Out now: Issue 3 of RabelsZ 81 (2017)

The new issue of "Rabels Zeitschrift für ausländisches und internationales Privatrecht – The Rabel Journal of Comparative and International Private Law" (RabelsZ) has just been released. It contains the following articles:

Holger Fleischer, *Spezialisierte Gerichte: Eine Einführung* (Specialized Courts: An Introduction)

> *Specialized courts are on the rise. This introduction takes a look at different patterns and types of judical specialization both nationally and internationally. It also addresses potential advantages and disadvantages of a specialized judiciary.*

Anatol Dutta, *Gerichtliche Spezialisierung für Familiensachen* (Specialized Courts for Family Matters)

> *In many jurisdictions, matters of family law are dealt with by specialized family courts. After outlining the different approaches from a comparative perspective (section I.), the article argues that a specialization in the area of family law is desirable. Family matters are not only self-contained from a substantive as well as procedural law perspective and clearly distinguishable from civil and commercial matters, but they are also characterised by a considerable degree of complexity which justifies judicial specialization (section II.). Furthermore, the dangers connected with specialized courts do not materialise in this area of law (section III.). However, a sensible specialization in family matters requires certain conditions as to the organisational structure and staffing of the competent courts (sections IV.1. and IV.3.). These conditions depend upon the role substantive family law assigns to courts. The paper argues that modern family law has abandoned its therapeutic attitude – family law matters are no longer regarded as a potential indication of pathologic families – therefore necessitating a legally oriented and conflict-solving judge rather than a court with a "therapeutic atmosphere". Moreover, the jurisdiction of family courts has to be defined carefully – for example, regarding the question of whether matters of juvenile delinquency and succession matters are to be handled by*

family courts (section IV.2.). Finally, the paper alludes to a tendency to remove family matters from courts by shifting them to extra-judicial institutions or even to the parties and their party autonomy (section V.).

Matteo Fornaser, *Streitbeilegung im Arbeitsrecht: Eine rechtsvergleichende Skizze* (Dispute Settlement in Employment Matters: A Comparative Overview)

Labour disputes are resolved through a broad array of resolution mechanisms. Interests disputes which arise when collective bargaining fails to reach an agreement on the terms of employment are generally settled through extra-judicial conciliation and arbitration procedures. State courts have no role to play in this context since interests disputes are not adjudicated on the basis of legal norms. Rather, such disputes are settled by reaching a compromise which strikes a fair balance between the competing interests of the parties involved. Rights disputes, on the other hand, are generally resolved through specialized state courts and, though more rarely, private arbitration (e.g. in the U.S.). The emergence of these mechanisms has resulted from a general dissatisfaction with the performance of ordinary state courts in resolving labour disputes: employers have taken the view that ordinary state courts are not sufficiently acquainted with the customs and usages of employment, while employees have feared that the courts are biased in favour of employers. The creation of special courts, including lay judges appointed by employers and employees, has sought to tackle these problems and to meet the needs of labour and management. One important aim of labour courts is to facilitate access to justice for employees with a view to ensuring that litigants are on an equal footing. Thus, in most jurisdictions the labour court procedure is designed to reduce litigation costs, e.g. by expediting proceedings and by limiting the right of an employer to recover attorney's fees from the employee-plaintiff in the event the claim is dismissed. Another way to ensure that proceedings before labour courts are speedy and inexpensive is to provide assistance to the parties so as to facilitate their reaching an amicable settlement. With regard to substantive law, labour courts play a dual role. First, they facilitate the enforcement of employee rights and, thus, complement substantive employee protection rules. Second, the emergence of specialized courts for the settlement of employment matters has had a deep impact on the development of labour law as a distinct field of law both in scholarship and practice.

