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The law applicable to agency: German legislature adopts choice of law rule

On June 11 the German legislature has adopted a new choice of law rule for the law of agency. It is largely based on a proposal of the 2nd Commission of the German Council for Private International Law headed by our co-editor Jan von Hein.

The new Article 8 of the German Introductory Law to the German Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch – EGBGB) reads as follows (private translation):

> *(1) A contract between principal and agent shall be governed by the law chosen by the principal before the agency is exercised, if the choice of law is known to both agent and third party. Principal, agent and third party are free to choose*

the applicable law at any time. The choice of law according to Sentence 2 of this paragraph takes precedence over Sentence 1.

(2) In the absence of a choice under Paragraph 1 and if the agent acts in exercise of his commercial activity, a contract between principal and agent, shall be governed by the law of the country in which the agent has his habitual residence at the time he acted, unless this country is not identifiable by the third party.

(3) In the absence of a choice under Paragraph 1 and if the agent acts as employee of the principal, a contract between principal and agent shall be governed by the law of the country in which the principal has his habitual residence, unless this country is not identifiable by the third party.

(4) If the agent does not act in a way described by Paragraph 2 or 3 and in the absence of a choice under Paragraph 1, a permanent contract between principal and agent shall be governed by the law of the country, in which the agent usually exercises his powers, unless this country is not identifiable by the third party.

(5) If the applicable law does not result from Paragraph 1 through 4, a contract between principal and agent shall be governed by the law of the country in which the agent acts in exercise of his powers. If the third party and the agent must have been aware that the agency should only have been exercised in a particular country, the law of this country is applicable. If the country in which the agent acts in exercise of his powers is not identifiable by the third party, the law of the country in which the principal has his habitual residence at the time the agent exercises his powers, is applicable.

(6) The law applicable for agencies on the disposition of property or the rights on property is to be determined according to Article 43 Paragraph 1 and Article 46.

(7) This Article does not apply to agencies for exchange or auction.

(8) The habitual residence in accordance with this Article is to be determined in line with Article 19, Paragraph 1 and 2, first alternative of Regulation (EG) No. 593/2008, provided that the exercise of the agency replaces contract formation. Article 19, Paragraph 1 and 2, first alternative of Regulation (EG) No. 593/2008

does not apply, if the country according to that Article is not identifiable by the third party.

The original German version is available here.

CJEU rules that child's physical presence is a necessary condition for habitual residence

On 8 June 2017 the CJEU has rendered another opinion regarding the interpretation of the concept of 'habitual residence' of the child under the Brussels II bis Regulation.

The facts of the case, C-111/17 PPU, indicate that OL, an Italian national, and PQ, a Greek national, married in Italy in 2013 and that they resided together in Italy. When PQ was eight months pregnant, the couple travelled together to Greece so that PQ could give birth there. On 3 February 2016 PQ gave birth, in Greece, to a daughter, who has remained since her birth in that Member State with her mother. After the birth of the child, OL returned to Italy. According to OL, he had agreed that PQ should stay in Greece with their child until May 2016, when he expected his wife and child to return to Italy. However, in June 2016 PQ decided to remain in Greece, with the child. OL brought an application before the *Monomeles Protodikeio Athinon* (Court of First Instance of Athens, Greece), for the return of that child to Italy, the Member State where the child's parents resided together before the birth of the child.

Having emphasised the importance of the primary caretaker's situation for determining the child's habitual residence, the CJEU stresses that it is nevertheless important to bear in mind that linking the child's habitual residence to that of his primary caretakers should not result 'in making a general and abstract rule according to which the habitual residence of an infant is necessarily that of his parents'. To adopt the position suggested by the father in OL v PQ, that the intention originally expressed by the parents as to the return of the mother accompanied by the child from Greece to Italy, which was the MS of their habitual residence before the birth of the child, constitutes an preponderant element in determining the child's habitual residence would go beyond the limits of that concept. Allowing the initial intention of the parents that the child resides in Italy prevails over the fact that she or he has been continuously resident in Greece since her or his birth would render the concept of 'habitual residence' essentially legal rather than fact-based.

The CJEU rules that Article 11(1) of the Brussels II bis Regulation, must be interpreted as meaning that, in a situation in which a child was born and has been continuously residing with his or her mother for several months in accordance with the joint agreement of the parents in a Greece, while in Italy they had their habitual residence before birth, the initial intention of the parents as to the return of the mother accompanied by the child in Italy cannot allow the child to be regarded as having his or her habitual residence in Italy. The CJEU concludes that in such a situation the refusal of the mother to return to Italy accompanied by the child cannot be regarded as an 'unlawful displacement or non-return' within the meaning of Article 11(1).

