# Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2016: Abstracts

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

*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.

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# TDM's Latin America Special

Prepared by guest editors Dr. Ignacio Torterola and Quinn Smith, this special addresses the various challenges and changes at work in dispute resolution in Latin America. A second volume that continues many of the themes from different angles and perspectives is also nearing completion. Download a free Excerpt here

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

*F. Eichel*, **Private International Law Aspects of Arbitration Clauses in Favor**

**of the Court of Arbitration for Sport**

The validity of arbitration clauses in favor of the Court of Arbitration for Sport (CAS) has been called into question by German courts in the long running proceedings of Claudia Pechstein against the International Skating Union. The courts held that the arbitration clause in the athletes' admission form was void. They referred to provisions in German Civil Law (s. 138 German Civil Code – BGB; s. 19 Act against Restraints of Competition – GWB) which are recognized as being internationally applicable so that the German courts could apply them even though the validity of the arbitration clause was governed by Swiss law. The article reflects the Private International Law aspects of these arbitration clauses illustrating that both the relevant law of International Civil Procedure as well as the choice of law provisions primarily serve the interests of commercial arbitration and thereby reinforce the structural imbalance existing between the sports association and the athlete when signing such arbitration clauses. Against this background, the article argues that the special circumstances of sport arbitration would allow the application of the German law of standard terms (s. 307 BGB) although it is, in principle, not considered to form part of the general ordre public-reservation in Private International Law.

*Th. Pfeiffer*, **Ruhestandsmigration und EU-Erbrechtsverordnung**

From a German perspective, the most significant change that was brought about by the EU Succession Regulation is the transition from referring to the deceased's nationality as the general connecting factor to the deceased's habitual residence. This transition reflects an analysis of interests which is primarily based on cases of migrant professionals or workers and their families. However, there is also a large group of migrants already retired at the time of their migration (e.g. the large group of German pensioners on the Spanish island of Mallorca). Their situation is different from migrant workers insofar as their migration occurs at a moment when the most significant decisions in their lives have been made already; as a consequence, migration at that age, usually, does not include following generations. Moreover, it is not unlikely that, in many cases, migrating pensioners, when planning for their estates, will not consider the laws of their new habitual residence. Based on this analysis, this article asks how the EU Succession Regulation addresses these particularities of migrating pensioners. In particular, it is discussed under which circumstances the laws of their home state (based on their nationality) may remain applicable. In this context, the article considers: (1) provisions which do not refer to the moment of deceased's death

but to an earlier event, (2) the need for an appropriate definition of habitual residence, (3) the escape clause in Art. 21 (2) of the Regulation, (4) a choice of law by the deceased and (5) waivers of succession. The article concludes that the Regulation is open for applying the laws of the deceased's nationality to a certain extent but that this law must not be applied automatically if the principle of referring to the deceased's habitual residence is taken seriously.

*A. Brand*, **Damages Claims and Torpedo Actions – The Principle of Priority of Art. 29 para 1 Brussels I-Regulation with a particular focus on Cartel Damages Claims.**
Forum shopping by way of „Torpedo actions" is an unwanted means of a tortfeasor to secure the jurisdiction of their home country rather than having to defend themselves before the courts at the seat of the injured plaintiff. This has gained particular relevance in proceedings concerning cartel-damages claims. The race hunt to the court could and should be avoided by strictly applying the principles of procedural efficiency and fair trial and the requirement of a justified interest for an action for (negative) declaration. As under domestic law, the principle of priority as laid down in art. 29 para. 1 of the Brussels I-Regulation cannot be applied to torpedo actions in case of tort.

*W.-H. Roth*, **Jurisdictional issues of competition damages claims**
In its CDC-judgment the Court of Justice for the first time had the chance to rule on several issues of jurisdiction concerning cartel-inflicted damages. Claimant was an undertaking specifically set up for the purpose of pursuing such damage claims that had been transferred to her by potential cartel victims. The Court deals with jurisdiction over multiple defendants (Art. 6 No. 1 Regulation EC 44/2001), the scope of tort jurisdiction (Art. 5 No. 3), based on the place where the event giving rise to the damage occurred and on the place where the damage occurred, and with the interpretation of jurisdiction clauses (Art. 23) potentially covering cartel-inflicted damage claims. The results reached and the arguments advanced by the Court, taken all in all, deserve applause. Given that the judgment deals with a setting of a follow-on action (with a binding decision by the EU-Commission) it will have to be clarified whether the main results of the judgment can also be applied in stand-alone actions.

