

# Conflicts - Between Domestic and Indigenous Legal Systems?

In *Beaver v Hill*, 2017 ONSC 7245 (available [here](#)) the applicant sought custody, spousal support and child support. All relevant facts happened in Ontario.

In response, the respondent asserted that the “inherent right of the Haudenosaunee and the Six Nations to govern themselves includes the right to have inter and intra-familial disputes decided through Haudenosaunee governance processes and protocols and according to Haudenosaunee laws”.

This took the court in some very interesting directions. It held “One of the novel issues that this case raises is whether general conflict of laws jurisdiction principles are also relevant on a more ‘micro-level,’ to an intra-provincial jurisdiction dispute between two Ontario citizens. In my view, these principles remain relevant in this case, even though the dispute has arisen at the intra-provincial level. Although the Respondent is not alleging that the Haudenosaunee or the Six Nations constitute a sovereign nation or other type of territorial entity within Ontario, his jurisdictional challenge is based on an alleged right to be governed by a complete system of dispute resolution, adjudicative processes and laws for handling Family Law matters that is independent of Ontario’s court system, processes and laws. This broad claim has raised basic preliminary issues about the appropriate forum for decision-making and the applicable laws. These are precisely the types of disputes that conflict of laws principles are intended to address.” (para 53)

I think the reaction to this analysis will be mixed. It seems possible that a court could have held exactly the opposite: that conflict of laws principles have nothing at all to do with the objections raised by the respondent. Instead, some form of public or constitutional law analysis is required to determine whether the respondent’s objections to Ontario jurisdiction and law are valid. But I also understand that some scholars have suggested an approach that accords with the court’s: that private international law principles can be used to address conflicts within one jurisdiction between the domestic legal system and indigenous legal systems or approaches. See for example Sara L. Seck, “Treaties and The Emancipatory Potential of International Law” in Michael Coyle and John Borrows,

eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017).

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## **NIKI continued (now in Austria)**

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

The Regional Court Korneuburg has opened a main insolvency proceeding – not a secondary insolvency proceeding that the German provisional administrator has applied for – on the assets of NIKI Luftfahrt GmbH in Austria (see here). Therefore, it obviously shares the view of the Regional Court of Berlin that NIKI’s COMI is located in Austria and not Germany.

However, it will be possible to lodge an appeal (“Rekurs”) against the Regional Court’s decision within the next 14 days.

As the German Federal Court of Justice still has to decide about the appeal against the ruling of the Regional Court of Berlin, we now see a main (preliminary) insolvency proceeding in Germany and one in Austria. It is not entirely clear under the EIR how to deal with such a positive conflict of jurisdiction. Depending on the decision of the German Federal Court it might just dissolve (if it locates NIKI’s COMI in Austria as well). Otherwise it should be – from my point of view – solved by cooperation and coordination in the spirit of Art. 42 EIR between the German and Austrian courts.

Interestingly the Regional Court Korneuburg has stated that since the decision of the Regional Court of Berlin no main insolvency proceeding is upheld in Germany. However, the Regional Court of Berlin has stated that, due to the fact that it has admitted an appeal (“Rechtsbeschwerde”) to the German Federal Court against its ruling, it has no legal force yet (see here).

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# US Court Refused to Apply the Chosen Chinese Law due to Public Policy Concern

In *Fu v. Fu*, 2017 IL App (1st) 162958-U, a father brought a claim against his son to revoke an unconditional gift of \$590,000 that he donated to his son for the later to pursue an EB-5 Visa to immigrate to the US. Both parties are Chinese citizens and the defendant is currently a resident of Massachusetts. The gift agreement was entered into in China, drafted in Chinese and contained a clause specifying PRC law should apply. The money was held by the International Bank of Chicago. The plaintiff brought the action in Illinois.

Under the US Law (Title 8 of the Code of Federal Regulations, § 204.6) a foreign national must invest at least \$500,000 in the US to be considered for an EB-5 Visa, and must 'show that he has invested his own capital obtained through lawful means.' (Matter of Ho, 22 I&N Dec. 206, 210 (AAO 1998)) After a few denied EB-5 approval, the plaintiff sought to recover the money, by claiming that the defendant was estranged from his parents, including the donor and refused to support them, and the purpose of the gift contract was for the defendant to obtain an EB-5 Visa but the defendant failed to do so.