This case seems to resolve the dilemma, dividing national courts, as to whether the physical presence of the child in the territory of a state is a necessary precondition for establishing the child's habitual residence.

Issue 2017.2 Nederlands Internationaal Privaatrecht

The second issue of 2017 of the Dutch Journal on Private international Law, Nederlands Internationaal Privaatrecht, includes papers on the Commission's proposal to amend the Posting of Workers Directive, the establishment of the Netherlands Commercial Court and the enforcement of foreign judgments in Nigeria.

Aukje van Hoek, 'Editorial: Online shopping en detachering van werknemers – twee hoofdpijndossier op de grens van IPR en interne markt', p. 175-177.

Fieke van Overbeeke, 'The Commission's proposal to amend the Posting of Workers Directive and private international law implications', p. 178-194.

This article discusses the Commission's proposal to amend the Posting of Workers Directive (PWD), launched on 8 March 2016. One amendment in particular will be highlighted: the insertion of a type of conflict-of-laws rule, determining from when the law of the host Member State would be fully applicable to the posted worker, namely after the posting lasted for two years. This would lead to a pre-determined qualification of Article 8 section 2 Rome I Regulation in posting of workers cases that are covered by the PWD. This has clear private international law implications, which will be discussed thoroughly. Yet, before entering into these aspects the interaction between the PWD and Rome I will be discussed. Uncertainty still exists on this matter, which makes it important to map this first. This results in an article divided into two parts: 1. Elaborating on the general conflict-of-law rules of the PWD and Rome I and their interaction; 2. Analysing the Commission's proposal from a private international law point of view by giving three private international law comments, some final remarks and assessing whether this proposal has implications for the formerly discussed interaction between the two conflict-of-law instruments.

Serge Vlaar, 'IPR-aspecten van het NCC-wetsvoorstel', p. 195-204. (in Dutch, the English abstract reads:)

For the last twenty years, London has already had an international commercial court and this court has been very successful in attracting cases from the European continent. In order to reduce this outflow various European countries have created international commercial courts of their own and the Netherlands is on the verge of doing so. This new court will be a court for large international cases, conducting proceedings in English. The draft law necessary for the functioning of this court has been published for consultation and includes a few interesting topics regarding private international law. This contribution intends to describe these topics and the new court in general.

Abubakri Yekini, 'Foreign judgments in Nigerian courts in the last decade: a dawn of liberalization', p. 205-403

Nigeria has largely been governed by military dictators since it gained independence from Great Britain in 1960. Sustained democratic transition is a recent phenomenon and that, possibly, account for the recent increase in foreign direct investment, international trade and trade in services between Nigeria and its trading partners such as the European Union, China and the US. The surge in international trade has caused an increase in transnational litigation and requests for the enforcement of foreign judgments in Nigeria. An assessment of reported cases reveals that the majority of these cases were decided roughly between 2005 and 2015. There is a need to evaluate the Nigerian regime for enforcement of foreign judgments, with a particular focus on judicial opinions and legislative policy in this area. The article seeks to achieve this by analyzing the two relevant statutes on judgment enforcement and judicial precedents over the last decade. The article finds that while reciprocity appears to be the policy behind the relevant statutes, the courts have adopted a liberal and pragmatic approach towards recognition and enforcement of foreign judgments. The article therefore concludes that while the liberal approach of the Nigerian Supreme Court is a welcome development, it needs to be supported by clear, consistent, and robust judicial reasoning. This will set a clear agenda for lawmakers tasked with aligning the relevant statutes with already established judicial approach and, above all, will make it easier to offer legal advice to foreign investors.

Worldwide Removal Order Upheld Against Google

The Supreme Court of Canada has upheld, by a 7-2 decision, an injunction issued by lower courts in British Columbia requiring Google, a non-party to the litigation, to globally remove or "de-index" the websites of the defendant so that they do not appear in any search results. This is the first such decision by Canada's highest court.

In *Google Inc. v Equustek Solutions Inc.*, 2017 SCC 34 (available here) Equustek sued Datalink for various intellectual property violations relating to the manufacture and sale of a networking device. Interlocutory orders were made against Datalink but it did not comply and it cut any connections it had to British Columbia (para 7). It continued its conduct, operating from an unknown location and selling its device over the internet. After some cooperative efforts with Google (de-indexing specific web pages but not Datalink's entire websites) were unsuccessful to stop potential customers from finding Datalink's device, Equustek sought an interlocutory injunction stopping Google from including any parts of Datalink websites in its search results worldwide. Google acknowledged that it could do this relatively easily (paras 43 and 50) but it resisted the injunction.