*R. Hüßtege*, **A tree must be bent while it is young**
The Federal Constitutional Court of Germany reprimands that the district court in an adoption procedure did not use all sources of knowledge in accordance to the

Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters and to the European Judicial Network, in order to determine whether an effective Romanian adoption exists. Due to this omission fundamental rights of the complainant were injured in the adoption case concerning the recognition of the Romanian decision. This case shows that instruments, like the mentioned regulation and the European Judicial Network in commercial and civil matters are not well known to courts. There is an urgent need for training of judges.

*C. F. Nordmeier*, **Lis pendens under art. 16 Brussels IIa and Art. 32 Brussels Ia when proceedings are stayed**

The case at hand deals with the decisive moment for lis pendens according to art. 16 (1) (a) Brussels IIa (equivalent to art. 32 (1) (a) Brussels Ia) if proceedings are stayed before service in order to reach an amicable arrangement. The provision contains an own obligation of the applicant. Whether a delay of service restrains lis pendens depends on the breach of this obligation being imputable to the applicant. Intention or negligence should not serve as a basis to impute the breach. The present contribution analyses different types of delay and its imputability: stay of proceedings to reach an amicable arrangement, deficiencies of the documents submitted for service and mistakes of the court while effecting service. For the continuance of lis pendens the author argues that a stay or an interruption of proceedings does not abolish the effects of lis pendens.

*B. Heiderhoff*, **Perpetuatio fori in custody proceedings**

Even if parents, as in the case at hand, have joint parental responsibility with the exception of the right to determine the child’s place of residence, the parent who has the sole right to determine the child’s place of residence may lawfully move abroad with the child. The other parent has to accept the complications in exercising parental responsibility. If the child is relocating its habitual residence to a state that is not a member state of the EU, but a signatory state to the Hague 1996 Children’s Convention, the Convention must be applied. This is clearly stated in Art. 61 Brussels II-Regulation. Unlike Art. 8 Brussels II-Regulation, the 1996 Children’s Convention does not follow the principle of perpetuatio fori. In order to prevent a parent from taking a child abroad during ongoing court proceedings, the courts should regularly consider an injunction by which the right to determine residence of the child is limited to Germany. This applies particularly when both parents have joint responsibility and merely the isolated

right to determine the child's place of residence is assigned to one parent. If one parent has sole custody at the beginning of the procedure, the interests must be weighed differently. The right to move abroad with the child during the proceedings should, in general, only be excluded if there is a rather serious chance for the affected parent to lose sole custody.

*U. P. Gruber*, **How to modify decisions on maintenance obligations**
In scholarly writing, proceedings to modify decisions on maintenance obligations have only attracted limited attention. However, these proceedings raise very intricate und unsolved problems of characterization. The Bundesgerichtshof, in a new decision, has tackled some of the questions while leaving others unanswered. In the author's opinion, the modification of decisions on maintenance obligations is governed by the Hague Protocol of 23 November 2007. The convention's predecessor, the Hague Convention of 2 October 1973, also covered the modification of decisions, and it can be presumed that the Hague Protocol, as far as its scope is concerned, follows the Hague Convention. The procedural framework of the proceedings to modify decisions on maintenance obligations, however, is governed by the lex fori, i.e. the law of the state in which the proceedings to modify the decision are brought. The Hague Protocol of 23 November 2007 is part of EU law. Therefore, it seems likely that the ECJ will be requested to decide on the issue. Whether or not the ECJ will support the application of the Hague Protocol seems impossible to predict.

*K. Siehr*, **Execution of Foreign Order to Return an Abducted Child**
A child was abducted by his mother from Germany to Poland and after one year re-abducted by his father to Germany. Instead of asking German courts for a return order under the EU Regulation No. 2201/2003 on Matrimonial Matters and Matters of Parental Responsibility the father turned to Polish courts and asked for a return order. Such an order was turned down because the child, in the meantime, had been abducted by the father to Germany. The mother asked the Polish court for a return order and got it as an urgent order because of the habitual residence of the child in Poland. The mother asked German courts to recognize and enforce this Polish order to return the child to Poland. The Court of Appeals of Munich recognized and enforced the Polish return order. The Munich court did not recognize the return order neither under Art. 42 nor under Art. 28 et seq. Regulation 2201/2003 because relevant certificates were missing or some enforcement obstacles (hearing of the father in Poland) were given. The German

court decided that the Polish return order should be recognized and enforced under the Hague Convention of 1996 on the Protection of Children without taking care of Art. 61 of the Regulation 2201/2003 which give precedence to the Regulation in this case. Jurisdiction of the Polish court is determined according to Art. 20 of the Regulation and Art. 11 of the Hague Convention of 1996 which granted only territorially limited jurisdiction to local courts in urgent matters. In this case, however, the child was not any more in Poland but in Germany. The German court is criticized because of not explaining properly the application of the Hague Convention of 1996 under Art. 61 of Regulation 2201/2003 and because of misinterpreting Art. 20 of the Regulation 2201/2203 and of Art. 11 Hague Convention by giving them universal jurisdiction.