Under the Illinois law, a valid gift requires 'delivery of the property by the donor to the donee, with the intent to pass the title to the donee absolutely and irrevocably, and the donor must relinquish all present and future dominion and power over the subject matter of the gift.' (Pocius v. Fleck, 13 Ill. 2d 420, 427 (1958)). Furthermore, the gift agreement between the parties also used the language that the gift was 'unconditional'. However, the plaintiff argued that under the PRC law, gifts may be revocable after the transfer of ownership, if the donee 'has the obligation to support the donor but does not fulfil it', or a donee 'does not fulfill the obligations as stipulated in the gift agreement.' (PRC Contract Law, Art 192)

The Appellate Court of Illinois First Judicial District affirmed the judgment of the circuit court of Cook County that the gift agreement was irrevocable. The plaintiff failed to successfully prove Chinese law. And even if the plaintiff properly pled PRC law, such interpretation was 'oppressive, immoral, and impolitic'. Under the US law on EB-5 Visa application, the foreign citizen must prove ownership of those funds to be eligible for an EB-5 Visa. The signed agreement stating the gift 'unconditional' would help the defendant to prove he legally owned the funds to acquire an EB-5 visa. If the governing PRC law indeed allows a gift to be given unconditionally and revoked after delivery and acceptance, as argued by the plaintiff, it would facilitate a deception on the US Government and is against public policy.

The full judgment can be found [here](#).

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## **NIKI continued**

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

The Spanish airline Vueling Airlines S.A. is still intending to acquire large parts of the NIKI business. Vueling is part of the European aviation group IAG, which also includes British Airways, Iberia, Aer Lingus and LEVEL. The provisional insolvency administrator of NIKI Luftfahrt GmbH, therefore, will continue to drive forward the sales process. Vueling has provided interim financing of up to € 16.5 million to finance the NIKI business until the closing of the purchase agreement. This funding is only sufficient for a few weeks.

Meanwhile, NIKI has lodged an appeal with the Federal Court against the ruling by the Regional Court of Berlin. Due to the legal complaint of the NIKI management against the decision, it does not have legal force yet. The preliminary insolvency proceeding in Germany therefore continues.

NIKI is expected to apply for the opening of secondary insolvency proceedings in

Austria by the end of the week, as well. According to the provisional insolvency administrator of NIKI this procedure is an important step to ensure the orderly processing of NIKI in Austria. In addition, the purchase agreement for the NIKI business should now be secured at short notice via this Austrian secondary process (see here).

It remains to be seen how the German Federal Court deals with the question of the rebuttal of the assumption that NIKI's COMI is located in Austria (the place of its registered office). It is even possible that the ECJ has to deal with this question for a second time after the Eurofood IFSC (Case C-341/04) case. As we will probably see a secondary proceeding commenced in Austria (NIKI seems to be one of the rare cases where the insolvency administrator of the main proceeding finds the commencement of a secondary proceeding useful for the success of the administration) we might even witness the application of some of the new rules of the EIR on the cooperation and coordination of main and secondary proceedings.

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## **NIKI, COMI, Air Berlin and Art. 5 EIR recast**

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

The Regional Court of Berlin has, on the basis of the immediate appeal against the order of the provisional insolvency administration on the assets of NIKI Luftfahrt GmbH (under Austrian law), repealed the decision of the District Court of Charlottenburg (see here) as it finds that international jurisdiction lies with Austrian and not German courts. In its decision, the regional court has dealt with the definition of international jurisdiction, which is based on the debtor's centre of main interests ('COMI'). According to the provisions of the European Insolvency Regulation, that is the place where the debtor usually conducts the administration of its interests and that is ascertainable by third parties.

The court has founded its decisions on the following arguments:

Since the debtor is based in Austria, it is assumed that the centre of their interests is also there (see Art. 3 II EIR recast). If this presumption is to be rebutted, high demands must be made to ensure legal certainty. According to the case-law of the European Court of Justice, objective and, for a third party, recognizable circumstances that would prove that the place of the head office is not located at the registered office are necessary.

The various factors should be considered in their entirety. In the present case, it can not be established with sufficient certainty on the basis of the arguments put forward by the debtor, on the one hand, and the complainant on the other hand, that the COMI is indeed located in Germany. Rather, no uniform picture is recognizable that could justify refuting the presumption.

