a Regulation on the Common European Sales Law, in particular the restriction of the scope to online and other distance sales of goods and the extension of the scope to certain digital content which is provided against another counter-performance than money” (COM(2015)634, p. 1).

On the relationship between the new directive on certain aspects concerning contracts for the online and other distance sales of goods and the existing Brussels I*bis* and Rome I Regulations, the Commission elaborates (COM(2015)635, p. 4):

“The proposal is compatible with the existing EU rules on applicable law and jurisdiction in the Digital Single Market. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), which provide rules to determine the competent jurisdiction and applicable law, apply also in the digital environment. These instruments have been adopted quite recently and the implications of the internet were considered closely in the legislative process. Some rules take specific account of internet transactions, in particular those on consumer contracts. These rules aim at protecting consumers

inter alia in the Digital Single Market by giving them the benefit of the non-derogable rules of the Member State in which they are habitually resident. Since the current proposal on the online and other distance sales of goods aims at harmonising the key mandatory provisions for the consumer protection, traders will no longer face such wide disparities across the 28 different legal regimes. Together with the proposed new contract rules for online and other distance sales of goods as set out in this proposal, the existing rules on private international law establish a clear legal framework for buying and selling in a European digital market, which takes into account both consumers' and businesses' interests. Therefore, this legislative proposal does not require any changes to the current framework of EU private international law, including to Regulation (EC) No 593/2008 (Rome I)."

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 6/2015: Abstracts

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

F. Garcimartin, **The situs of shares, financial instruments and claims in the Insolvency Regulation Recast: seeds of a future EU instrument on rights in rem?**
The location of intangible assets is a key issue for the application of certain Private International Law rules. At the EU level, Regulation 1346/2000 on Insolvency proceedings contains three uniform rules on location of assets, one of which deals with claims (Art. 2 (g) III 2000 EIR). The recast of this instrument (Regulation 2015/84) has extended this provision, which now includes eight different rules (Art. 2 (9) EIR Recast). The purpose of this paper is to analyze one set of these rules, specifically those laid down for intangible assets: shares and other financial instruments, claims and cash accounts. The relevance of this

analysis is twofold. From a positive-law perspective, it may be useful to resolve some of the problems that the interpretation and application of Article 2 (9) EIR Recast may give rise to in practice. From a normative perspective, Article 2 (9) EIR Recast may be the seed of a future EU instrument on the law applicable to rights in rem. This provision establishes a detailed list of common rules on location of assets. Should the future instrument take as a starting point the traditional conflict of laws rule in this area, i.e. the *lex rei sitae*, this list would be the primary reference to determine the situs of most assets.

M. Lehmann, **A Gap in EU Private International Law? OGH and BGH on the Law Applicable to Liability for Asset Acquisition and Takeover of a Commercial Enterprise**

The contribution discusses a recent tendency in some Member States to avoid applying European conflict laws to certain aspects of the law of obligations. In question are national rules under which persons who take over the entire property or the commercial business of another are liable for the latter's debt. The highest courts in civil matters in Germany and Austria have decided that these issues are not covered by the Rome Convention of 1980, and have instead submitted them to autonomous national conflict rules. An important strand of the literature wants to transfer this solution to the Rome I and II Regulations. It must be borne in mind, however, that both regulations establish a comprehensive regime for the law of obligations. They do not leave any room for national conflict rules, save for those areas that are expressly exempt from their scope of application. A solution must therefore be found within the regulations themselves. It is suggested here that the type of liability in question could be characterized as an overriding mandatory rule. Looking to the future, it would be preferable if the EU legislator introduced specific conflict rules to address this problem.