*D. Looschelders*, **Problems of Characterization and Adaptation in German-Italian Successions**

German-Italian successions often raise difficult legal questions. In its decision, the Higher Regional Court of Duesseldorf firstly deals with the invalidity of joint wills under Italian law. The main part of the decision is concerned with problems of characterization and adaptation. In the present case, these problems arise due to the parallel applicability of Italian Succession Law and German Matrimonial Property Law. The author supports the decision in general. However, it is stated that the courts considerations with regard to the necessity of adaptation are not convincing in all respects. Finally, it is shown how the problems of the case were to be solved in accordance with the European Succession Regulation which was not yet applicable.

*C. Mayer*, **Ancillary matrimonial property regime and conflict of laws – characterization of claims arising from an undisclosed partnership between spouses.**

While it is generally agreed that the legal regime for undisclosed partnerships follows the law applicable to contractual obligations, there is debate as regards undisclosed partnerships between spouses. Due to their special connection with the matrimonial property regime, it is argued that compensation claims arising from undisclosed partnerships between spouses are to be characterized as matrimonial. Along with the prevailing opinion, the German Federal Court of Justice now correctly supports a characterization as contractual. Given, however, the close relation to the matrimonial property regime, the court proposes an accessory connection: the partnership agreement is closest connected to the law

governing matrimonial property. Subject to criticism is, however, the far-reaching willingness of the court to find an implied choice of law by the spouses.

*M. Stöber*, **Discharge of Residual Debt and Insolvency Avoidance Actions in Cross-Border Insolvencies with Main and Secondary Proceedings**

15 years after the adoption of the European Regulation on Insolvency Proceedings in the year 2000, it is still difficult to answer the question which national insolvency law applies to cross-border insolvency proceedings within the European Union. The case that – in addition to main insolvency proceedings in one member state – secondary insolvency proceedings have been opened in another member state of the European Union is of particular complexity. In two recent judgments, the German Supreme Court has decided on the impact the opening of secondary proceedings in another state has on a discharge of residual debt (judgement of 18 September 2014) and on insolvency avoidance actions respectively (judgement of 20 November 2014) granted by the national law applicable to the main proceedings opened in the first state.

*C. Kohler*, **Claims for the payment of holiday allowances by a public fund for paid leave for workers: "civil and commercial" or "administrative" matters?**

By its ruling in BGE 141 III 28 the Swiss Federal Court refused to enforce in Switzerland an Austrian judgment according to which a Swiss company had to make payments to the Austrian fund for paid leave for workers in the construction industry that were due for workers posted to Austria by the defendant company. According to the Federal Court, the judgment is outside the scope of the Lugano-Convention as it has not been given in a "civil and commercial matter" as required by art. 1 thereof. The ways and means by which the Austrian fund claimed the payments constituted the exercise of public powers and differed from the legal relationship between the parties to an employment contract. The author submits that the judgment of the Federal Court is not in line with the ECJ's case-law on art. 1 of the Brussels instruments. In order to assess whether a case is a "civil and commercial matter", one has to look not at the modalities for the enforcement but at the origin of the right which forms the subject matter of the proceedings. In the instant case the right to paid leave stems from the employment contract and is of a private law character. As the Federal Court sees no legal basis for the enforcement of the Austrian judgment outside the Lugano-Convention, its judgment leaves a gap in the judicial protection of posted workers'

rights as between Austria and Switzerland contrary to the objective of Directive 96/71 which applies according to the bilateral agreements between Switzerland and the EU.

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# Brexit – Immediate Consequences on the London Judicial Market

*Prof. Burkhard Hess and Prof. Marta Requejo-Isidro, Max Planck Institute Luxembourg*

One of the major misunderstandings of the Brexit is that it won't influence London's importance as a major place of dispute resolution in Europe. Up until now, the adverse consequences of leaving the European Judicial Area have been insufficiently discussed. A first seminar organized by the British Institute for International and Comparative Law and the Max Planck Institute Luxembourg for Procedural Law in May illustrated that the adverse legal consequences will start immediately, even within the transitional period of two years foreseen by Article 50 of the EU Treaty. We would like to briefly summarize the main findings of this seminar which can also be found (as a video) at the websites of the MPI Luxembourg and of BIICL.

