InDret, Extraordinary Issue (April 2017)

Dr. Nuria Bouza Vidal, Professor of Private International Law at University of Barcelona and Pompeu Fabra University, retired in 2015; currently she is a member of the Unidroit Governing Council. As a kind of tribute to a life devoted to Private International Law the Spanish legal e-review *InDret* (www.indret.com) has just published an extraordinary issue collecting the presentations made at a ceremony held in her honor entitled "Internal, European and International Public Policy".

The issue contains the following articles:

- **José Carlos FERNÁNDEZ ROZAS, "The Public Policy of Arbitrator in the International Commercial Arbitration" (**"El orden público del árbitro en el arbitraje comercial internacional", pp. 5-69).

English abstract : Party autonomy in international commercial arbitration is the most compelling reason for the contracting parties to enter into arbitration agreement, rather than opting for litigation. However, arbitration functionalities may be hindered by several factors, one of which is arbitrability and public policy. The concept of public policy exists in almost all legal systems. Yet, it is one of the most elusive concepts in law given the contradictory case law and convoluted literature. The scope of public order is more than a mere tool of judicial review, upon completion of the proceedings before the arbitrators. It is manifested throughout the arbitration process which influence the determination of competence of arbitrators, in the substantiation of the arbitration proceedings and in determining the law applicable to the arbitration agreement, leading to a sort of "public order of the arbitrator". Consequently, the appreciation of public policy does not relate exclusively to the judges. The arbitrators are as competent as the judges to inquire about the content of the underlying public policy of a particular law, regulation or in an arbitration practice.

- **Núria BOUZA VIDAL, "The Safeguard of Public policy in International contracts: Private International Law approach and its adjustment in European law" ("La salvaguarda del orden público en los contratos internacionales: enfoque de derecho internacional**

privado y su adaptación en el derecho europeo", p. 70-101).

English abstract: This study analyses the ways to safeguard public policy in international contracts with the purpose to analyze and evaluate its meaning and function in the Private International Law of the Member States of European Union and in the substantive law of the European Union. In the first place, the different tools of Private international law aimed at safeguarding internal and international public policy of states are examined. In second place, the tools of Private international law to safeguard public policy must conform to the primary and secondary legislation of the European Union. These tools cannot restrict the freedom of movements in the internal European Market except for the reasons justified on the ground of public policy or overriding requirements of the public interest. Special attention should be paid to these notions because its meaning are not the same in European Law and in Private International Law. Also, some harmonization European Directives contains provisions about their geographic scope. Often these provisions are improperly considered overriding mandatory provisions.

- **Juan José ÁLVAREZ RUBIO, "Liability for damage to the marine environment: channels of international procedural action**" (**"Responsabilidad por daños al medio marino: cauces de actuación procesal internacional",** p. 102-138).

English abstract: This article analyzes the international procedural dimension linked to disputes arising from marine casualties for Oil spillage, and analyzes the interaction between the various regulatory blocks in the presence, and in particular the conventional dimension over domestic legislation and the institutional, from the European legislator. The criminal legal remedy becomes ineffective for the analysis of the complexity inherent in the realization of civil liability and its subjective and quantitative scope, and the international conventions in force establish a system of limitation of liability that is difficult to justify and sustainable today.

- **Estelle GALLANT, "International prenuptial agreements and anticipation of financial consequences of a divorce: which public policy?" (**"Contrats nuptiaux internationaux et anticipation des conséquences financières du divorce : ¿quel ordre public?", p. 139-164).

English abstract: In some jurisdictions the law allows spouses not only to regulate

their matrimonial property regime by agreement, but also to anticipate the financial consequences of their divorce, either by fixing the amount that such spouses may be allowed to claim to each other, or by ruling out any possibility of claiming any financial compensation. The receipt of a prenuptial agreement governed by a foreign law in a less lenient legal system raises the question of the role of international public policy as far as party autonomy is concerned, especially in a context where Maintenance Regulation and the Hague Protocol seek to balance the parties' forecast with a form of maintenance justice.

- **Santiago ÁLVAREZ GONZÁLEZ, "Surrogacy and Public Policy (ordre public)"** ("Gestación por sustitución y orden público", pp. 165-200).

English abstract: This paper deals with the role of public policy (ordre public) in light of international surrogacy cases. The author analyzes several judgments held by the supreme courts of Germany, Spain, France, Italy and Switzerland. This analysis shows that, even when faced by a series of common elements, the domestic ordre public remains different in each country. Equivalent situations receive different answers by law. This outcome is due to an also different idea about the ordre public scope, to a different view on the paramount interest of children, to a different understanding of the ECHR's jurisprudence and, last but not least, to the different possibilities of reconstruction of the family ties that each national law offers. The author concludes that this ordre public exception, linked so far to each national law, will no longer have a preeminent place on the international surrogacy issues, among other reasons, because it is not possible to achieve a satisfactory solution to the wide range of problems around surrogacy from the point of view of a sole national law.

