Conference on the "Codification of Private International Law" – Cologne, 23-24 September 2016: Proceedings now published in IPRax 2/2017

The year 2016 did not only mark 30 years since the great reform of German private international law in 1986, but it was also the 35th anniversary of the foundation of the *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)*. Therefore, Professor *Heinz-Peter Mansel*, President of the German Council for Private International Law and editor-in-chief of IPRax, and Professor *Jan von Hein*, chairman of the Council's 2nd Commission, organized a celebratory conference on **23-24 September 2016** at the University of Cologne (Germany) under the title: **"Codification of Private International Law: German Experience and European Perspectives Thirty Years After the PIL-Reform of 1986"** (see our previous post here). The conference was (mostly) held in German and generously supported by Gieseking, the publisher of IPRax. After being welcomed by Dr. Johannes C. Wichard (Federal Ministry of Justice and for Consumer Protection), the speakers – members of the German Council and a guest from Switzerland – both analyzed how private international law has evolved in the past and provided an outlook on current and future challenges of the field, particularly in the European context. The conference proceedings have now been published in IPRax 2/2017. The abstracts (kindly provided by the publisher) read as follows:

D. Henrich: **The Deutsche Rat für Internationales Privatrecht and the genesis of the Rearrangement Act of International Private Law**

The article shows the different stages on the way to the so-called IPR-Neuregelungsgesetz (Rearrangement Act of International Private Law) 1986. Starting point was Art. 3(2) of the German Grundgesetz: Men and women having equal rights. Consequently, the rules of applicable law could no longer prefer husband or father over wife or mother. Above all, the article describes the role of

the Deutscher Rat für Internationales Privatrecht constituted in 1953 in developing proposals not only to fill the gaps opened by Art. 3(2) GG but also for the formulation of a modern Act of Private International Law.

J. Pirrung: **International and European Influence on the 1986 Reform of Private International Law**

The 1986 reform of German Private International Law did not neglect international solutions, essentially such as proposed by the Hague Conference on PIL. But, in the main issues, determination of the law to be applied concerning the person, family relationships and succession, as well as in international procedural questions with regard to these matters, the reform largely followed the proposals of the German Council on PIL, namely application of the law of the nationality of the persons concerned, with some attenuations by applying the law of the State of habitual residence and admitting, to a certain extent, party autonomy. The relatively short provisions on these matters are in contrast to the rather detailed Articles of the 1980 Rome Convention on contractual obligations. Nevertheless, the incorporation of the rules of the Convention into the Introductory Provisions to the Civil Code (EGBGB) followed strong practical interests. This solution, though criticized by the EEC Commission and the Max-Planck-Institute on PIL, convinced the Law Committee of the Parliament. After 30 years, some important parts of the reform have, up to now, survived – Art. 4–7, 9, 11–16 EGBGB; but PIL on divorce, childhood, succession and obligations has undergone many changes, mainly because of the influence of the EU.

P. Mankowski: **The principle of nationality – in the past and today**

Since 1986, when the EGBGB was promulgated, the principle of nationality has lost ground in PIL. European PIL has switched over to the principle of habitual residence. The most recent examples are the PIL of successions and the PIL of matrimonial property. The principle of nationality can be based on the links between a State and its citizens, in particular the right to vote. Furthermore, nationality appears to be a pragmatic and practical connecting factor for nationality can be evidenced by ID documents like passports or ID cards. Yet, factual developments challenge this assumption: allegedly lost or burnt ID documents, forgery, States not issuing ID documents. All these challenges demand subsidiary answers or solutions.

A. Dutta: **Habitual residence – Success and future of a connecting factor**

The battle over the appropriate personal connecting factor in private international law appears to be over, at least on the continent where nationality has been increasingly ousted by habitual residence. The paper shows that, from a German perspective, this development did not start with the activities of the European legislature in the area of private international law. Rather, the Hague Conventions and also national law had already laid the basis for a shift from a purely legal to a more factually oriented connecting factor in order to identify the law which is most closely connected to a natural person. The article sketches the advantages of habitual residence from the perspective of the European Union before addressing some future challenges, in particular the danger of a domicilisation of habitual residence and the limits of personal connecting factors in general, especially as to "new" family status relations.

S. Corneloup: **On the loss of significance of renvoi**

The moderately "renvoi-friendly" attitude of the German legislator of 1986 contrasts with the evolutions having taken place on the European level, where principle and exception are clearly reversed. Today the question whether renvoi is to be observed has become rather negligible. Several reasons may explain this reality. Significant changes in PIL over the last decades have rarefied the practical need for renvoi, as the latter presupposes a specific constellation of the case, which has become less frequent in today's practice. Moreover, the objectives of renvoi are increasingly implemented through functional equivalents, which stem mainly from the field of international and European civil procedure, resulting in a further loss of significance of renvoi. In addition, the aim of international uniformity of decision, which is the main rationale behind renvoi, no longer expresses the overall priority of legislators and courts, as considerations based on substantive law increasingly take precedence over the uniformity of decision. This frequently results in an exclusion of renvoi.

T. Helms: **Public policy – The influence of basic and human rights on private international law**

On the occasion of the 30th anniversary of the extensive German private international law reform of 1986, this article seeks to determine the influence of basic and human rights on public policy. It demonstrates how the national public

policy exception in Art. 6 of the Introductory Act to the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch/EGBGB) is, by and large, substantially identical to the specific public policy exceptions that are enshrined in the European regulations on private international law. Impetus in favor of a European public policy has been provided by the jurisprudence of the European Court of Human Rights in particular. Recent decisions of the ECtHR which have had especially wide-ranging consequences for German law include the Mennesson and Labassee cases, which determined to whom a child born to a surrogate abroad is related under parentage law.