The issue of the British Columbia court's *in personam* or territorial jurisdiction over Google featured prominently in the lower court decisions, especially that of Justice Fenlon for the British Columbia Supreme Court (available here). This is an interesting issue in its own right, considering the extent to which a corporation can be present or carry on business in a province in a solely virtual (through the internet) manner (rather than having any physical presence). There is considerable American law on this issue, including the much-discussed decision in *Zippo Manufacturing v Zippo Dot Com Inc.,* 952 F Supp 119 (WD Pa 1997). In the Supreme Court of Canada, Google barely raised the question of jurisdiction, leading the court to state that it had not challenged the lower courts' findings of *in personam* and territorial jurisdiction (para 37). So more on that issue will have to wait for another case.

The majority decision (written by Abella J) applies the standard three-part test for an interlocutory injunction (para 25). In doing so it confirms two important points. First, it holds that a non-party can be made subject to an interlocutory injunction. It relies on considerable jurisprudence about *Norwich* orders and *Mareva* injunctions, both of which frequently bind non-parties. The common theme the court draws from these cases and applies to this case is the necessity of the non-party being bound for the order to be effective. In the majority's view, the injunction against Google is a necessity if the ongoing irreparable harm to Equustek is to be stopped (para 35). Second, it holds that an interlocutory injunction can be made with extraterritorial effect in cases in which the court has *in personam* jurisdiction over the entity being enjoined (para 38). Again, it made such an extraterritorial order in this case because that was, in its view, necessary for the injunction to be effective. An order limited to searches or websites in Canada would not have addressed the harm.

The dissenting judges (Cote J and Rowe J) accept both of these important points of law. They acknowledge that the court has the ability, in law, to issue such an injunction (para 55). But on the facts of this case they determine that the injunction should not have been granted, for several reasons. First, the injunction is not interlocutory but rather permanent, so that more restraint is warranted. In their view, Equustek will not continue the action against Datalink, content to have obtained the order against Google (paras 62-63). In response, the majority notes it is open to Google to apply in future to have the order varied or vacated if the proceedings have not progressed toward trial (para 51). Because they consider the injunction to be permanent, the dissenting judges object that no violation of Equustek's rights has as of yet been established on a balance of probabilities (para 66) such that there is no foundation for such a remedy. Since the majority considers the injunction to be interlocutory this issue does not arise for it.

Second, the dissent rejects the reliance on *Norwich* orders and *Mareva* injunctions, noting that in those cases the order does not enforce a plaintiff's substantive rights (para 72). In essence, this order is a step farther than the courts have gone in previous cases and not one the dissent is willing to take. The dissent also denies the injunction because (i) it is mandatory in nature rather than prohibitive, (ii) it is unconvinced that the order would be effective in reducing harm to Equustek and (iii) it thinks there is sufficient evidence that Datalink could be sued in France so that an alternative to enjoining Google is available. Aspects

of this supplementary reasoning are open to debate. First, the distinction between mandatory and prohibitive orders is not overly rigid and in any event mandatory orders are possible, especially in cases in which the target of the order can easily comply. Second, common sense suggests the injunction would have at least some impact on the ongoing alleged violations, even though of course there are other internet search engines. Moreover, the majority points out that it is "common ground that Datalink was unable to carry on business in a commercially viable way unless its websites were in Google's search results" (para 34). On the issue of effectiveness, the dissenting judges do not seem to be on this common ground. Third, proceedings against Datalink in France might or might not be viable. Even if it could be found in France, it could subsequently leave the jurisdiction and continue its operations elsewhere. So this seems a hard basis on which to deny Equustek the injunction.

It is fair for the dissent to point out that this injunction is not perfectly analogous to *Norwich* orders and *Mareva* injunctions. It does move beyond those cases. The debate is whether this is a reasonable incremental move in the jurisprudence relating to the internet or goes too far. The majority's overarching rationale for the move is the necessity of the injunction on these facts. Coupled with the ease with which Google can comply, this is a sufficient basis to evolve the law in the way the court does.

The U.S. Supreme Court Further Narrows Specific Jurisdiction over Nonresident Defendants

Many thanks to Dr. Cristina M. Mariottini for sharing the news of this very recent decision by the U.S. Supreme Court on specific jurisdiction.

On June 19th, 2017 the U.S. Supreme Court rendered a new opinion on the issue of specific jurisdiction over nonresident defendants in *Bristol-Myers Squibb v.*

Superior Court of California. In an 8-to-1 opinion penned by Justice Alito (Sotomayor, J., dissenting), the majority ruled that, as a result of the limitations imposed on jurisdiction by the due process clause, California courts lack specific jurisdiction to entertain the product liability claims brought (along with resident plaintiffs) by plaintiffs who are not California residents, regardless of the fact that all the claims are the same, because of an insufficient connection between the forum and the specific claims at issue.