Wolfgang Hau, *Zivilprozesse mit geringem Streitwert: small claims courts, small claims tracks, small claims procedures* (Small Claims: Courts, Tracks, Procedures)

> *In principle, constitutional standards require courts to deal with actions irrespective of the amount in controversy. But this does not necessarily mean that it is appropriate to let ordinary courts apply the standard rules of civil procedure in small claims cases. Rather, it is commonly understood that petty litigation raises particular problems and deserves special solutions. The question of how to design such organizational and/or procedural rules seems to gain momentum perpetually and across all jurisdictions. A comparative and historical analysis reveals an amazing variety of approaches and solutions, i.e. small claims courts, small claims tracks and small claims procedures. When providing special rules for small claims disputes, law-makers normally purport to facilitate access to justice, but more often than not try to cut costs. The latter aim, however, is not to be disregarded since affordability of justice is of utmost importance; moreover, there are numerous examples illustrating that procedural rules which emerged by necessity rather than by design may stand the test of time. Yet one should accept that both goals – removing barriers to justice and relieving the burden on the justice system ? are unlikely to be simultaneously achieved: you cannot have your cake and eat it. Both aims can be reached only if one is willing to cut down on the quality in the administration of justice (in particular as regards factfinding, the legal assessment of the case and the respondent's rights to defend). But in a system governed by the rule of law, this is no less acceptable than the converse, i.e. restricting access to justice as a means of cost-efficiently providing a high-quality system to a reduced number of lawsuits. High standards of accessible justice come at a price: a reasonably funded and elaborated judicial infrastructure available even for small claims.*

Holger Fleischer, **Sebastian Bong** and **Sofie Cools**, *Spezialisierte Spruchkörper im Gesellschaftsrecht* (Specialized Courts in Company Law)

> *Specialized courts are on the advance in many locations. This development is on display also in commercial law and company law. The present article cannot address the topic in its entirety and focuses instead on those judicial bodies that adjudicate internal corporate disputes. Three historic and comparative examples illustrate the particular types of institutions that have been formed.*

At the outset, the venerable German Divisions for Commercial Matters (Kammern für Handelssachen) are analysed, followed by likely the two best-known special courts for company law matters: the Delaware Court of Chancery and the Companies and Business Court (Ondernemingskamer) of the Amsterdam Court of Appeals. These three case studies are followed by a number of comparative observations on specialized judicial bodies in company law.

Stefan Reuter, *Das Rechtsverhältnis im Internationalen Privatrecht bei Savigny* (Savigny and Legal Relationships in Private International Law)

In the legal system conceptualised by Savigny, legal relationships serve as the starting point. Savigny defines a legal relationship as a relation between two people or between one person and an object as determined by legal rules. Accordingly, a legal relationship always has two elements: a material element (the specific facts in question) and a formal element (the legal rules). For example, where the facts of a concrete case involving two people match the conditions of the contract law rules, a legal relation exists between these two people. As compared to a legal relationship, a legal institution consists only of formal elements, namely legal rules, having the same subject matter. For example, all legal provisions regarding marriage form the legal institution of marriage. Although Savigny uses legal relationships as the starting point in both substantive law as well as in private international law, he creates different categories of legal relationships for each of them. Whereas in substantive law Savigny distinguishes between four categories (law of property, law of obligations, family law and law of succession) he adds a fifth category for the sake of private international law: legal capacity. In substantive law, Savigny defines legal capacity not as a legal relationship but only as a pre-condition of a legal relationship. This seems logical given that legal capacity cannot be described as a relation either between two people or between one person and an object, with such a relation being an essential condition according to Savigny's definition of a legal relationship. Nevertheless, in private international law it is generally accepted that legal capacity needs its own, separate conflict rule. Legal capacity was therefore one of the subjects of private international law, and for this reason Savigny re-categorised it as a legal relationship for the purpose of conflict of laws. Ultimately, no advantages follow from having legal relationships serve as the starting point in private

international law – as opposed to legal institutions or legal rules. Legal relationships do not result in a greater number of connections nor in a de-politicization of private international law. Rather, difficulties result when attempting to classify legal relations unknown to the lex fori.

Legal Implications of Brexit: an International Conference at the University of Hagen (Germany), 8-9 November 2017

The FernUniversität Hagen, Germany's leading state-maintained institution in the field of distance learning, will host an international conference dealing with the legal implications of Brexit on 8-9 November 2017. The description of the event provided by the organizers reads as follows:

„Modelled on the philosophy of Ordo-Liberalism, an offshoot of classical liberalism, the European Union strongly relies on the existence and stable operation of a legal system that can regulate free market and help achieve the expected economic, social and political outcomes. After many decades of tight economic, social and political relations regulated by a common legal system under the umbrella of the EU, the British withdrawal from the Union could represent a serious blow for the aspirations of stability in the Continent, especially against the backdrop of the current European crisis. Many fear this event could open up a

Pandora's Box of severe problems in the EU. What impact will Brexit have on the rights of EU and UK citizens? How is it going to affect the legal regulation of present and future economic relations between the EU and the UK and how will this affect such relations in turn? These and similar questions will be addressed in this conference by four panels of international legal experts and researchers from five universities from Europe, UK and USA."