B. Heiderhoff: **The autonomous German Private International Law in family matters**

Following the order of provisions contained in the EGBGB, from Art. 13 to Art. 24, the essay gives an overview over the most important changes of German international family law since 1986. Some topical issues, such as the validity of marriages with minor refugees and the application of the Rome III-Regulation to the recognition of private divorces are discussed. It is demonstrated that the existing legal framework does not solve all issues in a satisfactory, contemporary manner. Some newer subjects, such as the treatment of same-sex marriages or of children born by surrogate mothers, require further reforms of international family law. In summary, it can be observed that the importance of the nationality of the parties for the determination of the applicable law is diminishing, while the habitual residence has gained substantially in importance. At the same time, party autonomy has been strengthened. While this may partly raise concerns about the protection of the weaker party, it is clearly a necessary complement to the habitual residence as connecting factor. It is the only way to reach stability for legal relationships. These changes have been caused mainly by EU-law and the principle of free movement of persons. However, the reforms, both those already implemented and those yet to come, are not simply triggered by Europeanisation, but have been and will be reactions to modifications in the material family law and to changes in human behavior in familial contexts.

M.-P. Weller: **The German autonomous International Company Law**

The following article presents the state of the art of German autonomous International Company Law. It discusses the real seat theory, which is applied in cases concerning third state companies. In consequence of this approach,

companies from third states (e.g. from Switzerland) are converted into domestic partnerships. In addition, the article shows that the applicable company law is superposed by international mandatory rules. Furthermore, it has to be delimited from company insolvency law by the method of classification. Finally, the article highlights mechanisms to impose creditor protection and domestic public interests vis-à-vis foreign companies.

E. Jayme: **The future relevance of national codifications of private international law**

The European Union has enacted many regulations concerning conflict of laws and international civil procedure. In addition, there are many international conventions which contain conflicts rules. National codifications of private international law, however, retain their relevance for many questions which have not been regulated by European Acts and international conventions. We may mention the whole area of property, the law concerning the conclusion of marriage as well as some parts of the law of parents and children such as the establishment of paternity. The European conflicts rules, sometimes, state expressly not being applicable to certain questions such as invasion of privacy or agency. Here, national codifications remain in force. In addition, also methods and instruments of national conflicts law such as "characterization" will still be of some relevance, particularly with regard to the borderline between private international law and international civil procedure.

A. Bonomi: **European Private International Law and Third States**

Articulated in a number of sectorial regulations, the European private international law system has not always grown in a very systematic way. After years of swift development towards a more extensive coverage of different civil law areas and an increased integration of the national systems, the time has probably come to improve the coordination among the single instruments. The regulation of third-country relationships is undoubtedly one of those issues that call for a more consistent approach. While the universal application of choice-of-law rules is a constant feature of all adopted regulations, unjustified disparities persist with respect to jurisdiction and lis pendens. The national rules of the Member States have been entirely replaced by uniform European rules in certain areas, whereas they are still very relevant in others. Parallel proceedings pending in a third country are dealt with under one regulation, but ignored by the others.

And while the recognition and enforcement of third-country judgments is consistently left to national law, this might seem at odds with the far-reaching European coverage of jurisdiction and choice-of-law issues. Hopefully, the Hague Judgments Project will result in a successful convention in the near future. But the external relations of the EU in the area of private international law should not depend entirely on the prospects for a Hague instrument. Whether this prospect materializes or not, the EU institutions should take advantage of the negotiation process in order to elaborate on a coherent set of unilateral European law rules for disputes involving parties of third countries

(This contribution is published in English.)

J. Basedow: **EU Conflicts Legislation and the Hague Conference – A Difficult Relationship**

The transfer of legislative competence for the conflict of laws to the EU by the Treaty of Amsterdam has compelled the Hague Conference to aim at new goals. It was necessary to strengthen the universal character of this organization. As shown by the institutional development of EU and Hague Conference this goal has come closer. However, the legislative activities throughout the last 15 years indicate that the Europeans still exercise a controlling influence on the projects of the Hague Conference; this emerges from the judgements project, the maintenance project and the Principles on Choice of Law. For the future, the author advocates the adoption of more non-binding texts such as principles or model laws, that it cares more for the functioning of existing conventions and that it commits itself more to the dissemination of knowledge on the conflict of laws.

E.-M. Kieninger: **Towards a Codification of European Private International Law?**

In the first part, the article focuses on those areas of commercially relevant private international law which so far have not been touched by the European legislator, i.e. the law applicable to companies and to property law issues. In the second part, the author argues that an overall codification of European Private International Law, although perhaps desirable, might not be feasible and suggests a more moderate approach

Germany: Legal Consequences of the Draft Legislation on Child Marriage

On 17 February 2017, the German government presented a legislative draft on child marriage that represents a significant departure from current court practice (the text of the draft is available here). The legal status quo envisages a case-by-case examination whether a marriage was lawfully concluded outside of Germany. Such a determination considers both whether the marriage was consistent with German public policy and whether the surrounding circumstances of the individual situation of the minor spouse were taken into account. Particularly in cases where the marriage was concluded already some time ago and the spouses have since then voluntarily stayed together and established a family life, German courts have in the past upheld foreign marriages that would have been regarded as offensive at the time of their conclusion. Contrary to this case-by-case approach, the centerpiece of the recent draft is the automatic and strict non-recognition of marriages concluded outside of Germany by persons under the age of sixteen. Furthermore, marriages concluded by persons between the ages of sixteen and eighteen shall only be recognized if severe negative consequences were to occur otherwise.