- **Ana QUIÑONES ESCÁMEZ, "Surrogacy arrangements do not establish parenthood but a public authority intervention in accordance to law (Recognition method for foreign public acts and Conflict of laws for evidence and private acts)"** ("El contrato de gestación por sustitución no determina la filiación sino la intervención de una autoridad pública conforme a ley (Método del reconocimiento para los actos públicos extranjeros y método conflictual para los hechos y los actos jurídicos privados)", pp. 201-251).

English abstract : The present article focuses on Private International Law issues

raised by international surrogacy arrangements. I will examine the resolution methods offered by Private International Law: mandatory rules, conflict of laws and recognition of decisions and legal situations. Attention will be focused on the possibilities offered by the recognition method regarding a parenthood link between a child and the commissioning parents already established by a foreign public authority. Based on the principle that a child's parenthood cannot be subject to private autonomy, in cases where we are only faced with facts (reproductive practice) and private acts (surrogacy arrangements) the child's parenthood will not be established yet (conflict of Laws method), in order to serve her best interest. Giving some examples, I will show that solutions offered to international surrogacy arrangements in the USA or the EU are not so different, and that the surrogacy arrangement is not treated as a current arrangement in any other country. Finally, I will make some proposals at both domestic and international levels which, by means of respecting legislative diversity, foresee international limits when citizens from other countries access to this practice abroad. This solution aims at avoiding "limping situations" and guaranteeing that children conceived through surrogacy will not be delivered to unknown foreign citizens. Last but not least, I advocate for controlling relocation strategies of legal and procreative industry at international level, whose clients are recruited at their respective markets.

- **Esther FARNÓS AMORÓS, "Public policy and donor anonymity" (**"¿Deben los donantes de gametos permanecer en el anonimato?", pp. 252-273).

English abstract: This article highlights the tension between the anonymity of the donor and the donor conceived individuals' right to know one's origins. The study of legal systems that recognize this right spurs us to further examine the hypotheses, quite widespread today, which consider outdated traditional arguments for anonymity. In this regard, the article also shows the different treatment granted to adopted children and donor conceived children by legal systems such as the Spanish one. Beyond the possible conflicting rights of children, donors and parents, arguments provided by anonymity supporters, such as the moral damage resulting from disclosure or the possible link between disclosure and a decrease in the number of donors, should be also taken into account. However, these arguments require absolute empirical evidence, which is not currently conclusive. Last but not least, disclosure of the donor's identity is

consistent with the ever-growing trend to dissociate biological, social and legal spheres of parentage.

- **Mònica VINAIXA MIQUEL, "The party autonomy in the new EU Regulations on Matrimonial Property Regimes (2016/1103) and Property consequences of Registered Partnesrships (2016/1104) (**"La autonomía de la voluntad en los recientes reglamentos UE en materia de regímenes económicos matrimoniales (2016/1103) y efectos patrimoniales de las uniones registradas (2016/1104)", pp. 274-314).

English abstract: On June 24, 2016, with the aim of facilitating the citizens and international couples' life, in particular, in cross-border situations to which they may be exposed, the Council adopted by way of the enhanced cooperation, the Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (2016/1103 Regulation) and the Regulation on jurisdiction, applicable law, recognition and enforcement of decisions regarding the property consequences of registered partnerships (2016/1104 Regulation). With their approval an important gap in the current EU Private International Law on Family matters have been covered. Both of them are Private International Law instruments through which EU seeks to establish a clear and uniform legal framework on the subject. The new Regulations do not affect the substantive law of the Member States on Matrimonial Property Regimes and Property consequences of Registered Partnerships. The party autonomy has enormous advantages in the field of applicable law, unlike the subsidiary connecting factors applicable in the absence of choice of law by the parties, particularly in procedures about the liquidation of matrimonial/registered partnership property regime as a result of its breakdown or because of the death of one of the partners. As we will see, choice of law is the best connecting factor for the coordination of the different EU Regulations that can be applied in the same procedure, for example, the 1259/2010 Regulation on divorce and legal separation, the 650/2012 Regulation on successions and the 2016/1103 or the 2016/1104 Regulations recently adopted. If the parties choose one law as applicable to the different claim petitions, the competent court will have to apply only one law. The problem is that different Regulations do not contain uniform rules on choice of law. However, this result it is more difficult to be achieved through the objective connecting factors of the different UE Regulations as they are fixed in different periods. While the 1259/2010 and 650/2012 Regulations fix

the connecting factors at the end of the couple´s life, the new Regulations fixes them at its beginning (immutability rule). The aim of this contribution is party autonomy, however it is also taken into account the influence of the overriding mandatory provisions (such as certain rules of the primary matrimonial regime) which are applicable irrespective of the law otherwise applicable to the matrimonial or registered partnership property regime under the Regulations, the protection of third party rights as well as the role of the public policy in this field, which particularly operates when the applicable law is that of a third state.