For further information and registration, please click here.

And, while we're at it, *Michael White* has published a highly interesting article on „How progress in UK/EU talks has hit an impasse over the ECJ" in the „New European". The author in particular reports on a conference that took place on 24 July 2017 at the Institute for Government (IfG) in London and which involved Michael-James Clifton, chief of staff to the President of the Court of Justice to the European Free Trade Area – the EFTA Court – Dr. Holger Hestermeyer, a German international disputes specialist at King's College, London, Catherine Barnard, professor of EU law at Cambridge and the IfG's own Raphael Hogarth.
You may read the article here.

Out Now: Fainess – Justice – Equity – Festschrift für Reinhold Geimer zum 80. Geburtstag

On the occasion of his eightieth birthday on 30 July 2017, colleagues and friends have dedicated a *liber amicorum* to Professor Dr. Reinhold Geimer (University of Munich), who, as a Bavarian notary, is not only a highly respected legal practitioner, but also one of Germany's most prolific and influential academic writers on international civil procedure. The *Festschrift* is edited by Reinhold Geimer's good friend, co-editor and colleague Professor Dr. Rolf A Schütze (Tübingen/Stuttgart) and published by C.H. Beck (Munich; ISBN: 9783406710384). It contains more than 60 contributions (in German language),

mostly on European and international civil procedural law, and totals 837 pages. A must-read for anyone interested in the subject! Further details will be available soon on the publisher's website here.

Save the date: unalex-Conference at the University of Innsbruck on 24 November 2017

On 24 November 2017 Prof. Dr. Andreas Schwartze from the University of Innsbruck will host the final conference of the EU-project "unalex – multilingual information for the uniform interpretation of the instruments of judicial cooperation in civil matters".

The conference will discuss best practices of Member State courts, who base their case law on the consideration of judgments given by courts of other Member States, but also "undiscovered disputes" between courts of Member States, where relevant case law from other Member States was ignored.

The conference will provide the occasion for the first meeting of the European Legal Authors Network. The Network has started to form during the unalex project with the objective of developing systematic overviews on the application of the instruments of European private international law, where the case law of the courts of the Member States is comprehensively analysed and conflicting opinions discovered.

Further information will follow within the next weeks. We'll keep you posted!

Global Forum on Private International Law, Wuhan (China), 22 to 23 September 2017

The year 2017 marks the 30th anniversary of China's joining of the Hague Conference on Private International Law (HCCH). During these 30 years, huge progress has been made in the area of private international law both in China and around the world, and it has greatly facilitated cross-border movement of goods and capital, as well as interactions among peoples of different nations. At the same time, there are a number of challenges emerging. Different nations should work together, jointly meet those challenges and chart the right course for solutions.

With this in mind, the Ministry of Foreign Affairs of the People's Republic of China and China Society of Private International Law (CSPIL), with the support of the HCCH, intend to jointly host the **Global Forum on Private International Law** at Wuhan University in Wuhan, China from **22 to 23 September 2017**. The Forum will be organized by the Institute of International Law of the University, with the working language of English.

The theme of the Forum will be: **Cooperation for Common Progress- the Evolving Role of Private International Law**. The Forum will focus on the following topics:

(1) Common progress through private international law over 30 years: China, HCCH and the world;

(2) The Belt and Road Initiative and international legal cooperation;

(3) A global look at recent developments of private international law;

(4) The Hague Judgments Project.

Registration is open until 5 August, 2017. Further details may be found on the website of CSPIL here.

The text of the announcement above is largely drawn from the website of CSPIL.

10/11 November 2017: Investment Protection, Arbitration and the Rule of Law in the EU

Investment arbitration forms a part of the international litigation arena. And it is a subject which is legally demanding and politically explosive. The 23rd Würzburg Days of European Law ("23. Würzburger Europarechtstage") at the Julius-Maximilians-Universität Würzburg in Germany aim at an academically sound, open and maybe controversial debate of this topical issue. They will take place on **10 and 11 November 2017** and are organized by Prof. Dr. Markus Ludwigs and Prof. Dr. Oliver Remien, both from the University of Würzburg. The organizers are delighted to have found distinguished speakers and chairs initiating the discussions.