The place from which the essential business activities of the debtor are controlled, namely Berlin, is not a solely decisive criterion. The fact that Air Berlin had been practically NIKI's only customer, and thus the sales were particularly generated in Germany, was not automatically decisive, as well.

Then again, the fact that the debtor maintains offices in Vienna, in which amongst other things NIKI's financial accounting is conducted, argues for a COMI in Austria. Likewise, the competent supervisory authority is located in Vienna and the debtor has an Austrian operating license and the airworthiness of the aircraft is monitored from there. In addition, approximately 80% of the employment contracts concluded by the debtor are subject to Austrian employment law.

Finally, the debtor's own behaviour also indicates that it assumes its COMI in Austria. It had not informed the creditors and the public that it had relocated its COMI to Germany. Furthermore, in an insolvency proceeding opened at the request of a creditor before the Korneuburg Regional Court (file reference 35 Se 323 / 17k) in Austria, the debtor did not raise the objection that there was no international competence in Austria.

This should be the first case of application of the 'new' Art. 5 I EIR recast, that regulates the examination of international jurisdiction. It is very likely not the last, as the case shows that the COMI-concept is still controversial. It waits to be seen if the case will even be referred to the German Federal Court of Justice (the Regional Court has admitted the appeal to the German Federal Court of Justice which may be lodged within a period of one month).

The press release of the Regional Court of Berlin can be found [here](#).

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# Implementation of the EAPO in Greece

By virtue of Article 42 Law 4509/2017, a new provision has been added to the Code of Civil Procedure, bearing the title of the EU Regulation. Article 738 A CCP features 6 paragraphs, which are (partially) fulfilling the duty of the Hellenic Republic under Article 50 EAPO. In brief the provision states the following:

- 1: The competent courts to issue a EAPO are the Justice of the Peace for those disputes falling under its subject matter jurisdiction, and the One Member 1<sup>st</sup> Instance Court for the remaining disputes. It is noteworthy that the provision does not refer to *the court*, but to its respective *judge*, which implies that no oral hearing is needed.
- 2: The application is dismissed, if
  1. it does not fulfil the requirements stipulated in the Regulation, or if
  2. the applicant does not state the information provided by Article 8 EAPO, or if
  3. (s)he does not proceed to the requested amendments or corrections of the application within the time limit set by the Judge.

Notice of dismissal may take place by an e-mail sent to the account of the lawyer who filed the application. E-signature and acknowledgment of receipt are pre-requisites for this form of service.

The applicant may lodge an appeal within 30 days following notification. The hearing follows the rule established under Article 11 EAPO. The competent courts are the ones established under the CCP.

- 3: The debtor enjoys the rights and remedies provided by Articles 33-38 EAPO. Without prejudice to the provisions of the EU Regulation, the special chapter on garnishment proceedings (Articles 712 & 982 et seq. CCP) is to be applied.
- 4: If the EAPO has been issued prior to the initiation of proceedings to the

substance of the matter, the latter shall be initiated within 30 days following service to the third-party.

If the applicant failed to do so, the EAPO shall be revoked ipso iure, unless the applicant has served a payment order within the above term.

- 5: Upon finality of the judgment issued on the main proceedings or the payment order mentioned under § 4, the successful EAPO applicant acquires full rights to the claim.
- 6: The liability of the creditor is governed by Article 13 Paras 1 & 2 EAPO. Article 703 CCP (damages against the creditor caused by enforcement against the debtor) is applied analogously.

Some additional remarks related to the Explanatory Report would provide a better insight to the foreign reader.

1. There is an explicit reference to the German and Austrian model.
2. The placement of the provision (i.e. within the 5<sup>th</sup> Book of the CCP, on Interim Measures) clarifies the nature of the EAPO as an interim measure, despite its visible connotations to an order, which is regulated in the 4<sup>th</sup> chapter of the 4<sup>th</sup> Book, on Special Proceedings. Nevertheless, the explanatory report acknowledges resemblance of the EAPO to a payment order.
3. There is no need to provide information on the authority competent to enforce the EAPO, given that the sole person entrusted with execution in Greece is the bailiff.

The initiative taken by the MoJ is more than welcome. However, a follow-up is imperative, given that Article 738 A CCP does not provide all necessary information listed under Article 50 EAPO.