A group of plaintiffs – consisting of 86 California residents and 592 residents from 33 other States – sought compensation before Californian State courts for injuries associated with the consumption of the Bristol-Myers Squibb drug Plavix. Bristol-Myers Squibb, incorporated in Delaware and headquartered in New York, contracted with a State distributor in California, but it also engaged in business activities nationwide, extensively promoting and marketing the drug.

On the grounds that it "resembles a loose and spurious form of general jurisdiction", the U.S. Supreme Court refuted the "sliding scale approach to specific jurisdiction" on which the California Supreme Court relied when it asserted (by majority) specific jurisdiction over the nonresidents claims. Applying this test, the California Supreme Court concluded that Bristol-Myers Squibb's "extensive contacts with California" permitted the exercise of specific jurisdiction "based on a less direct connection between [Bristol-Myers Squibb's] forum activities and plaintiffs' claims than might otherwise be required". This attenuated requirement was satisfied, the California Supreme Court found, because the claims of the nonresidents were similar in several ways to the claims of the California residents (as to which specific jurisdiction was uncontested).

Reversing the decision of the California Supreme Court and assertively relying on its precedents, the majority of the U.S. Supreme Court ruled that "for specific jurisdiction, a defendant's general connections with the forum are not enough". Among the variety of interests that a court must take into consideration in determining whether the assertion of personal jurisdiction is constitutionally proper are "the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice". Restrictions on personal jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States". Relying, in particular, on *Walden v. Fiore et al.* ("a defendant's relationship with a… third party, standing alone, is an insufficient basis for

jurisdiction"), the majority of the Court held that, to assert jurisdiction, "a connection between the forum and the specific claims at issue" is needed and that "this remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents". The mere fact, as in the case at hand, that other (resident) plaintiffs were prescribed, obtained, and ingested a medication in a State – and allegedly sustained the same injuries as did the nonresidents – does not allow that State to assert specific jurisdiction over the nonresidents' claims.

In her dissent, however, Justice Sotomayor challenged the majority's core conclusion that the exercise of specific jurisdiction in the case at hand would conflict with the Court's decision in *Walden v. Fiore,* stating that "*Walden* concerned the requirement that a defendant 'purposefully avail' himself of a forum State or 'purposefully direc[t]' his conduct toward that State […], not the separate requirement that a plaintiff's claim 'arise out of or relate to' a defendant's forum contacts". Looking at the overall picture of personal jurisdiction in the U.S. and advocating for a balanced approach to general and specific jurisdiction, respectively, Justice Sotomayor underscored the "substantial curbs on the exercise of general jurisdiction" that the Court imposed with its decision in *Daimler AG v. Bauman* (in which Justice Sotomayor filed a concurring opinion and whose principles were reaffirmed as recently as last month in *BNSF Railway Co. v. Tyrrell*). In her dissent Justice Sotomayor further observed that, with its decision in *Bristol-Myers Squibb* (and – one may add – even more so with its plurality opinion in *J. McIntyre Machinery, Ltd. v. Nicastro*), the Court has introduced a similar contraction of specific jurisdiction. This contraction "will result in piecemeal litigation and the bifurcation of claims" curtailing, to a certain extent, plaintiffs' ability to "hold corporations fully accountable for their nationwide conduct". The majority's response to this objection that "The Court's decision… does not prevent the California and out-of-State plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over [Bristol-Myers Squibb]. Alternatively, the nonresident plaintiffs could probably sue together in their respective home States" is of limited avail to those national plaintiffs who wish to bring a consolidated action in case the corporation's "home" is abroad and, overall, it seems to confirm the Court's trend towards progressively relinquishing jurisdiction in favor of foreign courts.

Regulation (EU) 2015/848, on Insolvency Proceedings…

… is applicable from today on (see art. 92).

See here as well the C*ommission Implementing Regulation (EU) 2017/1105 of 12 June 2017 establishing the forms referred to in Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings*, OJ L 160, 22.6.2017.

Law on Jurisdiction Clauses Changes in Canada

In 2011 Facebook, Inc. used the name and picture of certain Facebook.com members as part of an advertising product. In response, a class action was started in British Columbia on behalf of roughly 1.8 million British Columbia residents whose name and picture had been used. The claim was based on section 3(2) of the province's *Privacy Act*. In response, Facebook, Inc. sought a stay of proceedings based on an exclusive jurisdiction clause in favour of California contained in the contracts of use for all Facebook.com members.

Canadian courts had repeatedly held that "strong cause" must be shown to displace an exclusive jurisdiction clause. In addition, while there was some ambiguity, the leading view had become that the analysis about whether to stay proceedings due to such a clause is separate and distinct from the general *forum non conveniens* analysis (para 18). The clause is not simply an important part of the *forum non conveniens* analysis – rather, it triggers a separate analysis.