Regarding private international and procedural law, all EU instruments on common rules for jurisdiction, parallel proceedings and cross-border enforcement will cease to exist after the transitional period, not only in areas such as insolvency and family matters, but also in the core areas of civil and commercial matters. Judgments given by English courts will no longer profit from the free movement of judgments. Their recognition and enforcement will depend on (outdated) bilateral agreements which were concluded between the 1930 and 1960s. As there are only six bilateral agreements, the autonomous, piecemeal provisions of EU Member States' regimes regarding the recognition of the judgments of third States will apply. Of course, there might be negotiations on a specific regime between the Union and the United Kingdom, but the EU

Commission might be well advised to tackle the more pressing problems of the Union (i.e. the refugee crisis where no solidarity is to be expected from the UK) instead of losing time and strength in bilateral negotiations.

From the European perspective, there is now a need to carefully evaluate the benefits of a bilateral agreement with the United Kingdom on issues of private international law. The main interest of the Union won't be to maintain or to strengthen London's dominant position in the European judicial market: EU Member States might equally provide for modern and highly-qualified legal services ready to attract commercial litigants and high-value litigation & arbitration. Examples in this respect are The Netherlands and Sweden. In addition, there is a genuine interest of the Union to see mandatory EU law applied in disputes related to the Internal Market by courts operating within its regulatory framework. A perfect example in this respect, as pointed out by Dr. Matteo Gargantini, – former senior research fellow at the MPI Luxembourg – is provided by the EU legal text concerning the financial markets. Here, the so-called MiFIR provides for a dense regulatory framework where a clear distinction is made between EU Member States and third States. In the future, the United Kingdom will qualify a third State in this respect. This entails that jurisdiction and arbitration clauses providing for the jurisdiction of English courts and/or for London as a seat of arbitration cannot be agreed. The pertinent provision (Article 46 § 6) of the MiFIR reads as follows:

> "Third-country firms providing services or performing activities in accordance with this Article shall, before providing any service or performing any activity in relation to a client established in the Union, offer to submit any disputes relating to those services or activities to the jurisdiction of a court or arbitral tribunal in a Member State."

This provision only applies to professional investors. For retail investors, Member States can even mandate that the investment firm establishes a branch in their territory, which of course would impact jurisdiction (also in the light of limitations to jurisdiction agreement vis-à-vis consumers). Here, the relevant provision is Art. 39 MiFID II, which says:

> "A Member State may require that a third-country firm intending to provide investment services or perform investment activities with or without any ancillary services to retail clients or to professional clients within the meaning

of Section II of Annex II in its territory establish a branch in that Member State."

These provisions entail direct and immediate consequences. Jurisdiction and arbitration clauses in contracts will apply to future controversies, and as such, their validity will be scrutinized at the moment when a dispute arises. An agreement made today to establish London as the place of dispute resolution will no longer guarantee the validity of that respective clause in two years' time. In other words, law firms would be well advised to no longer agree to these clauses as their validity will be challenged in every civil court within the European Union. Sending anti-suit injunctions abroad won't help either: firstly, their recognition by the courts of EU Member States is not guaranteed (and will depend on the fragmented autonomous laws of EU Member States). Secondly, mandatory EU law (the pertinent articles of MiFID II, for example) will certainly forbid any recognition within the Union. As a result, parties will lose additional money for unnecessary satellite litigation. Finally, the ratification of the Hague Choice of Court Convention or the Lugano Convention will not provide a means to overcome the problem as the MiFIR/MiFID will apply independently from any international framework. This example demonstrates that there might be much more interest on the English side in negotiating with the Union than the other way around. It also shows that there is a need to consider most carefully the immediate consequences of the Brexit.

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# Does the occurrence of purely financial damage in a Member State justify in itself the jurisdiction of the courts of that

# State pursuant to Article 5 (3) of Regulation No 44/2001?

by Lukas Schmidt, Research Fellow at the Center for Transnational Commercial Dispute Resolution (TCDR) of the EBS Law School, Wiesbaden, Germany.

Universal Music, a record company established in the Netherlands, acquired the Czech company B&M in the course of 1998. The contracts providing for the sale and delivery of B&M's shares were drawn up by a Czech law firm. Because of negligence by an associate of the Czech law firm the contracts provided a much higher sale price for B&M shares than intended by Universal Music. This led to a dispute between Universal Music and B&M's shareholders which was brought before an arbitration board in the Czech Republic, following a settlement between the parties in 2005. Because of this settlement Universal Music allegedly suffered financial damage of some 2.5 million EUR. Subsequently Universal Music has brought proceedings against the Czech lawyers before the Dutch courts. The Dutch courts have requested the CJEU to answer the question, whether Article 5 (3) of Regulation No 44/2001 must be interpreted as meaning that the *place where the harmful event occurred* can be construed as being the place, in a Member State, where the damage occurred, if that damage consists exclusively of financial damage which is the direct result of an unlawful act committed in another Member State. However the only connecting factor to the Netherlands, besides Universal Music being established in that state, was that the bank account from which Universal Music paid the settlement amount was situated in *Baarn* (The Netherlands). Thus the CJEU now finds that such "purely financial damage which occurs directly in the applicant's bank account can not, in itself, be qualified as a 'relevant connecting factor', pursuant to Article 5(3) of Regulation No 44/2001". Obviously in order not to contradict its ruling in *„Kolassa"* (C-375/13) the CJEU clarifies that only where "other circumstances specific to the case also contribute to attributing jurisdiction to the courts for the place where a purely financial damage occurred, that such damage could, justifiably, entitle the applicant to bring the proceedings before the courts for that place". Referring to *„Kronhofer"* the CJEU further states that the *place where the harmful event occurred "*does not refer to the place where the applicant is domiciled and where his assets are concentrated by reason only of the fact that he has suffered