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# Mutual Recognition and Enforcement of Civil and Commercial Judgments among China (PRC), Japan and South Korea

*Written by Dr. Wenliang Zhang, Lecturer in the Law School of Renmin U, China (PRC)*

Against the lasting global efforts to address the issue of recognition and enforcement of civil and commercial judgments (“REJ”), some scholars from Mainland China, Japan and South Korea echoed from a regional level, and convened for a seminar on “Recognition and Enforcement of Judgments between China, Japan and South Korea in the New Era”. The seminar was held in School of Law of Renmin University of China on December 19, 2017 and the participants were involved in discussing in depth the status quo and the ways out in relation to the enduring REJ dilemma between the three jurisdictions, especially that between China and Japan.

Unfortunately, despite the immense volume of civil and commercial interactions, China and Japan have been stuck in the REJ deadlock ever since China first refused to recognize Japanese judgments in the infamous 1994 case Gomi Akira. After this misfortune, both Chinese and Japanese courts have waged rounds of repeated refusals or revenges, forming a vicious circle in the guise of the so-called reciprocity. The Sino-Japanese REJ stalemate is considered to be illustrative of the most formidable blockades lying on the way to free movement of judgments. Between China and South Korea, the REJ future is promising. Although China refused to recognize, at least in one case, Korean judgments for lack of reciprocity, Korean courts have nevertheless recognized Chinese courts on a reciprocity basis. The positive move by Korean courts may well pave the way for Chinese courts to recognize Korean judgments in the future.

For smooth REJ, understanding must be ensured between the three jurisdictions

and mutual trust should also be established. In light of China's recent positive movement in applying reciprocity, there may exist a way out for the REJ deadlock if the other two jurisdictions could well join the trend. The papers presented for the seminar will appear in a special 2018 issue of *Frontiers of Law in China*:

1. Yuko Nishitani, *Coordination of Legal Systems by Recognition of Judgments ? Rethinking Reciprocity in Sino-Japanese Relationships*
  2. Kwang Hyun Suk, *Recognition and Enforcement of Foreign Judgments among China, Japan and South Korea: Korean Law Perspective*
  3. Qisheng He, *Wuhan University Law School Topic: Judgment Reciprocity among China, Japan and South Korea: Some Thinking for Future Cooperation*
  4. Wenliang Zhang, *To break the Sino-Japanese Recognition Feud - Lessons Learnt As Yet*
  5. Lei Zhu, *The Latest Development on the Principle of Reciprocity in the Recognition and Enforcement of Foreign Judgments in China*
  6. Yasuhiro Okuda, *Unconstitutionality of Reciprocity Requirement for Recognition and Enforcement of Foreign Judgments in Japan.*
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## **The ECtHR rules on the compatibility with the right to respect for private and family life of the refusal of registration of same-sex marriages contracted abroad**

By a judgment *Orlandi and Others v. Italy* delivered on December 14 the ECtHR held that the lack of legal recognition of same sex unions in Italy violated the right to respect of private and family life of couples married abroad.

The case concerned the complaint of six same sex-couples married abroad (in Canada, California and the Netherlands). Italian authorities refused to register their marriages on the basis that registration would be contrary to public policy. They also refused to recognize them under any other form of union. The complaints were lodged prior to 2016, at a time when Italy did not have a legislation on same-sex unions.

The couples claimed under articles 8 (right to respect of private and family life) and 14 (prohibition of discrimination) of the Convention, taken in conjunction with article 8 and 12 (right to marry), that the refusal to register their marriages contracted abroad, and the fact that they could not marry or receive any other legal recognition of their family union in Italy, deprived them of any legal protection or associated rights. They also alleged that *“the situation was discriminatory and based solely on their sexual orientation”* (§137).

Recalling that States are still free to restrict access to marriage to different sex-couples, the Court indicated that nonetheless, since the *Oliari and others v. Italy* case, States have an obligation to grant same-sex couples *“a specific legal framework providing for the recognition and the protection of their same-sex unions”* (§192).

The Court noted that the *“the crux of the case at hand is precisely that the applicants’ position was not provided for in domestic law, specifically the fact that the applicants could not have their relationship - be it a de facto union or a de jure union recognized under the law of a foreign state - recognized and protected in Italy under any form”* (§201).

It pointed out that although legal recognition of same-sex unions had continued to develop rapidly in Europe and beyond, notably in American countries and Australia, the same could not be said about registration of same-sex marriages celebrated abroad. Giving this lack of consensus, the Court considered that the State had *“a wide margin of appreciation regarding the decision as to whether to register, as marriage, such marriages contracted abroad”* (§204-205).