In *Douez v Facebook, Inc.*, 2017 SCC 33 (available here) the Supreme Court of Canada confirms the second of these points: the analysis is indeed separate. However, by a slim majority of 4-3 the court holds that the "strong cause" test operates differently in a consumer context than in the commercial context in which it was originally formulated. The court overturns the decision of the British Columbia Court of Appeal and rejects a stay of proceedings, paving the way for the class action to proceed in British Columbia.

The Separate Analysis

All of the judges support the separation from *forum non conveniens* (paras 17, 20 and 131). I have found this approach troubling as it has developed and so, while not a surprise, I am disappointed to see it confirmed by the court. As I understand it, the core reason for the separate analysis is to make sure that the clause is not overcome by a series of less important factors aggregated under the *forum non conveniens* analysis. So the separate analysis requires that the "strong cause" to overcome the clause has to involve something closely related or intrinsic to the clause itself. The best explanation of this view is in *Expedition Helicopters Inc. v Honeywell Inc.*, 2010 ONCA 351 (available here; see in particular para 24). The problem is that courts, in their search for strong cause, frequently go beyond this and refer to factors that are well established under the *forum non conveniens* approach.

In its analysis, the court puts almost no emphasis on (and does not really even explain, in the way *Expedition Helicopters* does) how the separate approach differs from *forum non conveniens* in terms of how the clause gets displaced. In places, it appears to actually be discussing *forum non conveniens* (see paras 29-30 and 155), in part perhaps due to its quite direct reliance on *The Eleftheria*, an English decision I think is more consistent with a unitary framework rather than a separate approach (a point noted in *Expedition Helicopters* at para 11). In *Douez*, the plurality finds strong cause for two reasons: public policy and secondary factors (para 64). Leaving public policy aside for the moment, it is telling that the secondary factors are "the interests of justice" and "comparative convenience and expense". These are the most conventional of *forum non conveniens* factors. If this analysis is followed by lower courts, rather than that as explained in *Expedition Helicopters*, the separate analysis might end up not being very separate.

The Consumer Context

The majority (which is comprised of two decisions: a plurality by three judges and a separate solo concurrence) considers the unequal bargaining power and potential for the relinquishing of rights in the consumer context to warrant a different approach to the "strong cause" test (para 33). In part, public policy must be considered to determine whether the clause is to be given effect. As a matter of law, this may well be acceptable. But one of the key features of the plurality decision is the basis on which it concludes that strong cause has been shown on the facts. It reaches this conclusion because the contract is one of adhesion with notable inequality of bargaining power and because the claim being brought relates to "quasi-constitutional rights" (para 58), namely privacy. If these factors are sufficient, then a great many exclusive jurisdiction clauses in standard form contracts with consumers are subject to being defeated on a similar basis. Lots of consumer contracts involve unequal bargaining strength and are in essence "take it or leave it" contracts. And it may well not be that difficult for claims to be advanced, alongside other claims, that involve some form of quasi-constitutional rights (the breadth of this is untested). This possibility that many other clauses do not provide the protection once thought is likely the most notable dimension of the decision.

The Dissent

The dissent would not modify the "strong cause" test (paras 125 and 171). It stresses the need for certainty and predictability, which are furthered by exclusive jurisdiction clauses (paras 124 and 159). The dissent concludes the clause became part of the contract, is clear and is not unconscionable. It reviews possible factors which could amount to strong cause and finds none of them present. It is critical of the majority for its use of public policy as a factor in the strong cause analysis. If the clause is enforceable – and in its view it is, even with the inequality of bargaining power – then it is wrong to rely on the factors used by the plurality to find strong cause (para 173). In the immediate aftermath of the decision I think the dissent has the better of the argument on whether strong cause has been shown in this particular case.

Territorial versus Subject Matter Jurisdiction

The proposed class action relies on a statutory provision. That statute contains a

provision (section 4) that provides that the British Columbia Supreme Court must hear and determine claims under the statute. The British Columbia Court of Appeal concluded that this provision addresses subject matter jurisdiction and not territorial jurisdiction (para 14). The dissent agrees with that view (para 142). In contrast, the plurality conflates the two types of jurisdiction. While it accepts that the provision is not one which overrides jurisdiction clauses (para 41), in the public policy analysis it is concerned that in litigation in California the plaintiff class would have no claim (para 59). But as the dissent points out, it is open to the California courts to apply the statute under its choice of law analysis (paras 165-66). No evidence was adduced to the contrary. Section 4, properly interpreted, does not prevent that. Even more worrying is the analysis of Justice Abella in her solo concurring decision. She concludes that section 4 deals with territorial jurisdiction and so overrides any jurisdiction clause to the contrary (paras 107-08). This is a remarkable interpretation of section 4, one which would see many other provisions about subject matter jurisdiction instead read as though they addressed territorial jurisdiction (which she does in footnote 1 in para 109).