The conference language will be German, but here is an English translation of the program. The conference flyer with the program in German is available here.

Friday November 10th, 2017

13.00 Welcome Addresses

- *Prof. Dr. Dr. h.c. Alfred Forchel*, President of the University of Würzburg
- *Prof. Dr. Eckhard Pache*, Dean of the Faculty of Law

13.15 Welcome and Introduction into the Subjects

- *Prof. Dr. Markus Ludwigs*, University of Würzburg
- *Prof. Dr. Oliver Remien*, University of Würzburg

13.30 Sovereignty and Investment Arbitration *Prof. Dr. Axel Flessner*, Humboldt University Berlin

TTIP, CETA & Co. – The Future of Free Trade Agreements in a Changed Political Environment, *MdB Prof. Dr. Heribert Hirte, LL.M.*, Member of the Bundestag, University of Hamburg

14.30 Statement and Discussion of the Papers, *Prof. Dr. Dr. Rainer Hofmann*,

University of Frankfurt/Main

15.15 Coffee Break

15.45 A Multilateral Investment Court as a Progress for the Rule of Law?, *Prof. Dr. Isabel Feichtner, LL.M.*, University of Würzburg

16.15 Statement and Discussion of the Paper, *Prof. Dr. Markus Krajewski*, University of Erlangen-Nürnberg

16.45 Coffee Break

17.15 Compensation for Infringements and Takings of Property after the Judgment of the Bundesverfassungsgericht (German Federal Constitutional Court) concerning the Stop to Nuclear Power, Justice Fed. Const. Ct. *Prof. Dr. Andreas L. Paulus*, University of Göttingen

17.45 Investment Protection Arbitration and EU State Aid Law, *Prof. Dr. Marc Bungenberg, LL.M.*, Saarland University

18.15 Statement and Discussion of the Papers, *Prof. Dr. Christian Tietje, LL.M.*, University of Halle-Wittenberg

19.00 Reception in the Entrance Hall in front of the Neubaukirche

Saturday November 11th, 2017

9.00 "EU-only"? – The Division of Competences between the EU and the Member States for the Conclusion of Free Trade Agreements, *Prof. Dr. Michael J. Hahn, LL.M.,* University of Bern

Are Investment Protection Agreements between EU-Member States a Relict Contrary to EU-Law?, *Dr. Thomas Wiedmann,* European Commission, Brussels

10.00 Statement and Discussion of the Papers, *Prof. Dr. Armin Hatje*, University of Hamburg

10.45 Coffee Break

11.15 Enforcement According to ICSID Convention and Setting Aside, Recognition and Enforcement According to the New York Convention, *Prof. Dr.*

Christian Wolf, University of Hannover

Transparency and Third Person Involvement by Way of an Amicus Curiae According to UNCITRAL and ICSID Rules and Arbitration Practice, *Dr. Sören Segger*, University of Würzburg

12.15 Statement and Discussion of the Papers, *Dr. Stephan Wilske, LL.M.*, GleissLutz Law Firm

13.00 Concluding Remarks by the Organizers

Everybody is cordially invited to participate. Participation is free of charge. Please register under http://www.europarechtstage.de.

Conflict of Laws in International Commercial Arbitration – Call for Papers

In 2010, Professors Franco Ferrari and Stefan Kroell organized a seminar on "conflict of laws in international commercial arbitration", conscious of the fact that every arbitration raises a number of 'conflict of laws' problems both at the pre-award and post-award stage. Unlike state court judges, arbitrators have no *lex fori* in the proper sense, providing the relevant conflict rules to determine the applicable law. This raises the question of which conflict of laws rules apply and, consequently, the extent of the freedom arbitrators enjoy in dealing with this and related issues. The papers presented at that conference were later published in a book co-edited by the two organizers of said conference. Professors Ferrari and Kroell are now preparing a new edition of the book, which has attracted a lot of attention over the years. Apart from updated versions of the papers published in the first edition (with the following titles: "Conflicts of law in international