financial damage there resulting from the loss of part of his assets which arose and was incurred in another Member State". As a consequence the place where the loss of the claimant´s assets occurs and the place where his assets are concentrated only can be qualified as the *place where the harmful event occurred*, pursuant to Article 5 (3), if other circumstances specific to the case also contribute to attributing jurisdiction to the courts for these places.

The full judgment is available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=180329&pageIndex=0&doclang=DE&mode=req&dir=&occ=first&part=1

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# 2nd Liechtenstein Conference on Private International Law on 30 June 2016

Despite the fact that thousands of legal persons and personal relations are subject to Liechtenstein Private International Law, Liechtenstein law has retained some unique features.  Whether the unique features should be maintained, or provide the reasoning for a reform agenda, will be discussed at the 2nd Liechtenstein Conference on 30 June 2016 organised by the Propter Homines Chair for Banking and Securities Law at the University of Liechtenstein.

The presentations will deal with Liechtenstein international company, foundation and trust law,  conflicts of law relating to banks, prospectus liability and collectus investment schemes, as well as matters of succession and the potential of Liechtenstein as an arbitration venue. All presentations will be held in German.

Please find further information here.

In case of interests please contact: nadja.dobler@uni.li

# EUPILLAR conference on Cross-Border Litigation Conference, London, 16-17 June

The “Cross-Border Litigation in Europe” conference is organised by the Centre for Business Law and Practice, University of Leeds, and the Centre for Private International Law, the University of Aberdeen. The conference is being held within the framework of a research project which is funded by the European Commission Civil Justice Programme.

The event will take place in the London School of Economics (New Academic Building, Lincoln’s Inn Field) on Thursday 16th June and Friday 17th June 2016.

The research study aims to consider whether the Member States’ courts and the CJEU can appropriately deal with the cross-border issues arising under the current EU Civil Justice framework. The project, which is coordinated by Professor Paul Beaumont from the University of Aberdeen, involves Dr Katarina Trimmings and Dr Burcu Yuksel from the University of Aberdeen, Dr Mihail Danov from the University of Leeds (UK), Prof. Dr. Stefania Bariatti from the University of Milan (Italy), Prof. Dr. Jan von Hein from the University of Freiburg (Germany), Prof. Dr. Carmen Otero from Complutense University of Madrid (Spain), Prof. Dr. Thalia Kruger from the University of Antwerp (Belgium), Dr Agnieszka Frackowiak-Adamska from the University of Wroclaw (Poland).

This conference is free to attend, but prior registration is required.

**Programme**

**16th June 2016**
9:00 am – 9:30 am
Paul Beaumont (Aberdeen), Mihail Danov (Leeds), Katarina Trimmings (Aberdeen)

and Burcu Yuksel (Aberdeen) Evaluating the Effectiveness of the EU Civil Justice Framework: Research Objectives and Preliminary Research Findings from Great Britain

9:30 am – 11:00 am – **Cross-Border Civil and Commercial Disputes: Legislative Framework**
Chair: Paul Beaumont (Aberdeen)
1) Sophia Tang (Newcastle), Cross-Border Contractual Disputes: The Legislative Framework and Court Practice
2) Michael Wilderspin (European Commission, Legal Services), Cross-Border Non-Contractual Disputes: The Legislative Framework and Court Practice
3) Jon Fitchen (Aberdeen), The Unharmonised Procedural Rules: Is there a case for further harmonisation at EU level?
4) Stephen Dnes (Dundee), Economic considerations of the cross-border litigation pattern

*15-minute break*

11.15 am – 12.30 pm – **Cross-Border Civil and Commercial Disputes: Practical Aspects**
Chair: Mihail Danov (Leeds)
1) Peter Hurst (39 Essex Chambers), Litigation Costs: Cross-Border Disputes in England and Wales
2) Susan Dunn (Harbour), Litigation Funders and Cross-Border Disputes
3) Craig Pollack (King & Wood Mallesons), Cross-Border Contractual Disputes: Litigants' Strategies and Settlement Dynamics
4) Jon Lawrence (Freshfields), Cross-Border Competition Law Damages Actions: Litigants' Strategies and Settlement Dynamics