Conclusion

The split between the judges as to what amounts to strong cause sufficient to set aside an exclusive jurisdiction clause is the most dramatic aspect of the decision. They see what is at stake very differently. On one view, this is a case in which consumers should not be deprived of important statutory rights by a clause to which they did not truly agree. On another view, this is a case in which contracting parties should be held to their agreement as to the forum in which any disputes which arise should be resolved because, even though the contract involves consumers, the agreement is not unfair and has not been shown to deprive them of any substantive rights. This debate will now play out across a wide range of consumer contracts.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2017: Abstracts

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

C. Kohler: **Limits of mutual trust in the European judicial area: the judgment of the ECtHR in Avotin?š v. Latvia**

In Avoti?š v. Latvia the European Court of Human Rights opposes the consequences of the principle of mutual trust between EU Member States which the Court of Justice of the European Union highlighted in Opinion 2/13. The ECtHR sees the risk that the principle of mutual trust in EU law may run counter to the obligations of the Member States flowing from the ECHR. In the context of judgment recognition the State addressed must be empowered to review any serious allegation of a violation of Convention rights in the State of origin in order to assess whether the protection of such rights has been manifestly deficient. Such a review must be conducted even if opposed by EU law. The author evaluates the Avoti?š judgment in the light of the recent case-law of the CJEU which gives increased importance to the effective protection of fundamental rights. In view of that case-law the opposition between the two European courts seems less dramatic as their competing approach towards the protection of fundamental rights shows new elements of convergence.

S. L. Gössl: **The Proposed Article 10a EGBGB: A Conflict of Laws Rule Supplementing the Proposed Gender Diversity Act (Geschlechtervielfaltsgesetz)**

In 2017 the German Institute for Human Rights published an expertise for the Federal Ministry of Family Affairs, Senior Citizens, Women and Youth on the topic of “Gender Diversity in Law”. The expertise proposed several legal changes and amendments, including a conflict of laws rule regarding the determination of the legal sex of a person (art. 10a EGBGB). The proposal follows the current practise to use the citizenship of the person in question as the central connecting factor. In case of a foreigner having the habitual residence in Germany, or a minor

having a parent with a habitual residence in Germany, a choice of German law is possible, instead. The rule reflects the change of substantive law regarding the legal sex determination from a binary biological-medical to a more open autonomy-based approach.

R. Geimer: **Vertragsbruch durch Hoheitsakt: „Once a trader, not always a trader?" – Immunitätsrechtlicher Manövrierspielraum für Schuldnerstaaten?**

A debtor state's inability to invoke state immunity: The issuance of bonds constitutes an actus gestionis, which cannot be altered to an actus imperii by legislative changes that unilaterally amend the terms of the bonds.

P. Mankowski: **Occupied and annected territories in private international law**

Private international law and international law are two different cups of tea. Private international law is not bound in the strict sense by the revelations of international law. An important point of divergence is as to whether occupied territories should be regarded as territories reigned by the occupying State or not. Private international law answers this in the affirmative if that State exerts effective power in the said territory. Private parties simply have to obey its rules and must adapt to them, with emigration being the only feasible exit. The State to whom the territory belonged before the occupation has lost its sway. This applies regardless whether UNO or EU have for whichever reasons uttered a different point of view. For instance, East Jerusalem should be regarded as part of Israel for the purposes of private international law, contrary to a recent decision of the Oberlandesgericht München.

F. Eichel: **Cross-border service of claim forms and priority of proceedings in case of missing or poor translations**

In recent times, there has been a growing number of inner-European multifora disputes where the claimant first lodged the claim with the court, but has lost his priority over the opponent's claim because of trouble with the service of the claim forms. Although Art. 32 (1) (a) Brussels Ibis Regulation states that the time when the document is lodged with the courts is decisive on which court is "the court first seised" in terms of Art. 29 Brussels Ibis Regulation, there has been dissent among German Courts whether the same is true when the service has failed due

to a missing or poor translation under the EU Service Regulation (Regulation EC No 1393/2007; cf. also the French Cour de Cassation, 28.10.2008, 98 Rev. Crit. DIP, 93 [2009]). Although the claimant is responsible for deciding whether the claim forms have to be translated, the author argues that Art. 32 (1) (a) Brussels Ibis Regulation is applicable so that the claimant can initiate a second service of the document after the addressee has refused to accept the documents pursuant to Art. 8 para. 1 EU Service Regulation. The claimant does not loose priority as long as he applies for a second service accompanied by a due translation as soon as possible after the refusal. In this regard, following the Leffler decision of the ECJ (ECLI:EU:C:2005:665), a period of one month from receipt by the transmitting agency of the information relating to the refusal may be regarded as appropriate unless special circumstances indicate otherwise.