In a recently published interview, Professor Jürgen Basedow, Director of the Max-Planck-Institute for Comparative and Private International Law in Hamburg, criticizes the rigid setting of a minimum age and the underlying assumption of the draft that a strict non-recognition of an under-age marriage would always be beneficial to the person concerned: “This overlooks many realities: In many instances the under-aged wife does not desire such assistance; for many young women marriage represents a recognition of their adulthood within their particular social setting.“ Basedow states further that there is no sensible way to avoid a meticulous case-by-case analysis of the particular circumstances of the individual case. The proposed draft, however, would lead to inflexibility and offer only little leeway to take the cultural identity of the spouses and their personal

decisions into account.

The full interview with Jürgen Basedow is accessible here.

Brexit and PIL, Over and Over

The abandonment of the EU by the UK is at the root of many doubts concerning the legal regime of cross-border private relationships. Little by little the panorama begins to clear up as the expectations and objectives of the UK are made public. Regarding cross-border civil and commercial matters, several Evidence Sessions have been held from December to January at the House of Lords before the Select Committee on the European Union, Justice Sub-committee (transcripts are available here); the Final Report was published yesterday.

At the end of January, the Minister of State for Courts and Justice gave the Committee details as to the hopes on the side of the UK of the post-Brexit best case scenario, which in a nutshell would rely on two main pillars: a set of common rules -either the regulations themselves, incorporated into the Great Repeal Act; or new agreements with the EU taking up the contents of the European rules- to ensure mutuality and reciprocity; and the absence of any post-Brexit role for the Court of Justice.

To what extent is this workable?

Taking the risk of repeating what other colleagues have already said let me share some basic thoughts on the issue from the continental point of view; in light of the documents above mentioned one feels there is a need to insist on them. The ideas are complemented and developed further in a piece that will be published in a collective book – *Diversity & Integration: Exploring Ways Forward,* to be edited by Dr. Veronica Ruiz Abou-Nigm and Prof. Maria Blanca Noodt Taquela.

It is indeed sensible to have solutions on cross-border jurisdiction and recognition and enforcement of decisions which enhance certainty for the continental citizens with interests in third States; this is a general truth. The British negotiators would

have to prove (with qualitative and quantitative arguments) what is so particular about the UK that an EU/UK convention is of the essence for the post-Brexit time. Moreover, and more important, the UK will have to convince the EU that the particular solutions to be agreed are those currently contained in the European regulations; and also, about the CJEU not being part of the agreement. For the endeavor to succeed fundamental obstacles must be overcome, all related to the systemic nature of the EU. Among the most obvious ones I would like to point to the following:

.- The inadequacy of the solutions. Certain mechanisms and technical solutions of the EU civil procedural law instruments – and the way we understand and apply them- have been endorsed only for integration. There are reasons to be skeptical about the "exportability" of the far-reaching solutions, in terms of removal of obstacles to the circulation of judgments, of the current EU procedural regulations to a context not presided by the philosophy of integration. Within the EU, the sacrifices imposed by mutual trust to the right to due process of individuals are endurable in the name of integration as a greater, common good. In the absence of any integration goal there is no apparent reason for an all-embracing blind reciprocal trust (neither of the EU MS in the UK nor vice versa. By the way, the fact that the UK is considering leaving the ECHR as well will not help to automaticaly trusting the UK decisions in the future).

.- The systemic character of the *acquis communautaire.* The EU legal instruments complement and reinforce one another: any proposal to reproduce single, isolated elements of the system in a bilateral convention EU/UK ignores this fact. Ties and links among the components of legal systems may be stronger or looser. When confronted with a proposal such as the UK, one of the unavoidable questions to be answered is to what extent the PIL EU instruments can have a separate, independent life one from each other.

.- In a similar vein: the EU PIL system does not start, nor does it end, in a few regulations – those which typically come to mind. Many conflict of laws and procedural rules for cross-border cases are set in EU acts with a broader content and purpose; they interact with the PIL instruments. What about this setting?

.- MS are actors in the system: they must keep loyal to it; they cannot escape from it. When applying their laws and when legislating they are subject to the overarching obligation of making it in a way that preserves the *effet utile* of the

EU rules. This creates from the outset a structural imbalance to any international agreement between the MS (the EU) and third countries: the MS enjoy very little -if at all- leeway to deviate from the constraint of keeping EU-consistent. Indeed, a similar situation would arise in connection to any other international agreement, but it is likely to be more problematic in the case of conventions which replicate the contents of the EU regulations but not their (EU) inspiration, nor their objectives.

.- International agreements concluded by the European Union (as opposed to those signed by the MS) form an integral part of its legal order and can therefore be the subject of a request for a preliminary ruling by the MS. *De iure,* once the UK is no longer an EU MS the CJEU findings will not be binding on it. The fact remains that diverging interpretations -one for the MS, another from the side of the UK- of the same bilateral instrument will jeopardize its very purpose (and I would say the Justice sub-committee has understood it, as we can read in the Final Report above mentioned: *The end of the substantive part of the CJEU's jurisdiction in the UK is an inevitable consequence of Brexit. If the UK and the EU could continue their mutually-beneficial cooperation in the ways we outline earlier without placing any binding authority at all on that Court's rulings, that could be ideal. However, a role for the CJEU in respect of essentially procedural legislation concerning jurisdiction, applicable law, and the recognition and enforcement of judgments, is a price worth paying to maintain the effective cross-border tools of justice discussed throughout our earlier recommendations. (Paragraph 35).*

ERA Conference on European Insolvency Law

On 8-9 June 2017, the Academy of European Law (ERA) will host a conference on European Insolvency Law under the title:

"Insolvency Proceedings within the EU: Latest Developments"

at the ERA conference center in Trier (Germany).