C. Kohler, **Special Rules for State-owned Companies in European Civil Procedure? (ECJ, 23.10.2014 – Case C-302/13 – flyLAL-Lithuanian Airlines AS, in liquidation, v Starptautiska lidosta Riga VAS, Air Baltic Corporation AS)**

In Case C-302/13, *flyLAL-Lithuanian Airlines*, the ECJ held that an action for damages resulting from the alleged infringement of EU competition rules by two Latvian companies, *Starptautiska Lidosta Ri-ga* and Air Baltic, was civil and commercial in nature. It was irrelevant in that respect that the in fringement was said to result from the determination by the defendant *Starptautiska Lidosta Ri-ga*

of airport charges pursuant to statutory provisions of the Republic of Latvia. Equally irrelevant was the fact that the defendant companies were wholly or partly owned by that Member State. Furthermore, the ECJ specified the grounds which would bar the recognition and enforcement of a judgment ordering protective measures as being contrary to the public policy of the Member State addressed. The Court ruled that the mere invocation of serious economic consequences for state-owned companies do not constitute such grounds. The author welcomes the judgment as it clarifies that there is no special regime for state-owned companies in European civil procedure. He adds that the ECJ's opinion 2/13 on the accession of the EU to the European Convention of Human Rights, given shortly after the judgment in Case C-302/13, does, in principle, not affect the relevance of the public policy exception in Regulation Brussels I.

F. Wedemann, **The Applicability of the Brussels Ia Regulation or the European Regulation on Insolvency Proceedings in Company Law Liability Cases**

The ECJ's *G.T. GmbH* decision is important for European civil procedure law as it has significant implications for the demarcation between the scopes of the Brussels Ia-Regulation and the European Regulation on Insolvency Proceedings in company law liability cases. The author analyses these implications. First of all, she identifies and critically discusses the general guidelines established or confirmed by the decision: (1) The fact that a liability provision allows an action to be brought even where no insolvency proceedings have been opened, does not per se preclude such an action from being characterized as falling within the scope of Art. 3 (1) European Regulation on Insolvency Proceedings. Rather, it is necessary to determine whether the provision finds its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings. (2) In cases where no insolvency proceedings have been opened, actions fall within the scope of the Brussels Ia Regulation. (3) Cases where insolvency proceedings have been opened, but the action in question is brought by someone other than the liquidator, require a differentiating treatment. (4) The defendant's domicile is irrelevant for the applicability of Art. 3 (1) European Regulation on Insolvency Proceedings. (5) The jurisdiction based on Art. 3 (1) European Regulation on Insolvency Proceedings is exclusive. Subsequently, the author focusses on German company law and its broad range of liability provisions and examines the consequences of *G.T. GmbH* for jurisdiction in proceedings based on these provisions.

F. Temming, **International jurisdiction over individual contracts of employment – How wide is the personal scope of Art. 18 et sqq. of the Brussels I Regulation?**

This case note is about the question whether or not independent sales representatives can be considered as employees for the purposes of Art. 18 et sqq. of the Brussels I Regulation (44/2001/EC). This could be the case if an individual sales representative renders his services only to one principal and does not employ personnel on his own account. The resulting economic dependence vis-à-vis his principal could call for the jurisdictional protection that is granted by Art. 18 et sqq. of the Brussels I Regulation (44/2001/EC) to individual employees. Whereas the Regional Higher Labour Court of Düsseldorf (*LAG Düsseldorf*) denied the analogous application of Art. 18 et sqq. of the Brussels I Regulation (44/2001/EC) in favour of the claimant, there is a good case that – in light of recent judgements – the Court of the European Union could consider individuals, who are economically dependant on their partner of a service contract, to fall under its flexible autonomous concept of "employee", if the degree of subordination due to a right of direction was comparable to the one of an employee. If this case is referred to the Court of the European Union, it will have the potential of becoming a landmark case.

M. Fornasier, **The law applicable to employment contracts and the country of closest connection under Art. 8(4) Rome I**

In its *Schlecker* judgment (Case C-64/12), the European Court of Justice shed some light on the escape clause in the choice-of-law rule regarding employment contracts (Art. 8 (4) Rome I Regulation). The Court held that the employment relationship may be more closely connected with a country other than that in which the habitual workplace is located even where the employee carries out the work habitually, for a lengthy period and without interruption in the same country and where, thus, the territorial connection of the employment contract with the habitual workplace is particularly strong. The following case note analyses to what extent the ruling is reconcilable with the principle of favor laboratories and whether it is consistent with the case law of the ECJ relating to the posting of workers. Moreover, the paper examines the impact of the judgment on mechanisms of collective labor law such as collective bargaining and employee participation.