- **Albert FONT I SEGURA, "The delimitation of the public policy reservation and evasion of law in Succession Regulation (EU) 650/2012"** ("La delimitación de la excepción de orden público y del fraude de ley en el Reglamento (UE) 650/2012 en materia sucesoria", pp. 314-365).

English abstract: The outstanding differences among the Member States on succession matters determine the intended coincidence between forum and ius in Regulation 650/2012. However, the combination of the rules of competition and the conflict rules provided for in the European instrument can sometimes lead to the application of foreign law. Under these circumstances the application of public policy reservation or the evasion of law can be taken which results in the application of lex fori, with the main purpose of ensuring the protection of public order. This contribution, above the limits and shortcomings of Regulation 650/2012, highlights the effective restrictions and potential constraints that can be or may be submitted to national jurisdictions. The author suggests mechanisms for the EUCJ to provide guidelines for interpretation and articulation between the two figures.

- **Jonathan FITCHEN, "Public Policy in Succession Authentic Instruments: Articles 59 and 60 of the European Succession Regulation"**, pp. 366-396.

The abstract reads: This chapter indicates the scope for difficulties in establishing the meaning of the public policy exceptions provided by Article 59(1) and Article 60(3) of the European Succession Regulation. Though EU jurisprudence from other EU Regulations concerning public policy exceptions for judgments offers some guidance, the lack of jurisprudence concerning the public policy of authentic instruments, diversity among national succession laws

and the novelty of Article 59's obligation of 'acceptance' may pose problems for authentic instruments in the Succession Regulation. The high probability of the Succession Regulation being operated by non-contentious probate practitioners, rather than by the courts more usually empowered by such European Regulations, is also suggested to potentially add to these difficulties. For those and other reasons it is suggested that cases involving the public policy exceptions should be capable of diversion to domestic or European courts for the determination of the public policy points at issue.

International Law Claims in U.S. Court: The Supreme Court Decides Venezuela v. Helmerich & Payne

Last week, the US Supreme Court issued its decision in *Bolivarian Republic of Venezuela v. Helmerich & Payne International*, deciding the pleading threshold a party must establish for the purposes of the 'expropriation exception' under § 1605(a)(3) of the Foreign Sovereign Immunities Act (FSIA).

We've reported on the case already here and here, and at this stage, there is little more that can be said about the decision that has not already been reported by Amy Howe at SCOTUSBlog and Ted Folkman and Ira Ryk-Lakhman at Letters Blogatory.

In sum, the plaintiff is a U.S. company, and its Venezuelan subsidiary, Helmerich & Payne de Venezuela. Helmerich & Payne de Venezuela started drilling for the state-owned oil company decades ago, but in 2010, then-President Hugo Chavez issued a decree appropriating the subsidiary's drilling rigs, which the state-owned oil company now uses. A little over a year later, the two companies filed a lawsuit in federal court in Washington, D.C., invoking the "expropriation exception" to the FSIA. That exception allows lawsuits against foreign governments to go forward in the United States when "rights in property taken in violation of international

law are in issue" and the state or state-owned entity later owns that property and has a commercial connection to the United States. As you can see, the language of the statute shows that the merits of a claim and the jurisdictional inquiries are substantially intertwined

In 2015, the court of appeals held that the claims could go forward so long they met the "exceptionally low bar" of not being "wholly insubstantial or frivolous." In an opinion by Justice Stephen Breyer, the court explained that the bar for such claims is, in fact, a bit higher. To wit, the expropriation exception will apply, and a U.S. court will have jurisdiction, only when the facts "do show (and not just arguably show) a taking of property in violation of international law." Such questions, the Court held, should be decided "as close to the outset" of the case "as is reasonably possible," in order to provide clarity to foreign governments and minimize the extent to which they are involved in litigation in U.S. courts. This, the court suggested, will in turn reduce the likelihood of friction with other countries and retaliatory litigation against the United States overseas.

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

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

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

The conference was organized by Susanne Gössl, Bonn, and a group of doctoral or postdoctoral students from different universities. It was supported by the Institute for German, European and International Family Law, the Institute for Commercial and Economic Law and the Institute for Private International Law and

Comparative Law of the University of Bonn the German Research Foundation (DFG), the German Society of International Law (DGIR), the Dr. Otto-Schmidt-Stiftung zur Förderung der Internationalisierung und der Europäisierung des Rechts, the Studienstiftung Ius Vivum, the Verein zur Förderung des Deutschen, Europäischen und Vergleichenden Wirtschaftsrechts e.V., and the publisher Mohr Siebeck.