The conference will give an in-depth analysis of the recast EU Regulation No 2015/848 on insolvency proceedings which will become applicable from 26 June 2017, in particular

- scope of the Regulation, pre-insolvency and hybrid proceedings
- main, secondary and synthetic proceedings
- groups of companies and the new group coordination proceeding
- Furthermore it will discuss the
- new Commission proposal for a Directive on insolvency, restructuring and second chance, published late 2016, and
- post-Brexit implications for insolvency and restructuring

This conference aims to meet the requirements of insolvency lawyers to stay informed on the latest developments in jurisprudence and legislation in insolvency matters at EU level. It will examine practical problems in applying the recast Insolvency Regulation, consequences of Brexit and the recent EU proposal on business insolvency.

The confirmed Speakers are:

- **Stefania Bariatti**, Professor at the University of Milan; Of Counsel, Chiomenti Studio Legale, Milan
- **Alexander Bornemann**, Head of Division, Federal Ministry of Justice and Consumer Protection, Berlin
- **Florian Bruder**, *Rechtsanwalt*, Counsel, DLA Piper, Munich
- **Jenny Clift**, Senior Legal Officer, International Trade Law Division, UNCITRAL Secretariat, Vienna
- **Reinhard Dammann**, *Avocat à la Cour*; Partner, Clifford Chance Europe LLP, Paris
- **Francisco Garcimartín**, Professor of Private International Law at the Autonomous University of Madrid
- **Gabriel Moss QC**, Barrister, 3-4 South Square, Gray’s Inn, London; Visiting Professor at Oxford University
- **Andreas Stein**, Head of Unit, Civil Justice Policy, DG Justice and Consumers, European Commission, Brussels
- **Nico Tollenaar**, RESOR, Amsterdam

- **Michael Veder**, Adviser at RESOR, Amsterdam; Professor of Insolvency Law at Radboud University Nijmegen; Chair of INSOL Europe Academic Forum
- **Bob Wessels**, Independent Legal Counsel, Adviser and Arbitrator; Professor emeritus at the University of Leiden

The conference language will be English. The event is organized by Dr *Angelika Fuchs* (ERA). The programme of the conference, together with a registration form, can be found here.

House of Lords EU Committee on Judicial Cooperation post-Brexit

On 20 March 2017 the European Union Committee of the House of Lords has published its Report on Judicial cooperation post-Brexit ("Brexit: Justice for families, individuals and Businesses?"). The full Report is available here. The summary reads as follows (emphasis added):

"The Brussels I Regulation (recast)

1. We acknowledge and welcome the UK's influence over the content of these three EU Regulations which are crucial to judicial cooperation in civil matters and reflect the UK's influence and British legal culture. We urge the Government to keep as close to these rules as possible when negotiating their post-Brexit application. (Paragraph 23)

2. The predictability and certainty of the BIR's reciprocal rules are important to UK citizens who travel and do business within the EU. We endorse the outcome of the Government's consultations, that an effective system of cross-border judicial cooperation with common rules is essential post-Brexit. (Paragraph 37)

3. We also note the Minister's confirmation, in evidence to us, that the important principles contained in the Brussels I Regulation (recast) will form part of the

forthcoming negotiations with the remaining EU Member States. (Paragraph 38)

4. While academic and legal witnesses differed on the post-Brexit enforceability of UK judgments, it is clear that **significant problems will arise for UK citizens and businesses if the UK leaves the EU without agreement on the post-Brexit application of the BIR.** (Paragraph 52)

5. The evidence provided to us suggests that the **loss of certainty and predictability resulting from the loss of the BIR and the reciprocal rules it engenders** will lead to an inevitable increase in cross-border litigation for UK based citizens and businesses as they continue to trade and interact with the remaining 27 EU Member States**.** (Paragraph 53)

6. We are concerned by the Law Society of England and Wales' evidence that the current uncertainty surrounding Brexit is already having an **impact on the UK's market for legal services and commercial litigation, and on the choices businesses are making as to whether or not to select English contract law as the law governing their commercial relationships.** (Paragraph 54)

7. The Government urgently needs to address this uncertainty and take steps to mitigate it. We therefore urge the Government to consider whether any interim measures could be adopted to address this problem, while the new UK-EU relationship is being negotiated in the two year period under Article 50. (Paragraph 55)

8. The evidence we received is clear and conclusive: **there is no means by which the reciprocal rules that are central to the functioning of the BIR can be replicated in the Great Repeal Bill, or any other national legislation. It is therefore apparent that an agreement between the EU and the UK on the post-Brexit application of this legislation will be required, whether as part of a withdrawal agreement or under transitional arrangements.** (Paragraph 60)

9. The Minister suggested that the Great Repeal Bill will address the need for certainty in the transitional period, but evidence we received called this into question. **We are in no doubt that legal uncertainty, with its inherent costs to litigants, will follow Brexit unless there are provisions in a withdrawal or transitional agreement specifically addressing the BIR.** (Paragraph 61)

10. The evidence suggests that jurisdictions in other EU Member States, and arbitrators in the UK, stand to gain from the current uncertainty over the post-Brexit application of the BIR, as may other areas of dispute resolution. (Paragraph 69)

11. With regard to arbitration, we acknowledge that the evidence points to a gain for London. But, we are also conscious of the evidence we heard on the importance of the principles of justice, in particular openness and fairness, underpinned by the publication of judgments and authorities, which are fundamental to open law. It is our view that greater recourse to arbitration does not offer a viable solution to the potential loss of the BIR. (Paragraph 70)

The Brussels IIa Regulation and the Maintenance Regulation

12. In dealing with the personal lives of adults and children, both the Brussels IIa Regulation and the Maintenance Regulation operate in a very different context from the more commercially focused Brussels I Regulation (recast). (Paragraph 81)

13. These Regulations may appear technical and complex, but the practitioners we heard from were clear that in the era of modern, mobile populations they bring much-needed clarity and certainty to the intricacies of cross-border family relations (Paragraph 82)