*Lunch (12.30 pm – 1.30 pm)*

1.30 pm – 3.00 pm – **Cross-Border Family Disputes**
Chair: Thalia Kruger (Antwerp)
1) Paul Beaumont (Aberdeen), Brussels IIa recast – a comment on the Commission's Proposal from a member of the Commission's Expert Group
2) Elizabeth Hicks (Irwin Mitchell), Litigants' strategies and settlement dynamics in cross-border matrimonial disputes
3) Marcus Scott-Manderson QC (4 Paper Buildings), Cross-Border Disputes

Involving Children: A View from the English Bar
4) Lara Walker (Sussex), Maintenance and child support: PIL Aspects
5) Rachael Kelsey (SKO), Arbitration and ADR: Cross-Border Family Law Disputes

*15-minute break*

3.15 pm – 4.45 pm – **National Reports: Cross-Border Litigation in Europe**
Chair: Stefania Bariatti (Milan)
1) Professor Bea Verschraegen (Universität Wien) and Florian Heindler, Preliminary Research Findings from Austria
2) Dr Teodora Tsenova and Dr Anton Petrov, Preliminary Research Findings from Bulgaria
3) Doc. Dr. Ivana Kunda, Preliminary Research Findings from Croatia
4) Professor JUDr Monika Pauknerová, Jiri Grygar and Marta Zavadilová, Preliminary Research Findings from Czech Republic
5) Professor Nikitas Hatzimihail (University of Cyprus), Preliminary Research Findings from Cyprus
6) Professor Peter Arnt Nielsen (Copenhagen Business School), Preliminary Research Findings from Denmark

*15-minute break*

5.00 pm – 6.15 pm – **National Reports: Cross-Border Litigation in Europe**
Chair: Jan von Hein (Freiburg)
1) Maarja Torga (University of Tartu), Preliminary Research Findings from Estonia
2) Gustaf Möller (Krogerus) Preliminary Research Findings from Finland
3) Professor Horatia Muir Watt (Science Po), Professor Jeremy Heymann (Lyon) and Professor Laurence Usunier (Cergy-Pontoise), Preliminary Research Findings from France
4) Aspasia Archontaki and Paata Simsive, Preliminary Research Findings from Greece
5) Dr Csongor Nagy (University of Szeged), Preliminary Research Findings from Hungary

7.00 pm – 10.30 pm *Dinner (by invite only)* – Old Court Room, Lincoln's Inn
Speech by Lord Justice Vos (Court of Appeal and President of the European Network of Councils for the Judiciary), The Effect of the European Networks of

Councils for the Judiciary (ENCJ) on Cross-Border Dispute Resolution

**17th June 2016**

8.30 am – 10:00 am – **National Reports: Cross-Border Litigation in Europe**
Chair: Carmen Otero (Madrid)
1) Maebh Harding (Warwick), Preliminary Research Findings from Ireland
2) Dr Irena Kucina (Ministry of Justice, Latvia), Preliminary Research Findings from Latvia
3) Kristina Praneviciene, Preliminary Research Findings from Lithuania
4) Céline Camara (Max Planck Istitute), Preliminary Research Findings from Luxembourg
5) Clement Mifsud-Bonnici, Preliminary Research Findings from Malta
6) Professor Aukje van Hoek (Universiteit van Amsterdam), Preliminary Research Findings from the Netherlands

*15-minute break*

10.15 am – 11.30 am – **National Reports: Cross-Border Litigation in Europe**
Chair: Agnieszka Frackowiak-Adamska (Wroclaw)
1) Professor Elsa Oliveira (Universidade de Lisboa), Preliminary Research Findings from Portugal
2) Dr Ileana Smeureanu (Jones Day, Paris), Lucian Ilie (Lazareff Le Bars) and Ema Dobre (CJEU) Preliminary Research Findings from Romania
3) Doc JUDr M. Duris, JUDr M Vozaryova, Dr M Burdova, Preliminary Research Findings from Slovakia
4) Professor Suzana Kraljic, Preliminary Research Findings from Slovenia
5) Professor Michael Bogdan and Ulf Maunsbach, Preliminary Research Findings from Sweden

*15-minute break*

11.45 am – 1.00 pm – **National Reports: Cross-Border Litigation in Europe**
Chair: Alex Layton QC
1) Thalia Kruger (Antwerp) and Eline Ulrix (Antwerp), Preliminary Research Findings from Belgium
2) Jan Von Hein (Freiburg), Preliminary Research Findings from Germany
3) Stefania Bariatti (Milan), Preliminary Research Findings from Italy