Professor *Dagmar Coester-Walten*, LL.M. (Michigan), Göttingen, gave the opening speech. She emphasized that the relation between politics and conflict of laws has always been controversial. Even the "classic" conflict of laws approach (Savigny etc.) was never free from political and other substantive values, as seen in the discussion about international mandatory law and the use of the public policy exception. She outlined the controversy around the "political" Private International Law in the 20th century, resulting in new theories of Private International Law such as Currie's "governmental interest analysis" and counter-reactions in continental Europe. Even after a review of the more political conflict of laws rules of the EU, Professor Coester-Waltjen came to the conclusion that the changes of the last decades were less a revolution than a careful reform in continuance of earlier tendencies.

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

In the second panel ***Dominik Düsterhaus***, **Luxemburg**, dealt with the question to what extend EU law and the interpretation through the CJEU lead to a "constitutinalisation" of Private International Law and International Procedure

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

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

The conference concluded with the unanimous decision to organize further conferences for young scholars in Private International Law, probably every two

years. The next conference will be held in Würzburg, Germany, in spring 2019.

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

Brexit Negotiations Series on OBLB

On 17 March 2017 Horst Eidenmüller and John Armour, both from the University of Oxford, organised a one-day conference at St Hugh's College, Oxford, on 'Negotiating Brexit'. One panel focused on the effects of Brexit on the resolution of international disputes, including issues of jurisdiction, choice of law, recognition and enforcement as well as international arbitration. Two of the contributions to the conference have recently been published on the Oxford Business Law Blog:

- Giesela Rühl, *The Effect of Brexit on Choice of Law and Jurisdiction in Civil and Commercial Matters*, available here;
- Marco Torsello, *The Impact of Brexit on International Commercial Arbitration*, available here.

A third post by Tom Snelling will deal with the impact of Brexit on recognition and enforcement on foreign judgments.

Séminaire de Droit Comparé et Européen- Summer 2017, Urbino

The 59th edition of the *Séminaire de Droit Comparé et Européen* d'Urbino (Italy) will be held next summer from August 22nd to September 1st.

The *Séminaire* is a common venture of Italian and French jurists taking place since 1959. The venue is ideal for developing a dialogue on Comparative, International (both public and private) and European law with jurists from different world countries, since it largely benefits of the relaxing time of the year and of the serenity of the environment: Urbino gave birth to humanism and to the Vitruvian man.

This year's seminar's main topics are robotics and AI international legal problems, State immunity, the future of family law, arbitration and many others. Speaker include Prof. M.E. Ancel, S. Yansky-Ravid, A. Giussani, C. Malberti, P. Morozzo della Rocca, A. Bondi, L. Mari, I. Pretelli as well as practitioners - lawyers, mediators, arbitrators and notaries. The Seminar promotes multilingual competencies: presentations are in French, English or Italian, often followed by summarized translations in the other two languages.

The whole program as well as email addresses for further information is downloadable here.

The Justice Initiative Frankfurt am Main 2017

Written by Prof. Dr. Dres. h.c. Burkhard Hess, Executive Director Max Planck Institute Luxembourg for Procedural Law

Against the backdrop of Brexit, an initiative has been launched to strengthen

Frankfurt as a hot spot for commercial litigation in the European Judicial Area. On March 30, 2017, the Minister of Justice of the Federal State Hessen, Ms Kühne-Hörmann, organized a conference at which the Justice Initiative was presented. More than 120 stakeholders (lawyers, judges, businesses) attended the conference. The original paper was elaborated by Professors Burkhard Hess (Luxembourg), Thomas Pfeiffer (Heidelberg), Christian Duve (Heidelberg) and Roman Poseck (President of the Frankfurt Court of Appeal). Here, we are pleased to provide an English translation of the position paper with some additional information on German procedural law for an international audience. The proposal has, as a matter of principle, been endorsed by the Minister of Justice. Its proposals are now being discussed and shall be implemented in the next months to come. The paper reads as follows:

1. Background Information

In the European Judicial Area, London has positioned itself as the most important hub for cross-border disputes arising from the European internal market. According to statistics, in around 80% of all commercial cases at least one party is foreign, while almost 50% of all claims issued in the London court concern only foreigners. The value of disputes before the London Commercial Court is regularly in the 6 – 7-digit range. The court hears approximately 1,000 procedures per year, of which almost 200 concern parties from the continent (see here). A key focus is on financial disputes. Often, the jurisdiction of the High Court of London is based on jurisdiction agreements (Article 25 Brussels I^{bis} Regulation).