14. We were pleased to hear the Minister recognise the important role fulfilled by the Brussels IIa Regulation and confirm that the content of both these Regulations will form part of the forthcoming Brexit negotiations. (Paragraph 83)

15. We have significant concerns over the impact of the loss of the Brussels IIa and Maintenance Regulations post-Brexit, if no alternative arrangements are put in place. We are particularly concerned by David Williams QC's evidence on the loss of the provisions dealing with international child abduction. (Paragraph 92)

16. **To walk away from these Regulations without putting alternatives in place would seriously undermine the family law rights of UK citizens and would, ultimately, be an act of self-harm.** (Paragraph 93)

17. **It is clear that the Government's promised Great Repeal Bill will be insufficient to ensure the continuing application of the Brussels II and**

Maintenance Regulations in the UK post-Brexit: we are unaware of any domestic legal mechanism that can replicate the reciprocal effect of the rules in these two Regulations. We are concerned that, when this point was put to him, the Minister did not acknowledge the fact that the Great Repeal Bill would not provide for the reciprocal nature of the rules contained in these Regulations. (Paragraph 97)

18. We are not convinced that the Government has, as yet, a coherent or workable plan to address the significant problems that will arise in the UK's family law legal system post-Brexit, if alternative arrangements are not put in place. **It is therefore imperative that the Government secures adequate alternative arrangements, whether as part of a withdrawal agreement or under transitional arrangements** (Paragraph 98)

Options for the future

19. The balance of the evidence was overwhelmingly against returning to the common law rules, which have not been applied in the European context for over 30 years, as a means of addressing the loss of the Brussels I Regulation (recast). We note that a return to the common law would also not be the Government's choice. (Paragraph 114)

20. A return to the common law rules would, according to most witnesses, be a recipe for confusion, expense and uncertainty. In our view, therefore, the common law is not a viable alternative to an agreement between the EU and the UK on the post-Brexit application of the Brussels I Regulation (recast). (Paragraph 115)

21. Nonetheless, in contrast to key aspects of the two Regulations dealing with family law, Professor Fentiman was of the opinion that in the event that the Government is unable to secure a post-Brexit agreement on the operation of the Brussels I Regulation (recast), a return to the common law rules would at least provide a minimum 'safety net'. (Paragraph 116)

22. **The combination of UK membership of the Lugano Convention, implementation of the Rome I and II Regulations through the Great Repeal Bill, and ratification of the Hague Convention on choice-of-court agreements, appears to offer at least a workable solution to the post-Brexit loss of the BIR.** (Paragraph 126)

23. The inclusion in the Lugano Convention of a requirement for national courts to "pay due account" to each other's decisions on the content of the Brussels I Regulation, without accepting the direct jurisdiction of the CJEU, could be compatible with the Government's stance on the CJEU's status post-Brexit, as long as the Government does not take too rigid a position. (Paragraph 127)

24. This approach will come at a cost. In particular, it will involve a return to the Brussels I Regulation, with all its inherent faults, which the UK as an EU Member State succeeded, after much time and effort, in reforming. (Paragraph 128)

25. In contrast to the civil and commercial field, we are particularly concerned that, save for the provisions of the Lugano Convention on cases involving maintenance, there is no satisfactory fall-back position in respect of family law. (Paragraph 135)

26. Our witnesses were unanimous that a return to common law rules for UK- EU cases would be particularly detrimental for those engaged in family law litigation. The Bar Council also suggested that an already stretched family court system would not be able to cope with the expected increase in litigation. (Paragraph 136)

27. The Bar Council specifically called for the EU framework in this field to be sustained post-Brexit. But while this may be the optimal solution in legal terms we cannot see how such an outcome can be achieved without the CJEU's oversight. (Paragraph 137)

28. Other witnesses suggested the UK rely on the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children. But the evidence suggests that this Convention offers substantially less clarity and protection for those individual engaged in family law based litigation. (Paragraph 138)

29. The Minister held fast to the Government's policy that the Court of Justice of the European Union will have no jurisdiction in the UK post-Brexit. We remain concerned, however, that if the Government adheres rigidly to this policy it will severely constrain its choice of adequate alternative arrangements. (Paragraph 142)

30. Clearly, if the Government wishes to maintain these Regulations post-Brexit, it will have to negotiate alternative arrangements with the remaining 27 Member States to provide appropriate judicial oversight. But the Minister was unable to offer us any clear detail on the Government's plans. When pressed on alternatives, he mentioned the Lugano Convention and "other arrangements". We were left unable to discern a clear policy. (Paragraph 143)

31. The other examples the Minister drew on, Free Trade Agreements with Canada and South Korea, do not deal with the intricate reciprocal regime encompassed by these three Regulations. We do not see them as offering a viable alternative. (Paragraph 144)

32. We believe that the Government has not taken account of the full implications of the impact of Brexit on the areas of EU law covered by the three civil justice Regulations dealt with in this report. In the area of family law, we are very concerned that leaving the EU without an alternative system in place will have a profound and damaging impact on the UK's family justice system and those individuals seeking redress within it. (Paragraph 145)

33. In the civil and commercial field there is the unsatisfactory safety net of the common law. But, at this time, it is unclear whether membership of the Lugano Convention, which is in itself imperfect, will be sought, offered or available. (Paragraph 146)

34. **We call on the Government to publish a coherent plan for addressing the post-Brexit application of these three Regulations, and to do so as a matter of urgency. Without alternative adequate replacements, we are in no doubt that there will be great uncertainty affecting many UK and EU citizens.** (Paragraph 147)"

Conference Report: Scientific

Association of International Procedural Law, University of Vienna, 16 to 17 March 2017

On 16 and 17 March 2017 the *Wissenschaftliche Vereinigung für Internationales Verfahrensrecht* (Scientific Association of International Procedural Law) held its biennial conference, this time hosted by the Law Faculty of the University of Vienna at the Ceremony Hall of the Austrian Supreme Court of Justice (*Oberster Gerichtshof*).