Thus, the Court admitted that it could *“accept that to prevent disorder Italy may wish to deter its nationals from having recourse in other States to particular institutions which are not accepted domestically (such as same-sex marriage) and which the State is not obliged to recognize from a Convention perspective”*

(§207).

However, the Court considered that the refusal to register the marriages under any form left the applicants in “*a legal vacuum*”. The State has failed “*to take account of the social reality of the situation*” (§209). Thus, the Court considered that prior to 2016, applicants were deprived from any recognition or protection. It concluded that, “*in the present case, the Italian State could not reasonably disregard the situation of the applicants which correspond to a family life within the meaning of article 8 of the Convention, without offering the applicants a means to safeguard their relationship*”. As a result, it ruled that the State “*failed to strike a fair balance between any competing interests in so far as they failed to ensure that the applicants had available a specific legal framework providing for the recognition and the protection of their same-sex union*” (§ 210).

Thus, the Court considered that there had been a violation of article 8. It considered that, giving the findings under article 8, there was no need to examine the case on the ground of Article 14 in conjunction with article 8 or 12. (§212).

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# **Functioning of the ODR Platform: EU Commission Publishes First Results**

*Written by Emma van Gelder and Alexandre Biard, Erasmus University Rotterdam (PhD and postdoc researchers ERC project Building EU Civil Justice)*

On 13 December 2017, the European Commission published a report on the functioning of the Online Dispute Resolution (ODR) Platform for consumer

disputes, and the findings of a web-scraping exercise of EU traders' websites that investigated traders' compliance with their information obligations vis-à-vis consumers.

In 2013, two complementary and intertwined legislative instruments - the Consumer ADR Directive (Directive 2013/11/EU) and the ODR Regulation (Regulation 524/2013) - were adopted to facilitate the out-of-court resolution of consumer disputes in the EU. Among other things, the Consumer ADR Directive has promoted a comprehensive landscape of high quality ADR bodies operating across the EU, and the ODR Regulation has established an ODR platform that offers consumers and traders a single point of entry for complaints arising out from online sales and services. The ODR platform is operational since 15 February 2016.

Data about claims lodged between 15 February 2016 and 15 February 2017 reveals:

- **1,9 million individuals** visited the ODR platform, proving the considerable level of coverage and uptake of the platform, as well as a high level of awareness among consumers and traders;
- **Consumers submitted more than 24,000 complaints** via the ODR platform. Reasons for complaining included problems with the delivery of goods (21%), non-conformity issues (15%) and defective goods (12%). 1/3 of complaints related to cross-border issues;
- **85 % of cases were automatically closed within 30 days after submission**, which is the deadline for consumers and traders to agree on a competent ADR body. A large number of traders ultimately did not follow through using the ODR platform. However, it appears that **40% of consumers were bilaterally contacted by traders to solve their problems outside the scope of the ODR platform**. As the European Commission highlights, the ODR platform has thus **behavioural effects** on traders and 'consumers' mere recourse to the ODR platform has a preventive effect on traders that are more inclined to settle the dispute rapidly without taking the complaint to a dispute resolution body through the ODR platform workflow';
- **9 % of complaints were not closed by the system, but refused by the trader**. For 4% of them, parties both pulled backed before they reached an agreement with the ADR entity;**2% of complaints were submitted to**

**an ADR body.** In half of these cases, the ADR body refused to deal with the case on procedural grounds (*e.g.* lack of competence or consumer's failure to contact the trader first). **In the end, only 1% of the cases reached an outcome via an ADR entity.**

In parallel, the web-scraping exercise of 20,000 traders' websites was conducted between 1 June and 15 July 2017. It aimed to investigate traders' compliance with their information obligations, which include in particular the obligation to provide consumers with an easily accessible electronic link to the ODR platform on their websites, and an email address that consumers may use to submit complaint against them on the ODR platform. Key findings of can be summarized as follows:

- **Only 28% of controlled websites included a link to the ODR platform.** Compliance ultimately depended on traders' size (*e.g.*, 42% of large traders included a link vs. 14% of small traders), location (*e.g.*, 66% of online traders located in Germany provided a link vs. 1% in Latvia), and sectors (*e.g.*, 54% in the insurances sector vs. 15% of 'online reservations of offline leisure');
- **85% of investigated traders provided an email address;**
- **Accessibility to the ODR link appears still limited:** for 82% of websites, the link to the ODR platform was included in the Terms & Conditions, which for consumers might be difficult to retrieve considering the risk of information overload.