The upcoming Brexit will change this situation in relation to parties from the continent. In the future, the United Kingdom as a state will no longer benefit from the benefits of the European Judicial Area; the UK will rather be a third country. Parties to civil disputes must already consider whether they prefer to choose other courts within the European Judicial Area. The liberal rules of jurisdiction laid down in Article 25 of the Brussels I^{bis} Regulation and the special jurisdiction rules established in Articles 7 and 8 of the Brussels I^{bis} Regulation promote appropriate strategies. In financial contracts, jurisdiction clauses do not only provide for London, but also for other courts in the European Judicial Area, such as Frankfurt. Therefore, Germany can become a competing judicial hub. With the expected relocation of the financial center from London to Frankfurt (and indeed,

likely to other European locations) a relocation of the judicial hub is also to be expected. It is submitted that one should strive for a shift of financial disputes to Frankfurt; even today, the Frankfurt judiciary is characterized by the existence of its special expertise in commercial areas. Indeed, the Frankfurt civil courts already have a high degree of specialization to hear financial and banking disputes.

Attracting high-profile, commercial disputes entails positive effects with regard to the legal services sector, in particular the legal profession, but also the courts of ordinary jurisdiction. Corresponding developments can be observed with regard to patent litigation. In this highly-specialized area of law, the courts of Düsseldorf, Mannheim and Munich have already established themselves as sought-after throughout Europe.

For these reasons, the Justice Initiative proposes that the attractiveness of the civil and commercial courts of Frankfurt should be strengthened through some targeted (mainly organizational) measures. A simultaneous information campaign would also increase Frankfurt's visibility as an attractive place for the solution of international commercial disputes. Our considerations are linked to and continue to advance earlier initiatives ("Law Made in Germany") that aim to strengthen Germany as a compelling place for dispute resolution.

In particular, the authors propose the following measures:

A. A comprehensive strategy to strengthen Frankfurt as a hub for international dispute settlement

I. The core concern relates to the further specialization of the dispute resolution bodies within the state courts in order to promote the efficient resolution of cross-border commercial disputes. A combination of targeted measures, including the provision of a well-equipped court and experienced judges with good language skills as well as a modern process design shall enable a practical, user-friendly framework for the settlement of international commercial disputes

II. The initiative shall be accompanied by the comprehensive involvement of the judiciary, of the business sector (the Chamber of Industry and Commerce) as well as of the legal profession (including lawyers' associations and lawyers' chambers).

III. Simultaneous strengthening of arbitration in Frankfurt (via the creation of a

Center for International Dispute Resolution).

B. Establishment of Chambers for International Commercial Matters at LG Frankfurt as well as of appropriately specialized senates at OLG Frankfurt

I. Composition of the Chamber for International Commercial Disputes with judges who have:

1. In-depth experience of business law (and, if possible also experience as lawyers) as well as;
2. Good English language skills.

II. Occupation of the commercial lay judges in consultation with the Chamber for Commerce with experts from the fields:

1. Finance and banking;
2. International commercial matters;
3. Auditing.

Here again, adequate language skills must be ensured.

III. Sufficient equipment of the Chamber for International Commercial Disputes:

1. Comprehensive use of the electronic support system, for example by providing an IT tool in order to enable an "electronic process and case file management";
2. Adequate equipment of the registrar of the Chamber / Senate with a staff, which also disposes of a sufficient knowledge of foreign languages and is able to manage (partially or partly) foreign-language files;
3. Borrowing best practices from arbitration with regard to the secretary/registry who adopts active support functions (as a case manager).

C. Process design

I. In respect of its own procedural practice, the Kammer für international Handelssachen should borrow "best practices" from patent litigation and international commercial arbitration:

1. The court should establish a "road map" with the parties at the start of

the process; this would structure the course of the procedure. In this respect, it would seem to be a good idea to use the first hearing as a "Case Management Conference" with the parties:
2. Intensive use of the obligation of the court to provide information on open legal and factual issues under section 139 ZPO (German Code of Civil Procedure – the text is reproduced at the end of the document), in order to facilitate a speedy and transparent procedure;
3. Written preparation statements of witnesses shall generally be permitted (see § 377 (3) ZPO);
4. Increased use of sections 142 to 144 ZPO to enable a (structured) exchange of evidence between the parties under the control of the court ("German disclosure");
5. Recording of the hearing and preparation of a textual record (sections 160 to 164 ZPO) – as an electronic document.

II. Extensive use of the English language within the existing framework of sections 184 and 185 (2) of the Court Organisation Act (but no English-speaking hearings per se). The court should decide at its own discretion whether and to what extent the hearing is held in English. The proposals of the parties must be respected as far as possible.

1. No translation of documents which are drafted in the English language (as already foreseen by section 142 (3) ZPO):
2. Witness will be heard in their original tongue or in English;
3. Extensive use of video conferencing:
4. Elaboration of judgments in a way which allows for their speedy translation into foreign languages.

D. The implementation of the initiative

I. Obtaining the support of lawyers, the judiciary and politicians in Hesse (Fall 2016)

II. Opening symposium on the 30th of March 2017;

III. Establishment of a working group with the aim of defining the necessary measures to be taken;

IV. Development and implementation of an accompanying communication

strategy;

V. Establishment of a chamber for international trading at Regional Court of Frankfurt and a parallel specialization at the the Heigher Regional Court preferably on January 1, 2018 (within the business distribution plan of 2018).