arbitration: an overview" by Filip De Ly, "The law applicable to the validity of the arbitration agreement: a practioner's view" by Leonardo Graffi, "Applicable laws under the New York Convention" by Domenico Di Pietro, "Jurisdiction and applicable law in the case of so-called pathological arbitration clauses in view of the proposed reform of the Brussels I-Regulation" by Ruggiero Cafari Panico, "Arbitrability and conflict of jurisdictions: the (diminishing) relevance of lex fori and lex loci arbitri" by Stavros Brekoulakis, "Extension of arbitration agreements to third parties: a never ending legal quest through the spatial-temporal continuum" by Mohamed S. Abdel Wahab, "The effect of overriding manadatory rules on the arbitration agreement" by Karsten Thorn and Walter Grenz, "Arbitration and insolvency: selected conflict of laws problems" by Stefan Kröll, "Getting to the law applicable to the merits in international arbitration and the consequences of getting it wrong" by Franco Ferrari and Linda Silberman, "Manadatory rules of law in international arbitration" by George A. Bermann, "Conflict of overriding mandatory rules in arbitration" by Anne-Sophie Papeil, "The law applicable to the assignment of claims subject to an arbitration agreement" by Daniel Girsberger, "The laws governing interim measures in international arbitration" by Christopher Boog), the new edition seeks to include papers on new topics, such as the law governing arbitrators' liability, the law governing issues of characterization in commercial and investment arbitration, the law governing limitation periods (including their characterization as procedural or substantive), the law governing the taking of evidence (including the characterization of evidence as procedural or substantive, its admissibility and weight), the law governing damages (including whether different laws govern *heads* of damages and *quantification*), the law governing issues fees and costs, the law governing res iudicata, the law governing privilege, the law governing ethical obligations (both of arbitrators and counsel), the role of the Hague Principles on Choice of Law in international arbitration).

The editors welcome the submission of papers on any of the aforementioned topics as well as other topics related to the relationship between conflict of laws and international commercial arbitration. If interested, please submit an abstract (2000 words) and a basic bibliography to Professors Ferrari (franco.ferrari@nyu.edu) and Kroell (stefan.kroell@law-school.de) for acceptance by 1 October 2017. If accepted, the paper will need to be submitted (in blue book format) by 1 February 2018.

Out now: Yuko Nishitani (ed.), Treatment of Foreign Law – Dynamics towards Convergence? (2017)

The book *Treatment of Foreign Law – Dynamics towards Convergence?* (Springer, 2017), edited by Professor Yuko Nishitani, has just been published.
It includes one general report and 30 national reports on the treatment of foreign law in diverse jurisdictions. Additionally, the book includes a report by the Hague Conference on Private International Law on the state and progress of its envisaged project on the treatment of foreign law. The general report and most of the individual reports were prepared for the 2014 Conference of the International Academy of Comparative Law held in Vienna.

The abstract reads as follows:

> *This work presents a thorough investigation of existing rules and features of the treatment of foreign law in various jurisdictions. Private international law (conflict of laws) and civil procedure rules concerning the application and ascertainment of foreign law differ significantly from jurisdiction to jurisdiction. Combining general and individual national reports, this volume demonstrates when and how foreign law is applied, ascertained, interpreted and reviewed by appeal courts. Traditionally, conflicts lawyers have been faced with two contrasting approaches. Civil law jurisdictions characterize foreign law as "law" and provide for the ex officio application and ascertainment of foreign law by judges. Common law jurisdictions consider foreign law as "fact" and require that parties plead and prove foreign law. A closer look at various reports, however, reveals more differentiated features with their own nuances among civil law jurisdictions, and the difference of the treatment of foreign law from other facts in common law jurisdictions. This challenges the appropriacy of the conventional "law-fact" dichotomy. This book further examines the need for*

facilitating access to foreign law. After carefully analyzing the benefits and drawbacks of existing instruments, this book explores alternative methods for enhancing access to foreign law and considers practical ways of obtaining information on foreign law. It remains to be seen whether and the extent to which legal systems around the world will integrate and converge in their treatment of foreign law.

Highly recommendable!

Further information, including a table of contents, is available here.

The Revised European Small Claims Procedure Has Entered into Force

The revised European Small Claims Procedure entered into force on July 14 (see Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure). According to the Commission's Fact Sheet, *Small Claims Procedure becomes even simpler, faster and more user friendly.* Which means:

1. The European Small Claims Procedure is more widely available. The threshold rises to €5 000 from €2 000.

2. Citizens can use online procedures to avoid unnecessary travelling to courts The new rules enhance the use of technology and will limit unnecessary travelling. In practice this means:

- kicking-off the procedure online;
- using video-conferencing for communication;

- limiting physical presence only to the cases when the court cannot make a decision based on written documents;
- accepting documents sent by email by the court.