J. Schilling, **The International Private Law of Freight Forwarding Contracts**

After having taken position to charter parties in its ICF-decision already, the ECJ now comments the international private law of freight forwarding contracts. In its *Haeger & Schmidt* ruling the court clarifies that those contracts, which exclusively state an obligation to arrange for transport cannot be considered contracts of carriage in the meaning of Art. 4 para. 4 Rome Convention or Art. 5 para. 1 Rome I Regulation. However a freight forwarding contract falls within the material scope of the special rule for transport contracts, if its principal purpose is the transport as such of the goods. This can be considered, if the forwarding agent is performing the transport partially or entirely by himself, or in case of freight forwarding at a fixed price. The question of qualification will particularly be relevant in cases to which the Rome I Regulation applies, because the differences between the conflict of laws regime for general contracts and that for contracts of carriage have increased. As the uniform transport law does generally not apply to freight forwarding contracts, the recent ECJ decision on the international private law of those contracts appears even more important.

J. Hoffmann, **Duties of disclosure towards contracting parties without knowledge of the contract language**

The judgement of the German Federal Labour Court discussed in this article had to determine the legal consequences of the conclusion of a standard contract with an employee who had no knowledge of the language of the contract. Although neither the validity of the contract nor the inclusion and validity of the standard terms are in question, the information imbalance should be addressed by accepting a precontractual duty to explain the contract contents in appropriate cases. Such a duty should specifically be acknowledged if the precontractual negotiations were conducted in a different language. It can also be endorsed as a contractual obligation based on the fiduciary duty of the employer towards his employee as long as the language deficit remains.

M. Zwickel, **Prima facie evidence between lex causae and lex fori in the area of the French Road Traffic Liability Act (Loi Badinter)**

The decision of the Regional Court Saarbrücken, which had already given rise to a preliminary ruling by the ECJ regarding the “effective service of notice of proceedings on the claims representative of a foreign insurer”, relates to the problem of the usability of German prima facie evidence in a case to be decided in accordance with French law. The jurisprudence of the French *Cour de cassation* does not permit any reduction in the standard of proof within the framework of

road traffic liability. Adducing the prima facie evidence – contrary to French civil law – therefore potentially leads to a divergence of procedural and substantive law. The decision makes it especially clear that prima facie evidence within and outside of the scope of Art. 22 (1) Rome II-Regulation can sensibly only be treated in accordance with the *lex causae*.

M. Stürner, **Enforceability of English third party costs order**
The German *Bundesgerichtshof* (*BGH*) had to deal with an application to declare enforceable a third party costs order issued by the English High Court in the context of an insolvency proceeding. The *BGH* left open the question whether that decision falls within the scope of the Brussels I Regulation or the Insolvency Regulation as both regimes should not leave any gap between them and also provide identical grounds for refusing recognition. On that basis, the *BGH* held that the third party costs order did not violate German public policy. The author generally agrees with the decision.

H. Roth, **Actions to oppose enforcement and set-off**
Due to the close connection with the enforcement procedure, the exclusive jurisdiction of Article 22 (5) Lugano Convention of 2007 includes actions to oppose enforcement pursuant to § 767 of the German Code of Civil Procedure (*ZPO*).
Contrary to the view of the Federal High Court of Justice (BGH), § 767 ZPO can be applied even if the court seized would not be internationally competent in case of an independent legal assertion of the counterclaim.
The court is able to assess preliminary questions, which were submitted in defense, regardless of the restrictions by the law relating to jurisdiction. This principle also applies to the set-off.

H. Odendahl, **The 1961 Hague Protection of Minors Convention – How vital is the fossil?**
The Austrian Supreme Court of Justice had to decide upon the recognition of a Turkish court decision on the custody of a child of Turkish nationality living in a foster family in Austria, which was based on Art. 4 of the 1961 Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants. Recognition was rejected for reasons of public policy (Art. 16). The following article discusses the remaining scope of this outdated convention and the impact of its application in relation to its successor, 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, as well as the 1980 Luxembourg European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children.