After opening and welcoming remarks by the Chairman of the Association, Prof. Burkhard Hess, Luxemburg, the Vice President of the Supreme Court Dr. Elisabeth Lovrek, and Prof. Paul Oberhammer, speaking both as Dean of the Law Faculty of the University of Vienna and chair of the first day, the first session of the conference dealt with international insolvency law:

Prof. Reinhard Bork, Hamburg, compared the European Insolvency Recast Regulation 2015/848 and the 1997 UNCITRAL Model Law on Cross-Border Insolvency Law in respect to key issues such as the scope of application, international jurisdiction and the coordination of main and secondary proceedings. Bork made clear that both instruments, albeit one is binding, one soft law, have far-reaching commonalities on the level of guiding principles (e.g. universality, mutual trust, cooperation, efficiency, transparency, legal certainty etc.) as well as many similar rules whereas in certain other points differences occur, such as e.g. the lack of rules on international jurisdiction and applicable law as well as on groups of companies and data protection in the Model Law. In particular in respect to the rules on the concept of COMI Bork suggested updating the Model Law given a widespread reception of this concept and its interpretation by the European Court of Justice far beyond the territorial reach of the European Insolvency Regulation.

Prof. Christian Koller, Vienna, then focused on communication and protocols between insolvency representatives and courts in group insolvencies. Koller explained the difficulties in regulating these forms of cooperation that mainly depend of course on the good-will of those involved but nevertheless should be

and indeed are put under obligation to cooperate. In this context, Koller, inter alia, posed the question if choice of court-agreements or arbitration agreements in protocols are possible but remained skeptical with a view to Article 6 of the Regulation and objective arbitrability. In principle, however, Koller suggested using and, as the case may be, broadening the exercise of party autonomy in cross-border group insolvencies.

In contrast to the harmonizing efforts of the EU and UNCITRAL Prof. Franco Lorandi, St. Gallen, described the Swiss legal system as a rather isolationist "island" in cross-border insolvency matters, yet an island "in motion" since certain steps for reform of Chapter 11 on cross-border insolvency within the Federal Law on Private International Law of 1987 (*Bundesgesetz über das Internationale Privatrecht, IPRG)* are being currently undertaken (see the Federal Governments Proposal; see the Explanatory Report).

In the following Pál Szirányi, DG Justice and Consumers, Unit A1 – Civil Justice, reported on accompanying implementation steps under e.g. Article 87 (establishment of the interconnection of registers) and Article 88 (establishment and subsequent amendment of standard forms) of the European Insolvency Recast Regulation to be undertaken by the European Commission as well as on the envisaged harmonization of certain aspects of national insolvency laws within the EU (see Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, see also post by Lukas Schmidt on conflictoflaws.net) and finally on the EU's participation in the UNCITRAL Working Group V on cross-border insolvency. Szirány further explained that it is of interest to the EU to align and coordinate the insolvency exception in the future Hague Judgments Convention with EU legislation, see Article 2 No. 1 lit. e covering "insolvency, composition and analogous matters" of the 2016 Preliminary Draft Convention.

Prof. Christiane Wendehorst, Vienna, reported on the latest works of the European Law Institute, in particular on the ELI Unidroit Project on Transnational Principles of Civil Procedure, but also on the project on "Rescue of Business in Insolvency Law", that is drawing to its close, potentially by the ELI conference in Vienna on 27 and 28 April 2017 as well as on the project on "The Principled Relationship of Formal and Informal Justice through the Courts and Alternative

Dispute Resolution".

Finally, Dr Thomas Laut, German Federal Ministry of Justice (*Bundesministerium der Justiz*) reported on current legislative developments in Germany including works in connection with the Brussels IIbis Recast Regulation, human rights litigation in Germany and the Government Proposal for legislative amendments in the area of conflict of laws and international procedural law (*Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz, Entwurf eines Gesetzes zur Änderung von Vorschriften im Bereich des Internationalen Privat- und Zivilverfahrensrechts*). This Proposal aims at, inter alia, codifying choice of law rules on agency by inserting a new Article 8 into the Introductory Law of the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch, EGBGB)* and enhancing judicial cooperation with non-EU states, in particular in respect to service of process.

On the second day, Prof. Hess, Luxemburg, introduced the audience to the second session's focus on methodology in comparative procedural law and drew attention to the growing demand and relevance – reminding the audience, inter alia, of the influence of the Austrian law of appeal on the civil procedure reforms in Germany – but also to certain unique factors of the comparison of procedural law.

Prof. Stefan Huber, Hannover, took up the ball and presented on current developments of comparative legal research and methodology in general as well as possible particularities of comparing procedural law such as e.g. a strong lex fori-principle, the supplementing character of procedural law supporting the realization of private rights, a typically compact character of a procedural legal system, areas of discretion for the judge and the central role of the state – features which might make necessary a more "contextual" approach and a stronger focus on "legal concepts" as a layer between macro and micro perspectives. Huber also argued for a more substantive approach in regard to the latest efforts of the EU to compare the quality of justice systems of the Member States by its annual Justice Scoreboards since 2013. Indeed, the mere collection of economic and financial figures and other "juridical" data leaves unanswered questions of legal backgrounds and concepts in the various legal orders that might very well explain certain particularities in the data. Yet, it must be welcomed that the EU has started to embark on the delicate and methodically demanding but inevitable task of comparing the justice systems linked together under a principle of mutual trust.

Prof. Fernando Gascón Inchausti, Complutense de Madrid, continued the deep reflections on comparative procedural law with a view to the EU and illustrated the relevance in case law both of the European Court of Justice as well as the European Court of Human Rights and in the EU's law-making and evaluations of existing instruments, see recently e.g. Max-Planck-Institute Luxemburg, "An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumer law, JUST/2014/RCON/PR/CIVI/0082, to be published soon.