All in all, the undertaking of the necessary organizational endeavor as well as the timetable for the implementation of the initiative both appears to be feasible. The implementation requires, in particular, the establishment of the Chamber for International Commercial Disputes (Kammer für international Handelssachen) within the District Court of Frankfurt. The following disputes could be assigned to the Chamber from the date of its establishment: international disputes, where the jurisdiction of the Landgericht Frankfurt (District Court of Frankfurt) is based on the Brussels I^{bis} Regulation or the Lugano Convention. Within the District Court, the respective disputes would be allocated to the specialized chamber via the business distribution plan of the court.

Annex: The pertinent provisions of the German Code of Civil Procedure and the Court Organisation Act

Code of Civil Procedure (Zivilprozessordnung – ZPO)

Section 139 Direction in substance of the course of proceedings

(1) To the extent required, the court is to discuss with the parties the circumstances and facts as well as the relationship of the parties to the dispute, both in terms of the factual aspects of the matter and of its legal ramifications, and it is to ask questions. The court is to work towards ensuring that the parties to the dispute make declarations in due time and completely, regarding all significant facts, and in particular is to ensure that the parties amend by further information those facts that they have asserted only incompletely, that they designate the evidence, and that they file the relevant petitions.

(2) The court may base its decision on an aspect that a party has recognisably overlooked or has deemed to be insignificant, provided that this does not merely concern an ancillary claim, only if it has given corresponding notice of this fact and has allowed the opportunity to address the matter. The same shall apply for

any aspect that the court assesses differently than both parties do.

(3) The court is to draw the parties' attention to its concerns regarding any items it is to take into account ex officio.

(4) Notice by the court as provided for by this rule is to be given at the earliest possible time, and a written record is to be prepared. The fact of such notice having been given may be proven only by the content of the files. The content of the files may be challenged exclusively by submitting proof that they have been forged.

(5) If it is not possible for a party to immediately make a declaration regarding a notice from the court, then the court is to determine a period, upon the party having filed a corresponding application, within which this party may supplement its declaration in a written pleading.

Section 142 Order to produce records or documents

(1) The court may direct one of the parties or a third party to produce records or documents, as well as any other material, that are in its possession and to which one of the parties has made reference. The court may set a deadline in this regard and may direct that the material so produced remain with the court registry for a period to be determined by the court.

(2) Third parties shall not be under obligation to produce such material unless this can be reasonably expected of them, or to the extent they are entitled to refuse to testify (…).

(3) The court may direct that records or documents prepared in a foreign language be translated by a translator who has been authorised or publicly appointed by the authorities of a Land, under the stipulations of Land law, for the preparation of translations of the nature required, or who is deemed to have equivalent qualifications. The translation shall be deemed to be true and complete where this is confirmed by the translator. The confirmation is to be set out on the translation, as are the place and date of the translation and the translator's authorisation/appointment/equivalency, and the translated document is to be signed by the translator. It is admissible to prove that the translation is incorrect or incomplete. The order provided for in the first sentence hereof may not be issued to the third party.

Section 143 Order to transmit files

The court may direct the parties to the dispute to produce the files in their possession to the extent they consist of documents concerning the hearing on the matter and the decision by the court.

Section 144 Visual evidence taken on site; experts

(1) The court may direct that visual evidence is to be taken on site, and may also direct that experts are to prepare a report. For this purpose, it may direct that a party to the proceedings or a third party produce an object in its possession, and may set a corresponding deadline therefor. The court may also direct that a party is to tolerate a measure taken under the first sentence hereof, unless this measure concerns a residence.

(2) Third parties are not under obligation to so produce objects or to tolerate a measure unless this can be reasonably expected of them, or to the extent they are entitled to refuse to testify pursuant to sections 383 to 385. Sections 386 to 390 shall apply mutatis mutandis.

(3) The proceedings shall be governed by the rules applying to visual evidence taken on site as ordered upon corresponding application having been made, or by those applying to the preparation of reports by experts as ordered by the court upon corresponding application having been made.

Section 377 Summons of a witness

(3) The court may instruct that the question regarding which evidence is to be taken may be answered in writing should it believe that, in light of the content of the question regarding which evidence is to be taken and taking into consideration the person of the witness, it suffices to proceed in this manner. The attention of the witness is to be drawn to the fact that he may be summoned to be examined as a witness. The court shall direct the witness to be summoned if it believes that this is necessary in order to further clear up the question regarding which evidence is to be taken.

Court Organisation Act

Section 184

The language of the court shall be German. The right of the Sorbs to speak Sorbian before the courts in the home districts of the Sorbian population shall be guaranteed.