The EU Commission now intends to take actions to solve the identified issues. In particular, it will cooperate with national authorities to solve technical issues, and maximize the use of the platform with the view to strengthening its contribution to the development of the Digital Single Market.

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# Conference Report: Contracts for

# **the Supply of Digital Content and Digital Services, A legal debate on the proposed directive, ERA Brussels, 22 November 2017**

*Written by Antonella Nolten, Research Fellow at the EBS Law School, Wiesbaden, Germany*

On 22 November 2017 the Academy of European Law (ERA) hosted a conference on the recent developments on the Proposal for a Digital Content Directive in Brussels.

After welcoming remarks by Dr. Angelika Fuchs, Prof. Bénédicte Fauvarque-Cosson, University Paris II - Panthéon-Assas, chaired the first panel on the scope of the Directive. To begin with, Prof. Fauvarque-Cosson reminded the participants of the past developments in European contract law, mentioning the UPICC, the Principles of European Contract Law, and the CESL. The challenges these projects had to face clearly showed that for most member states contract law represented the heart of their legal traditions, and member states were therefore reluctant towards radical changes.

Evelyne Gebhardt, MEP, Co-rapporteur for the IMCO and JURI Committees, explained the position of the IMCO/JURI joined committee after the vote on 21 November 2017. In order to ensure updates for consumers and interoperability, a sensible inclusion of embedded digital content (EDC) was proposed. The scope of the Directive was extended to also include OTTs (Over-the-top content) in order to ensure remedies and conformity rights in this field. The overall objective were a high level of consumer protection and to anticipate rules for digital content on a European scale in order to prevent deviating national legislation.

Jeremy Rollson, Microsoft, praised the work of the Commission and the European Parliament. With regard to platforms, he proposed a modernization of the scope. Since the release of the proposal in 2015 by the commission, the technology had already gone through major changes. As various forms of OTTs existed, it proved hard to find a one size fits all model, however it were necessary to agree on

certain principles. Rollson outlined the difficulties businesses were facing, because many different legal instruments had to be considered. He suggested a targeted scope in order to ensure the applicability of the rules.

The question, which rules should apply to embedded digital content, was addressed by Prof. Karin Sein, University of Tartu, Estonian EU Presidency Team. After having explained the advantages and disadvantages of the different approaches, she reported on the council's opinion to exclude embedded digital content from the scope of the Digital Content Directive. This solution offered the upside that from a consumer's perspective it was easily understandable, that the rules for goods also applied to smart goods. The overall goal was to achieve a future-proof solution, which was at the same time easily understandable for the average consumer.

In the following discussion Evelyne Gebhardt disagreed with Prof. Sein on the topic of embedded digital content and presented the European Parliament's opinion to extent the scope of the directive to EDC. The European Parliament preferred the split approach. This approach offered the main advantage that it were not up to the consumer to define where the product's defect lay, but the supplier had to determine whether the defect touched the digital content or the good itself. Prof. Sein replied that, overall, it was less relevant, where the rules were installed, since this was only a question of technique. Nevertheless, the installation of specific rules remained the main objective. Prof. Staudenmayer, Head of Unit - Contract Law, DG Justice, European Commission, agreed and added the main requirements of the rule were that it needed to be forward-looking and at the same time practical for consumers. Prof. Fauvarque-Cosson highlighted the different scope of the Digital Content Directive in contrast to the CESL, as the scope was limited to B2C-contracts and moreover the territorial scope covered domestic as well as cross-border contracts.

Prof. Karin Sein introduced the audience to the second panel's focus on conformity criteria, remedies and time limits. Agustín Reyna, BEUC, compared the specifications of the conformity criteria in the Commission's proposal to the Council's proposal and the IMCO/JURI report. During the upcoming Trilogues he would expect an agreement on a balance between objective and subjective criteria. He pointed to the possible conflicts between contractual disclaimers (subjective) and consumer expectations (objective). He praised the amendment in Art. 6a (5), which introduced specific rules for updates for digital content or



digital services. In his opinion the relation between third party rights and copyright issues needed further clarification.