3. Cutting court fees: Fees can be very high in small claims cases and sometimes higher than the value of the claim. With the new rules, the court fees have to be proportionate to the value of the claim.

Third Country Law in the CJEU's Data Protection Judgments

This post by Prof. Christopher Kuner was published last week at the European Law Blog. *I thought it worth reproducing it here, the same week of the hearing of case C-498/16 (Schrems again, but this time from a different perspective: private, and within the framework of Regulation Brussels I).*

Introduction

Much discussion of foreign law in the work of the Court of Justice of the European Union (CJEU) has focused on how it deals with the rules, principles, and traditions of the EU member states. However, in its data protection judgments a different type of situation involving foreign law is increasingly arising, namely cases where the Court needs to evaluate the law of *third countries* in order to answer questions of EU law.

This is illustrated by its judgment in *Schrems* (Case C-362/14; previously discussed on this blog, as well as here), and by *Opinion 1/15* (also discussed on this blog, part I and part II), a case currently before the CJEU in which the judgment is scheduled to be issued on 26 July. While these two cases deal with data protection law, the questions they raise are also relevant for other areas of

EU law where issues of third country law may arise. The way the Court deals with third country law in the context of its data protection judgments illustrates how interpretation of EU law sometimes involves the evaluation of foreign legal systems, despite the Court's reluctance to admit this.

The *Schrems* judgment

The *Schrems* case involved the validity of the EU-US Safe Harbour arrangement, a self-regulatory mechanism that US-based companies could join to protect personal data transferred from the EU to the US. Article 25(1) of the EU Data Protection Directive 95/46/EC allows transfers of personal data from the EU to third countries only when they provide an 'adequate level of data protection' as determined by a formal decision of the European Commission. On 26 July 2000 the Commission issued such a decision finding that the Safe Harbour provided adequate protection.

The plaintiff Schrems brought suit in Ireland based on the data transfer practices of Facebook, which was a Safe Harbour member. Schrems claimed that the Safe Harbour did not in fact provide adequate protection, and that the Irish Data Protection Commissioner (DPC) should reach this conclusion notwithstanding the Commission adequacy decision.

On 18 June 2014 the Irish High Court referred two questions to the CJEU dealing with the issue of whether the DPC could examine the validity of the Safe Harbour. In its judgment of 6 October 2015, the CJEU invalidated the Commission's decision and held that providing an adequate level of data protection under EU law requires that third country law and standards must be 'essentially equivalent' to those under EU data protection law (para. 73). A more detailed, general analysis of *Schrems* can be found in my article in the current issue of the *German Law Journal*.

Third country law under *Schrems* and *Opinion 1/15*

As far as third country law is concerned, the *Schrems* judgment requires an individual to be allowed to bring a claim to a data protection authority (DPA) that a Commission adequacy decision is invalid, after which he or she must be able to contest in national court the DPA's rejection of such a claim, and the national court must make a preliminary reference to the CJEU if it finds the claim to be well-founded (para. 64). Thus, the Court practically invites individuals to bring

claims to DPAs regarding the adequacy of protection in third countries, and requires national courts to refer them to the CJEU for a preliminary ruling.

Under the judgment, the standard for determining the validity of a Commission decision is whether third country law is 'essentially equivalent' to EU law, which by definition must involve an examination of the third country law with which EU law is compared.

The Court has stated that it does not pass judgment on the law of third countries. In the interview he gave to the *Wall Street Journal* in which he discussed the *Schrems* judgment, CJEU President Lenaerts said that 'We are not judging the U.S. system here, we are judging the requirements of EU law in terms of the conditions to transfer data to third countries, whatever they be'. Advocate General Mengozzi also reiterated this point in para. 163 of his Opinion in *Opinion 1/15*.