Section 185

(1) If persons are participating in the hearing who do not have a command of the German language, an interpreter shall be called in. No additional record shall be made in the foreign language; however, testimony and declarations given in the foreign language should also be included in the record or appended thereto in the foreign language if and to the extent that the judge deems this necessary in view of the importance of the case.(…)

(2) An interpreter may be dispensed with if all the persons involved have a command of the foreign language.

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.

Revista Española de Derecho Internacional 2017-1

The new issue of the Revista Española de Derecho Internacional, *RED*I, has just been released both in digital and printed form. It includes the following PIL articles:

Santiago Álvarez González, *What Conflict Rule Should Be Adopted To Determine The Law Applicable To Preliminary Questions On Which The Succession May Depend?*

> Abstract: This paper deals with the classic topic of «incidental or preliminary question» in the conflicts of laws. The start point is the question nº 13 of the Green Paper Succession and wills. There is no consensus on the answer to the incidental question- which is understandable, as this is indeed the begin of every theoretical problem. However, there is no consensus either around the concept of incidental question. And this is something that precludes any proper discussion. As a way out the author proposes to reject the theory (rectius: the theories) of the preliminary question and to adopt a case by case approach. This *ad hoc* approach is based, among other, upon the multiple rules and exceptions (many of them very reasonable) proposed by authors, especially in German doctrine. In some cases «recognition» (and not conflicts of laws) can be the most appropriate approach; in others any one of the classic proposals (…) will provide with the better answer, depending on the

circumstances and the most preponderant interest involved; it is also possible to avoid the problem through a proper «characterization» of the situation. The main shortcoming of this proposal – the fact that it puts legal certainty at a risk- is a fully manageable one; and in any case it is a proposal not weaker than the current heterogeneous scenario.

Rafael Arenas García, *The European Legislator And The Private International Law Of Companies In The EU*

Abstract: Luxembourg Court's case law has shown that the freedom of establishment granted by the EU law affects not only the substantive company law of the Member States, but also the conflict of laws rules in matters relating to companies. In the absence of secondary legislation relating to the law governing companies in the EU, and in order to improve legal certainty it would be desirable that the European legislator draw up rules aimed to determine which will be the lex societatis governing companies incorporated in EU countries. This regulation should also concretize the matters ruled by this lex societatis and the change of the lex societatis as a result of the transfer of the registered office of the company. Among the subjects covered by this regulation it should necessarily be included the company's legal capacity and the directors' liability. It would be also necessary to delimitate the scope of the specific corporate regulation and that relating with insolvency proceedings.

Pedro de Miguel Asensio, *Jurisdiction And Applicable Law In The New Eu General Data Protection Regulation*

Abstract: The new EU General Data Protection Regulation brings about a deep transformation of the previous legal framework based on the mere approximation of laws. As regards the cross-border dimension, it amends the territorial scope of application of EU data protection law to clarify that it covers the processing of data of subjects who are in the Union by a controller or a processor not established in the Union where the processing activities are related to offering goods or services to such data subjects. This article discusses the rationale that supports the new approach and the relevant criteria for its interpretation. Unlike the previous regime, the provisions of the Regulation on its territorial scope do not determine the competent national supervisory authority. The Regulation includes specific provisions on the

distribution of competences between the supervisory authorities of the Member States with regard to cross-border situations. Such rules play also an important role concerning the right to a judicial remedy against a supervisory authority. Additionally, new special jurisdiction rules are established concerning private claims by data subjects against a controller or processor as a result of the infringement of the rights granted to them by the Regulation. Such rules are of special significance with respect to the right to compensation where a damage results from an infringement of the Data Protection Regulation. One of the main objectives of this article is to clarify the issues raised by the relationship of the new special rules on jurisdiction and related proceedings with other provisions, such as those of the Brussels I (Recast) Regulation. The shortcomings of EU conflict rules in the area of private enforcement of data protection law and the interplay between the new Regulation and the general EU framework on conflict of laws are also discussed.

Fernando Esteban de la Rosa, *Consumer Complaints' Regime In The New European Law On Alternative And Online Consumer Dispute Resolution*

Abstract: The global nature of online consumer trade has given rise to new strategies guaranteeing consumer rights, such as enabling online dispute resolution. The new European law, namely Directive 2013/11/EU and Regulation 524/2013/EU, has boosted regional acceptance of this trend. The present study analyses the impact of the new European legislation on the system of private international law. The study reveals, on the one hand, the need to make systematic adjustments in order to achieve a spatial scope of application for the principle of liberty according with the EU legislator´s intention, to devoid the interpretation excluding the reference to foreign consumer arbitration or to integrate some regulatory gaps inherent to the newly established system. On the other hand, it focuses on the need to verify whether the current regime complies with the requirements derived from the recognition of the right proclaimed by art. 47 ECFR and art. 19 TEU. In this perspective the study contains de lege ferenda solutions intertwined with the peculiarities of the online management of cross-border claims via the European platform.