4) Agnieszka Frackowiak-Adamska, Agnieszka Guzewicz and ?ukasz Petelski (Wroclaw), Preliminary Research Findings from Poland
5) Carmen Otero (Madrid), Preliminary Research Findings from Spain

*Lunch (1.00 pm – 2.00 pm)*

2.00 pm – 3.30 pm – **Shaping the development of the EU PIL Framework**
Chair: Paul Beaumont (Aberdeen)
1) Jacek Garstka (EU Commission, DG Justice), Drafting Legislative Instruments in a Diverse Union 2) Pascale Hecker (Référendaire, CJEU), Cross-Border Litigation: Challenges for EU Judiciary
3) Lady Justice Black (Head of International Family Justice), International Family Justice: Challenges in an EU context
4) Paul Torremans (Nottingham), Cross-Border IP Disputes: Specific Issues and Solutions

*15-minute break*

3.45 pm – 4:30 pm – **The way the EU PIL framework is shaping the litigants' strategies in a cross-border context**
Chair: Mihail Danov (Leeds)
1) Alex Layton QC (20 Essex Chambers), Cross-Border Civil and Commercial Disputes: PIL issues – a view from the English Bar
2) Christopher Wagstaffe QC (29 Bedford Row), Cross-Border Matrimonial Disputes: PIL issues – a view from the English Bar
3) Sophie Eyre (Bird & Bird), Remedies and Recoveries in a Cross-Border Context

4:30 – 5:30 pm – **The Way Forward: The research partners' views**
1) Thalia Kruger (Antwerp) and Eline Ulrix (Antwerp), Preliminary Views from Belgium
2) Jan Von Hein (Freiburg), Preliminary Views from Germany
3) Stefania Bariatti (Milan), Preliminary Views from Italy
4) Agnieszka Frackowiak-Adamska, Agnieszka Guzewicz and ?ukasz Petelski (Wroclaw), Preliminary Views from Poland
5) Carmen Otero (Madrid), Preliminary Views from Spain
6) Paul Beaumont (Aberdeen), Mihail Danov (Leeds), Katarina Trimmings (Aberdeen) and Burcu Yuksel, Addressing the Challenges: Is there a case for Reform?

# The Max Planck Institute Luxembourg is recruiting

The Max Planck Institute Luxembourg is currently recruiting new members for its team. Two types of positions are currently open:

**1. Research Fellow in EU Procedural Law:**

The Max Planck Institute Luxembourg would like to appoint highly qualified candidates for 2 open positions as Research Fellow (PhD candidate) for the Research Department of European and Comparative Procedural Law

Job description

The research fellow will conduct legal research (contribution to common research projects and own publications), particularly in the field of comparative civil procedural law (including European law and international arbitration).

Your tasks

The successful candidate will have the great opportunity to contribute to the development of the Department of European Comparative Procedural Law led by Prof. Burkhard Hess and, in parallel, work on her/his PhD project.

The Research Fellow is expected to write her/his PhD thesis and perform the major part of her/his PhD research work in the premises of the institute in Luxembourg, but also in close collaboration with her/his external supervisor and with the university or institution delivering her/his PhD diploma. A supervision of a PhD-thesis by Prof. Hess will also be possible.

Your profile

The applicants are required to have obtained at least a Master degree in Law with outstanding results and to have a deep knowledge of domestic procedural and European procedural law. According to the academic grades already received,

candidates must rank within the top 10 %.

The successful candidates should demonstrate a great interest and curiosity for fundamental research and have a high potential to develop excellence in academic research. Proficiency in English is compulsory (in written and oral); further language skills (in French and German notably) are of advantage.

Our offer

The MPI Luxembourg will offer scientific guidance, a fully-equipped office and an access to its noteworthy library to foster legal research activities. You will be free to write your thesis in English or in any other language which suits you, as long as you are able to communicate on its content in English.

The MPI Luxembourg offers outstanding conditions to undertake fundamental legal research, and a very conducive work climate in an international team, while being in depth knowledge exchange and support among other research fellows.

Salary and social benefits are provided according to the Luxembourgish legal requirements. Positions are full-time but may be considered as part-time as well.

Joining us

If you are interested in joining our Institute, please apply online and follow our usual application process.

Documents required

A detailed CV incl. list of publications; copies of academic records; a PhD project description of no more than 1-2 pages with the name of the foreseen PhD supervisor and the name of the institution awarding the PhD certificate; the name and contact details of two referees.