P. Huber: **A new judgment on a well-known issue: contract and tort in European Private International Law**

The article discusses the judgment of the ECJ in the Granarolo case. The core issue of the judgment is whether an action for damages founded on an abrupt termination of a long-standing business relationship qualifies as contractual or as a matter of tort for the purposes of the Brussels I Regulation. The court held that a contract need not be in writing and that it can also be concluded tacitly. It stated further that if on that basis a contract was concluded, the contractual head of jurisdiction in Art. 5 Nr. 1 Brussels I Regulation will apply, even if the respective provision is classified as a matter of tort in the relevant national law. The author supports this finding and suggests that it should also be applied to the distinction between the Rome I Regulation and the Rome II Regulation.

D. Martiny: **Compensation claims by motor vehicle liability insurers in tractor-trailer accidents having German and Lithuanian connections**

The judgment of the ECJ of 21/1/2016 deals with multiple accidents in Germany caused by a tractor unit coupled with a trailer, each of the damage-causing vehicles being insured by different Lithuanian insurers. Since in contrast to Lithuanian law under German law also the insurer of the trailer is liable, after having paid full compensation the Lithuanian insurer of the tractor unit brought an indemnity action against the Lithuanian insurer of the trailer. On requests for a preliminary ruling from Lithuanian courts, the ECJ held that Art. 14 of the Directive 2009/103/EC of 16/9/2009 relating to insurance against civil liability in

respect of the use of motor vehicles deals only with the principle of a "single premium" and does not contain a conflict rule. According to the ECJ there was no contractual undertaking between the two insurers. Therefore, there exists a "non-contractual obligation" in the sense of the Rome II Regulation. Pursuant to Art. 19 Rome II, the issue of any subrogation of the victim's rights is governed by the law applicable to the obligation of the third party – namely the civil liability insurer – to compensate that victim. That is the law applicable to the insurance contract (Art. 7 Rome I). However, the law applicable to the non-contractual obligation of the tortfeasor also governs the basis, the extent of liability and any division of his liability (Art. 15 [a] [b] Rome II). Without mentioning Art. 20 Rome II, the ECJ ruled that this division of liability was also decisive for the compensation claim of the insurer of the tractor unit. A judgment of the Supreme Court of Lithuania of 6/5/2016 has complied with the ruling of the ECJ. It grants compensation and applies also the rule of German law on the common liability of the insurers of the tractor unit and trailer.

P.-A. Brand: **Jurisdiction and Applicable Law in Cartel Damages Claims**

It can be expected that the number of cartel damages suits in the courts of the EU member states will substantially increase in the light of the EU Cartel Damages Directive and its incorporation in the national laws of the EU member states. Quite often the issues of jurisdiction and the applicable law play a major role in those cases, obviously in addition to the issues of competition law. The District Court Düsseldorf in its judgement on the so-called "Autoglas-cartel" has made significant remarks in particular with regard to international jurisdiction for claims against jointly and severally liable cartelists and on the issue of the applicable law before and after the 7th amendment of the German Act against Restraints of Competition (GWB) on 1 July 2005. The judgement contributes substantially to the clarification of some highly disputed issues of the law of International Civil Procedure and the Conflict of Law Rules. This applies in particular to the definition of the term "Closely Connected" according to article 6 para 1 of the Brussels I Regulation (now article 8 para 1 Brussels I recast) in the context of international jurisdiction for law suits against a number of defendants from different member states and the law applicable to cartel damages claims in cross-border cartels and the rebuttal of the so-called "mosaic-principle".

A. Schreiber: **Granting of reciprocity within the German-Russian recognition practice**

Germany and the Russian Federation have not concluded an international treaty which would regulate the mutual recognition of court decisions. The recognition according to the German autonomous right requires the granting of reciprocity pursuant to Sec. 328 para. 1 No. 1 of the German Code of Civil Procedure. The Higher Regional Court of Hamburg has denied the fulfilment of this requirement by (not final) judgement of 13 July 2016 in case 6 U 152/11. The comment on this decision shows that the estimation of the court is questionable considering the – for the relevant examination – only decisive Russian recognition practice.

K. Siehr: **Marry in haste, repent at leisure. International Jurisdiction and Choice of the Applicable Law for Divorce of a Mixed Italian-American Marriage**

An Italian wife and an American husband married in Philadelphia/Pennsylvania in November 2010. After two months of matrimonial community the spouses separated and moved to Italy (the wife) and to Texas (the husband). The wife asked for divorce in Italy and presented a document in which the spouses agreed to have the divorce law of Pennsylvania to be applied. The Tribunale di Pordenone accepted jurisdiction under Art. 3 (1) (a) last indent Brussels II-Regulation and determined the applicable law according to Rome III-Regulation which is applicable in Italy since 21 June 2012. The choice of the applicable law as valid under Art. 5 (1) (d) Rome III-Regulation in combination with Art. 14 lit. c Rome III-Regulation concerning states with more than one territory with different legal systems. The law of Pennsylvania was correctly applied and a violation of the Italian ordre public was denied because Italy applies foreign law even if foreign law does not require a legal separation by court decree. There were no effects of divorce which raised any problem.