Elena Rodríguez Pineau, *Regulation Brussels IIbis Recast: Reflections On The Role Of European Private International Law*

Abstract: Ten years after the Regulation (EC) 2201/2003 entered into force, and bearing in mind the jurisprudence of the European Court of Justice on the Regulation, the Commission believes that the time is ripe for a Regulation recast. Thus, in 2016 the Commission has presented its proposal. The text identifies six basic problems that are deemed to be in need of a thorough revision: international child abduction, the disposal of exequatur, the enforcement of foreign decisions, cooperation between authorities, cross-border placement of children and the hearing of the child. As the proposal highlights, the recast would aim at better protecting the best interest of the child. However, many of the new rules included entail direct harmonisation of procedural rules of Member States, which will result in a deeper integration that will foster the principles of mutual recognition and mutual trust among Member States. This article deals with the novelties of the Brussels II recast (both as to the six items previously identified as well as other new elements of the Regulation) and tackles the tension between the protection of the best interest of the child and the reinforcement of the principle of mutual recognition in the European area of civil justice.

All papers are in Spanish. The whole summary (thus Public International Law papers, contributions to the *Foro* and a selection of recently published books with a critical comment) can be downloaded here.

SSRN: Recent articles on Private International Law/Conflict of Laws

I thought it might be worth to draw your attention to a couple of interesting papers that I came across on SSRN recently (without any claim of completeness):

On Brexit and Private International Law:

- *Matthias Lehmann & Nihal Dsouza* (University of Bonn), What Brexit

Means for the Interpretation and Drafting of Financial Contracts
- *John Armour* (University of Oxford), *Holger Fleischer* (MPI Hamburg), *Vanessa Jane Knapp* (Queen Mary University of London) & *Martin Winner* (Vienna University of Economics and Business), Brexit and Corporate Citizenship
- *Mukarrum Ahmed* (Lancaster University) & *Paul R. Beaumont* (University of Aberdeen), Exclusive Choice of Court Agreements: Some Issues on the Hague Convention on Choice of Court Agreements and its Relationship with the Brussels I Recast Especially Anti-Suit Injunctions, Concurrent Proceedings and the Implications of Brexit
- *Mukarrum Ahmed* (Lancaster University), Brexit and English Jurisdiction Agreements: The Post-Referendum Legal Landscape

On EU Private International Law:

- *Jean-Sylvestre Bergé* (Université de Lyon), The Gap between Legal Disciplines, Blind Spot of the Research in Law: Remarks on the Operation of Private International Law in the EU Context
- *Evangelos Vassilakaki*s (Aristotle University of Thessaloniki), The Choice of the Law Applicable to the Succession under Regulation 650/2012 – An Outline
- *Laura van Bochove* (Leiden University), Purely Economic Loss in Conflict of Laws: The Case of Tortious Interference with Contract
- *Ilaria Pretelli* (Swiss Institute of Comparative Law), Exclusive and Discretionary Heads of Jurisdiction for Third States and Lugano States: The Way Forward
- *Ugljesa Grusic* (Faculty of Laws, University College London), Long-Term Business Relationships and Implicit Contracts in European Private Law
- *Matthias Haentjens & Dorine Verheij* (Leiden University), Finding Nemo: Locating Financial Losses after Kolassa/Barclays Bank and Profit
- Remus Titiriga (INHA University), Revival of Rabel's Trans-National Characterization for Rules of Conflict? Some Answers in a European Convention
- *Berk Demirkol* (University of Galatasaray), Droit Applicable aux Contrats de Construction (Law Applicable to Construction Contracts)

On non-EU Private International Law:

- *Patrick Borchers* (Creighton University School of Law), Is the Supreme Court Really Going to Regulate Choice of Law Involving States?
- *Akawat Laowonsiri* (Thammasat University), Conflict of Genders in Conflict of Laws: Unresolved Problems in Thailand and Elsewhere
- *Ralf Michaels* (Duke University School of Law) The Conflicts Restatement and the World
- *Jinxin Dong* (China University of Petroleum), On the Internationally Mandatory Rules of the PRC
- *Hannah L. Buxbaum* (Indiana University Bloomington Maurer School of Law), Transnational Legal Ordering and Regulatory Conflict: Lessons from the Regulation of Cross-Border Derivatives
- *Patrick Borchers* (Creighton University School of Law), An Essay on Predictability in Choice-of-Law Doctrine and Implications for a Third Conflicts Restatement
- *John F. Coyle* (University of North Carolina School of Law), The Canons of Construction for Choice-of-Law Clauses

On International Arbitration

- *Csongor István Nagy* (University of Szeged), Central European Perspectives on Investor-State Arbitration: Practical Experiences and Theoretical Concerns
- *Evangelos Kyveris* (University College London), An In-Depth Analysis on the Conflicting Decisions in Dallah v. Pakistan: Same Law, Same Principles, Different Decisions