**2. Research Fellow (PhD candidate) in EU Family Law**

For a period of thirty-six months, the Research Fellow will conduct legal research and cooperate at the Max Planck Institute Luxembourg (research Department of European and Comparative Procedural Law) within the Project 'Planning the future of cross-border families: a path through coordination – "EUFam's" (JUST/2014/JCOO/AG/CIVI 4000007729)' which aims (i) at assessing the

effectiveness of the functioning ‘in concreto’ of the EU Regulations in family matters, as well as the 2007 Hague Protocol and the 2007 Hague Recovery Convention; and (ii) at identifying the paths that lead to further improvement of such effectiveness.

Your tasks

The successful candidate will benefit from the opportunity to partake in the development of the Department of Procedural Law led by Prof. Dr. Dr. h.c. Burkhard Hess by becoming an active and integrated part of the Project team.

The Research Fellow is expected to assist in the achievement of the objectives of the Project, namely by carrying out and developing legal research with a view to contributing to the drafting of the Project’s Final Study and by participating in the presentation of the scientific outcomes of the Project.

Moreover, she/he will actively cooperate in the organization of meetings and of an international seminar, and will cooperate with the Project team in reporting on financial matters, in carrying out the research activities and in analysing potential interplays of research activities with cross-cultural issues. The project will be terminated with 14 months. The remaining time shall be (mainly) dedicated to the elaboration of the PhD.

Your profile

Applicants must have earned a degree in law and be PhD candidates working on a thesis on EU private international and procedural law in family matters. According to the academic grades already received, candidates must rank within the top 10 %.

The successful candidate shall demonstrate a strong interest and aptitude for legal research and have a high potential to develop excellence in academic research.

Her/His CV must portray a consolidated background in EU private international and procedural law in family matters: to this aim, prior publications in this field of the law shall be highly regarded in the selection process.

Full proficiency in English is compulsory (written and oral); further language skills are greatly valued.

Our offer

The MPI Luxembourg offers scientific guidance, a productive working environment within an international team of researchers, and the possibility to develop connections and fruitful exchanges with academia, judges and practitioners from many EU Member States. Moreover, the Institute will provide a fully-equipped office and access to its renowned legal library.

Salary and social benefits are provided according to the Luxembourgish legal requirements. The position is full-time, for a period of thirty-six months.

Joining us

If you are interested in joining our Institute, please apply online and follow our usual application process.

Documents required

A detailed CV incl. list of publications; copy of academic records; a PhD project description of no more than 1-2 pages with the name of the PhD supervisor and the name of the institution awarding the PhD certificate; the name and contact details of two referees.

**Note for all positions:**

Full information and access to application platform: here.

Contact person is Diana Castellaneta: diana.castellaneta@mpi.lu

Deadline: 31 May 2016

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# Post Brexit: The Fate of

# Commercial Dispute Resolution in London and on the Continent

A joint conference of the Max Planck Institute for Procedural Law (Luxembourg) and the British Institute for International and Comparative Law will be held on May 26th in London, within the framework of a series of BIICL events on the Brexit.

This particular seminar will look at the potential impact of a Brexit on cross-border commercial dispute resolution and on the role of London as a center for international litigation and arbitration. Speakers will address selected questions such as the legal framework for the transitional period; the validity of choice of court agreements and future frequency of choice of court agreements in favour of English courts; the different approaches in England and under the Brussels I Recast as to parallel proceedings; the cross-border circulation of titles; the Swiss position as to commercial dispute resolution between Member States and third States. A roundtable discussion will place a particular focus on London's future as a centre for commercial dispute resolution post Brexit.

**Speakers:**

- Burkhard Hess, Max Planck Institute Luxembourg
- Richard Fentiman, University of Cambridge
- Andrew Dickinson, University of Oxford
- Marta Requejo Isidro, Max Planck Institute Luxembourg/University of Santiago de Compostela
- Trevor Hartley, London School of Economics
- Alexander Layton QC, 20 Essex Street
- Tanja Domej, University of Zurich
- Thomas Pfeiffer, University of Heidelberg
- Paul Oberhammer, University of Vienna
- Adam Johnson, Herbert Smith Freehills
- Martin Howe QC, 8 New Square
- Karen Birch, Allen and Overy
- Diana Wallis, President of the European Law Institute and former Vice-President of the European Parliament

- Deba Das, Freshfields Bruckhaus Deringer LLP

**Time**: 15:30-19:00 (followed by a drinks reception)

**Venue:** British Institute of International and Comparative Law, Charles Clore House, 17 Russell Square, London WC1B 5JP

The program is available here; for registration click here.

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# Recent Scholarship

Professor Anthony Colangelo of the SMU Dedman School of Law has just posted a new article entitled *A Systems Theory of Fragmentation and Harmonization*. It blends public and private international law and has a strong dose of conflict of laws. It is well worth the read!

Also, as a friendly reminder, there is a wonderful SSRN eJournal on Transnational Litigation/Arbitration, Private International Law, and Conflict of Laws that is available here.