M. Wietzorek: **Concerning the Recognition and Enforcement of German Decisions in the Republic of Zimbabwe**

The present contribution is dedicated to the question of whether decisions of German courts – in particular, decisions ordering the payment of money – may be recognized and declared enforceable in the Republic of Zimbabwe. An overview of the rules under Zimbabwean statutory law and common law (including a report on the interpretation of the applicable conditions, respectively grounds for refusal, in Zimbabwean case law) is followed by an assessment of whether reciprocity, as required by section 328 subsection 1 number 5 of the German Civil

Procedure Code, may be considered as established with respect to Zimbabwe.

A. Anthimos: **Winds of change in the recognition of foreign adult adoption decrees in Greece**

On September 22, 2016, the Plenum of the Greek Supreme Court published a groundbreaking ruling on the issue of the recognition of foreign adult adoption decrees. The decision demonstrates the respect shown to the judgments of the European Court of Human Rights, especially in the aftermath of the notorious Negrepontis case, and symbolizes the Supreme Court's shift from previous rulings.

Operating Law in a Global Context – Comparing, Combining and Prioritising

A book by Jean- Sylvestre Bergé and Geneviève Helleringer, Elgar Publishing 2017, just published.

Lawyers have to adapt their reasoning to the increasingly global nature of the situations with which they deal. Often, rules formulated in a national, international or European environment have all to be jointly applied to a given case. In a single situation, several laws must be mobilised, alternatively, cumulatively, at the same time or at different moments, in or on one or several spaces or levels, by one or by multiple actors. The book seeks to make explicit the analysis the lawyer engages in every time he is confronted by the operation of several laws in different contexts.

The subject matter of the book is not the definition or description of a so-called 'global law'. The book focuses on the needs of a global lawyer who is required to reach conclusions in a pluralistic context. It makes explicit the required global reasoning. Readers are presented with concrete cases involving more than one legal rule and different levels as well as a *modus operandi* that the authors found to be invariant in global contexts. Legal reasoning in a global context has to be organised according to a basic three-step approach, consisting of the comparison (Part I), then the combination (Part II) and, finally, the ordering or 'prioritisation' (Part III) of the methods and solutions of national, international and European law to be used to solve the case. The book

conveys in detail how the law is operated through a wide range of situations and concrete examples cutting across domains, including criminal law, contract law, fundamental rights, internal market, international trade, procedure.

The book is aimed at an international audience. Illustrations of how lawyers have to combine different contexts are taken in various domestic case law including the UK, Germany, Belgium, Italy, Spain, the US, as well as France. The book is adapted from an analytical framework that was developed in a book written in French by Jean-Sylvestre Bergé, *L'application du droit national, international et européen*, Paris: Dalloz, Méthodes du droit, 2013.

Academic lawyers as well as practitioners often realise that some cases trigger uncertainty as to the applicable legal reasoning. For example, in cases presented before an international court, lawyers may wonder whether the effects produced by a law applied at a national or European level may be considered. In a European context, lawyers need to be able to determine precisely whether the methods and solutions that have been developed over the last 60 years substitute or add to the legal constructions defined at other levels which came before: national or international.

The difficulty facing lawyers increases even more when a case might fall to be decided under a series of different legal environments. Thus, a case presented before a national judge can sometimes give rise to proceedings before a European court, for example, a preliminary ruling on the interpretation or validity of EU law brought before the Court of Justice of the European Union or an application made to the European Court of Human Rights after the exhaustion of all national remedies. More rarely, a national conflict may become an interstate conflict brought before the International Court of Justice. In the same way, a situation addressed by a public or private international court may have consequences for European and/or national courts (for example, a sanction announced by the United Nations and executed at a European and national level or an international arbitral award presented to a national judge who decides to apply European Union law and to consult, in that capacity, the Court of Justice of the European Union).

Lawyers may therefore be worried that in spite of all their efforts to put into operation the legal methods and solutions applied in a given context, their analysis could be challenged on the occasion of the re-examination of the case in another national, international or European context. To prevent a new examination from entirely escaping, or weakening, their expertise, what can lawyers (including students training to practice in a global environment) do? Should they open themselves up to other legal environments beyond the one in which they are used to? Or should they revert to the one context that they know best and will therefore provide for a solution with a maximum degree of foreseeability? The book provides a method for tackling these questions.

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