Staudenmayer added to the discussion on the inclusion of updates that consumers needed to be informed about possible updates as well as a right to terminate. The topic, whether the consumer should be able to keep the old version, was discussed controversially. With regard to the remedies package, Staudenmayer justified the facilitation of the right of termination by stating that most suppliers also preferred a termination of the contract, caused by the fact that they did not want to invest in a bad product and rather develop a new one. On the other hand consumers also profited, as the easier termination gave an incentive to suppliers to develop good products. Regarding the reversal of burden of proof, he reported on the commission's reason to not imply a time limit, since digital content was not subject to wear and tear. However, as the council and the European Parliament supported a time limit for the burden of proof, a discussion on how long this period will be and when it should start is expected. To conclude, Staudenmayer emphasized the transition our economy is undergoing as it is turning towards a digital economy and reminded the participants of the importance of promoting this change in order to stay competitive on a global scale.

Panel II ended with a Round Table on the topic "Balancing the interest of suppliers and consumers? Watering down full harmonization?". Fauvarque-Cosson explained the historic development from a preference for minimum to a preference for maximum harmonization and indicated that recently some member states saw the subsidiarity principle endangered. Therefore she suggested more targeted rules as a substitute for full harmonization. Concerning updates, Anna Papenberg, stated that updates could often be very burdensome and consumers needed access to previous versions. Prof. Schulte-Nölke referred to the suggestion of the ELI regarding embedded digital content, which proposed that in this case hard- and software should be subject to remedies and the consumer should be allowed to cherry-pick a system. The Round Table ended with the conclusion that defining a targeted scope could lead to similar results as full harmonization.

After a short lunch break, Stephen Deadman, Facebook Global Deputy Chief Privacy Officer reported on "Data and its role in the digital economy". He stated that in the future, as part of a new wave of innovation, people would be made aware of the value of their data with the aim of empowering people in their life by

using their data. In his opinion data driven innovation and privacy should become mutually enforcing. He underlined that data were not to be classified as a currency, as it were neither finite nor exclusive. In fact, data were superabundant and, by using data, people did not give up data.

Romain Robert, Legal Officer, Policy & Consultation Unit, EDPS, presented the “Interaction of the GDPR, the e-Privacy legislation and the Digital Content Directive”. He stressed the EDPS’s opinion that data were significantly different from money as a counter performance. He referred to the EDPS opinion from April 2017 on the proposed Directive and explained the position, why the term “data as a counter performance” should be avoided. Differences between the Digital Content Directive and the GDPR arose with regard to the definition of personal data. In the EDPS opinion almost all data provided by the consumer would be considered as personal data.

Insight on the topic “Data as a price under contract law?” was provided by Prof. Hans Schulte-Nölke, University of Osnabrück and the Radboud University Nijmegen. In his opinion the Digital Content Directive was not properly coordinated with the GDPR. He pointed to a conflict between contract law and the GDPR, as under data protection law personal data were protected as a fundamental right, whereas in contract law personal data could be considered as a counter-performance for a service. Hence under contract law the contract was the reason for the right to exchange, thus for what had been exchanged under the contract. Therefore the supplier had a right to keep the counter performance after proper performance of the contract. Meanwhile the GDPR granted a right to withdraw consent at any time (Art. 7 (3) GDPR). How can a balance be achieved in a way that, on the one hand, contract law is interpreted in the light of the GDPR and, on the other hand, considering the principle that GDPR supersedes contract law, but contract law purposes are still met. He came to the conclusion the GDPR should not hinder contract law. Further, he raised the question, whether a counter performance could be assumed, in the case that a supplier gathered more information than the amount that were necessary for the performance of the service.

“Provision of data and data processing under the proposed regime” was the subject of the Round Table at the end of the conference day. Jeremy Rollson drew the attention to his opinion that data were neither comparable to oil nor to a currency, but without doubt very valuable. Robert Reyna agreed and further

elaborated that the idea of “data as a counter performance” put suppliers in a very strong position, as they could determine, which data to label as a counter performance and which to label a necessity for the contract. A solution to balance this power of determination could be a presumption in consumer law. Anna Papenberg specified that a consumer could not give away personal data, but, more specifically, the exploitation rights of data. The fact that consumers did not give up data, but that their data was being used, were not the same as a counter performance, added Stephen Deadman. It was agreed on the necessity to limit the power of the supplier in order to define, which data counted as counter performance and which was necessary for the execution of the contract. The event ended with warm words of thanks to the organizers and speakers for a highly interesting conference day.