Prof. Margaret Woo, Northeastern University Boston, closed the session with a global perspective on comparative procedural law from a US and Chinese perspective and particularly drew attention to portectionist tendencies in the US such as e.g. the recent (not entirely new) "foreign law bans" (for a general report from 2013 see here) to be observed in more and more state legislations that put the application of foreign law under the condition that the foreign law in its entirety, i.e. its "system", does not conflict in any point of law with US guarantees and state fundamental rights. Obviously, this overly broad type of public policy clause is directed against Sharia laws and the like but goes far beyond in that it compares the entire legal system rather than the result of the point of law relevant to the case at hand. In the EU, Article 10 Rome III Regulation might have introduced a "mini" foreign law ban in case of abstract discrimination: "Where the law applicable pursuant to Article 5 or Article 8 makes no provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the forum shall apply". It remains of course to be seen whether the ECJ interprets this provision in the sense of an ordinary public policy clause requiring a concrete discrimination with effect on the result in the particular case at hand.

In the closing discussion, the audience strongly confirmed the need and benefits of comparative research and studies in particular in times of doubts and counter-tendencies against further cooperation and integration amongst states, their economies and judicial systems. The event ended with warm words of thanks and respect to the organizers and speakers for another splendid conference. If everything goes well, interested readers will be able to study the contributions in the forthcoming conference publication before the international procedural community will meet again in two year's time – the last conference's volume has

just been published, see Burkhard Hess (ed.), Band 22: Der europäische Gerichtsverbund – Gegenwartsfragen der internationalen Schiedsgerichtsbarkeit – Die internationale Dimension des europäischen Zivilverfahrensrechts, € 68,00, ISBN: 978-3-7694-1172-0, 2017/03, pp. 236.

Conference Report – Property regimes of international couples and the law of succession

On the 9th and 10th of March 2017, the Academy of European Law (ERA) hosted the conference "Property regimes of international couples and the law of succession" in Trier, Germany. It gave an opportunity to more than 60 academics and practitioners of 24 different nationalities to discuss property aspects of marriage and registered partnerships at European level. The focus has been put on the two new additions to European family, i.e. the property regime Regulations (No 2016/1103 and 2016/1104) and their interplay with the already applicable Succession Regulation (No 650/2012).

This post by ***Amandine Faucon***, research fellow at the MPI Luxembourg, provides an overview of the presentations and the discussions held at the Conference.

Setting the scene

Enhanced cooperation in family matters: genesis of the Regulations – María Vilar Badia (EU Commission) explained that the aim of the Regulations was to complete the existing European family law framework. In that perspective, two texts were proposed to the European legislator in 2011 but were rejected, after four years of negotiations, by Poland and Hungary. The main obstacle was the indirect recognition of same-sex couples. Given the lack of necessary unanimity,

the Council suggested adopting the already negotiated texts through the enhanced cooperation process. This approach was supported and six months later, in June 2016, the instruments were adopted by eighteen Member States.

A comprehensive set of EU rules on international family estate law – Prof. Dieter Martiny acknowledged the broad scope of EU Regulations, now covering almost all aspects of family life. He briefly presented each of these instruments as well as their material scope. Furthermore, he discussed the interplay of the new Regulations with the already applicable ones, especially with regard to characterization matters, since one act can raise questions that have to be solved under different texts (e.g.: donation). He then presented the recurrent features of all existing instruments, e.g. the existence of party autonomy, and pointed out some issues such as the lack of common general provisions.

New rules on matrimonial property regimes

Jurisdiction in case of death or divorce and in all other cases – Prof. Costanza Honorati illustrated the characterisation issue notably with the concept of marriage and registered partnership. Regarding jurisdiction, she stated that the new Regulations fulfil classical private International law objectives by aiming at concentrating jurisdiction, through a reference to the forum successionis and the forum divortii, and at favoring the application of the lex fori by making a detour by the applicable law, in case it is a chosen one. For the rest, habitual residence and nationality are the main criteria.

Applicable law, its scope and effects in respect of third parties and which choices can be made? – Dr. Ian Summer first explained the difficulty of knowing which Regulation to apply through the example of a relationship being considered as a marriage in a country and a registered partnership in a second. He then criticized the exclusion of pension rights which are a significant part of patrimonial disputes. As regard to applicable law, he explained the main features of the new Regulations: unity, universality and a hierarchy of connecting factor in the absence of a choice of law. The latter, being the privileged factor, was particularly detailed notably as regard to the different choice possible and the formal conditions to be fulfilled. The effects of the law applicable with respect to third party were also addressed.

Special rules for property consequences of registered partnerships – María

Vilar Badia laid out the differences existing between the Regulation on matrimonial property regime (No 2016/1103) and the Regulation on the property consequences of registered partnerships (No 2016/1104). The overall objective of the legislator was to have very similar text so that both types of relationships are treated equally. The differences are therefore rare and consist of additional safeguards to protect registered partners, as this status does not exist in every participating State.

Crossover: property regimes and succession law

Workshop: Making the right choice – party autonomy in property & succession law

Within the workshop the following case has been set as working hypothesis: An Italian and an Austrian got married in Belgium where they lived for six months before moving to Germany. The wife bought a holiday apartment in Antibes and received a flat in Italy. After a while, they separated and the wife moved back to Italy. The participants addressed the relevant questions of property regime, divorce, succession and maintenance. The concept of habitual residence and the application of party autonomy as a tool to achieve some coherence were particularly examined. The participants concluded that there is no unique answer to the case and that the final outcome largely depends on the will of the parties involved. It is, therefore, fundamental for practitioners to carefully provide legal advises to their clients.