However, it is surely disingenuous to claim that the *Schrems* case did not involve evaluation of US legal standards. First of all, the need to review third country law is logically inherent in the evaluation of a Commission decision finding that such law provides protection essentially equivalent to that under EU law. Secondly, the CJEU in *Schrems* did indeed consider US law and intelligence gathering practices and their effect on fundamental rights under EU law, as can be seen, for example, in its mention of studies by the Commission finding that US authorities were able to access data in ways that did not meet EU legal standards, in particular the requirements of purpose limitation, necessity, and proportionality (para. 90). Indeed, whether US law adequately protects against mass surveillance by the intelligence agencies was a major issue in the case, as the oral hearing before the Court indicates.

Opinions of Advocates General in data protection cases also illustrate that the CJEU sometimes examines third country law when answering questions of EU law. For example, the opinion of Advocate General Bot in *Schrems* contains an evaluation of the scope of the supervisory powers of the US Federal Trade Commission (paras 207-208). And in *Opinion 1/15*, Advocate General Mengozzi indicated that provisions of Canadian law had been brought before the CJEU (para. 320), and that some of the parties' contentions required interpretation of issues of Canadian law (para. 156). As a reminder, *Opinion 1/15* is based on a request for an opinion by the European Parliament under Article 218(11) TFEU

concerning the validity of a draft agreement between the EU and Canada for the transfer of airline passenger name records, which shows the variety of situations in which questions of third country law may come before the CJEU.

Future perspectives

It is inevitable that the CJEU will increasingly be faced with data protection cases that require an evaluation of third country law. For example, the Commission indicated in a Communication of January 2017 that it will consider issuing additional adequacy decisions covering countries in East and South-East Asia, India, Latin America, and the European region. In light of the *Schrems* judgment, challenges to adequacy decisions brought before a DPA or a national court will often result in references for a preliminary ruling to the CJEU. Furthermore, the interconnectedness of legal orders caused by globalization and the Internet may also give rise to cases in other areas of law where evaluation of third country law is necessary to answer a question of EU law.

Since in references for a preliminary ruling the determinations of national courts will generally be accepted by the CJEU, and a request to intervene in a preliminary ruling procedure to submit observations on third country law is not possible, there is a risk that a judgment in such a case could be based on an insufficient evaluation of third country law, such as when the evidence concerning such law is uncontested and is presented only by a single party. In fact, the evidence concerning US law in the *Schrems* judgment of the Irish High Court that resulted in the reference for a preliminary ruling to the CJEU was in effect uncontested. By contrast, in the so-called '*Schrems II*' case now underway in Ireland, the Irish courts have allowed oral and written submissions on US law and practice by a number of experts.

Scholarship and practice in private international law can provide valuable lessons for the CJEU when it needs to evaluate third country law. For example, situations where evidence concerning foreign law is presented by a single party and is uncontested have been criticized in private international law scholarship as a 'false application of foreign law', because such evidence can prove unreliable and result in unequal treatment between foreign law and the law of the forum (see the excellent 2003 lectures of Prof. Jänterä-Jareborg in volume 304 of the Collected Courses of the Hague Academy of International Law regarding this point).

If the CJEU is going to deal increasingly with third country law, then it should at least have sufficient information to evaluate it accurately. It seems that the CJEU would view third country law as an issue of fact to be proved (see in this regard the article by Judge Rodin in the current issue of the *American Journal of Comparative Law*), which would seem to rule out the possibility for it to order 'measures of inquiry' (such as the commissioning of an expert's report concerning third country law) under Article 64(2) of its Rules of Procedure in a reference for preliminary ruling for the interpretation of Union law. However, the Court may order such measures in the scope of a preliminary ruling on the validity of a Union act, which would seem to cover the references for a preliminary ruling mandated in *Schrems*(see para. 64 of the judgment, where the CJEU mandates national courts to make a reference to the Court 'for a preliminary ruling *on validity*' (emphasis added)). Thus, the CJEU may have more tools to investigate issues of third country law than it is currently using.

It would also be helpful if the Commission were more transparent about the evaluations of third country law that it conducts when preparing adequacy decisions, which typically include legal studies by outside academics. These are usually not made public, although they would provide useful explanation as to why the Commission found the third country's law to be essentially equivalent to EU law.

Conclusion

In conclusion, the CJEU should accept and be more open about the role that third country law is increasingly playing in its data protection judgments, and will likely play in other areas as well. Dealing more openly with the role of third country law and taking steps to ensure that it is accurately evaluated would also help enhance the legitimacy of the CJEU's judgments. Its upcoming judgment in *Opinion 1/15* may provide further clarification of how the CJEU deals with third country law in its work.