Equalization of accrued gains and pension rights adjustment – Peter Junggeburth discussed the characterization problem regarding pension rights and its impact on the increase in the share of the succession or divorce. The presentation was given from the point of view of German inheritance and matrimonial property law but contemplated the impact of the questions raised in cross-border situations.

Planning cross-border successions

Options for drafting a last will under the EU Succession Regulation: first experiences – Dr. Julie Francastel first considered the general rule – the law of the last habitual residence of the deceased – and raised the issue of determining the habitual residence. She used the case of a retired person living part-time in Mallorca and part-time in Germany as an example. In that situation, choosing the

law applicable can be advisable. She stressed the impact of such a choice on jurisdiction and added that a choice should be considered even if a situation does not bear cross-border elements at first sight. The formal conditions of the choice and the issue of succession contracts (that do not exist in every Member States) were also addressed.

European Certificate of Succession and the division of the estate – Dr. Jan-Ger Knot presented the European Certificate of Succession (hereafter ECS) and its objectives. He stressed that its operation in practice remains very unclear and leads to many difficulties for practitioners. It was also recalled that depending on the Member State, the authorities issuing the ECS can be a Notary or a Court. He then described the effects of the ECS and the different means to challenge it. The problem of conflicting ECS was also addressed and in this respect the European Network of Registers of Wills Association has been introduced as a possible solution.

Paying inheritance tax twice? – Prof. Alain Steichen first gave an overview of the main reasons leading to double taxation: the location of the deceased, heirs and assets in Member States having different taxation systems. Given the increasing mobility of citizens and purchases abroad, the problem is expanding but there are no possibilities to force Member States to avoid double taxation. He presented the Model for treaties on double taxation on inheritance from the OECD (1982) and the EU recommendation (2011) favoring the taxation at the residence of the heir but their impact is limited. A common rule to be followed by every State should be imposed to avoid the problem.

Hands-on experience: Planning cross-border successions with a view to third states and offshore jurisdictions

EU and Switzerland – Tobias Somary first indicated that internationality is becoming normality and therefore stressed the importance of estate planning. In that regard, the law applicable to matrimonial property regime should be carefully considered, as it can significantly impact the size of the estate and its distribution at the dissolution of the matrimonial regime. He then turned to the inheritance question and stressed that according to the Succession Regulation the law of a non-member State, such as Switzerland, can be applied to the inheritance. He, therefore, advised to plan the succession carefully and gave some examples as an illustration of the possible difficulties.

UK before & after BREXIT and off-shore jurisdictions – Alex Ruffel explained that the UK is not part of the Succession Regulation and therefore applies its own private International law. She presented the related English provisions and illustrated them with practical examples. She then stressed out the present uncertainty as to whether the UK should be considered as a third State with regard to the application of Article 34 of the Succession Regulation (renvoi). This problem will vanish post-Brexit and is the only before/after difference regarding successions. Concerning off-shore jurisdictions, she explained that although most have a common law system, creating a trust or a company is advisable to avoid further complications.

The concluding remarks were presented by Prof. Dieter Martiny who noted the willingness of the EU to ease the life of European citizens but stressed that many uncertainties remain and lay in the hands of the European Court of Justice.

Six vacancies in PIL and European civil procedure Erasmus School of Law (ERC project)

Erasmus School of Law (Erasmus University Rotterdam) has six vacancies in the area of private international law and civil procedure.

- One vacancy for an **Assistant professor Private International Law** for a period of max. five years. The position involves teaching and research in the area of private international law and international and European litigation. Start date is 1 August 2017 at the latest. The deadline to apply is **1 May 2017**. More information on the vacancy, the requirements and how to apply is available here.
- Five research positions (**2 PhD and 3 Postdoc positions)** within the **ERC Consolidator project 'Building EU civil justice: challenges of procedural innovations bridging access to justice' (EU-JUSTICE).**

This project, financed by the European Research Council, investigates how digitalisation, privatisation, self-representation, and specialisation trends influence access to justice in selected Member States, and what the repercussions are for the emerging EU civil justice system. Further information on the project, the vacancies, and how to apply is available here. The closing date is **14 April 2017**.

Book: Free movement of judgments and fair trial in the EU

The book Free Movement of Civil Judgments in the European Union and the Right to a Fair Trial (T.M.C. Asser Press/Springer, 2017), authored by Monique Hazelhorst, has just been published. It is the commercial edition of a PhD thesis succesfully defended at Erasmus School of Law (Rotterdam).

This book examines the attainment of complete free movement of civil judgments across EU member states from the perspective of its conformity with the fundamental right to a fair trial. In the integrated legal order of the European Union, it is essential that litigants can rely on a judgment no matter where in the EU it was delivered. Effective mechanisms for cross-border recognition and the enforcement of judgments provide both debtors and creditors with the security that their rights, including their right to a fair trial, will be protected. In recent years the attainment of complete free movement of civil judgments, through simplification or abolition of these mechanisms, has become a priority for the European legislator.

The text uniquely combines a thorough discussion of EU legislation with an in-depth and critical examination of its interplay with fundamental rights. It contains an overview and comparison of both ECtHR and CJEU case law on the right to a fair trial, and provides a great number of specific recommendations for current and future legislation.

With its critical discussion of EU Regulations from both a practical and a theoretical standpoint, this book is particularly relevant to legislators and policymakers working in this field. Because of the extensive overview of the functioning of the EU's mechanisms and of relevant case law it provides, the book is also highly relevant to academics and practitioners.

More information is available here.

Out now: T.W. Dornis, Trademark and Unfair Competition Conflicts – Historical-Comparative, Doctrinal, and Economic Perspectives, Cambridge University Press, 2017 (696 pages). (also available as Open-Access Resource on Cambridge Core)

Professor Tim W. Dornis (Leuphana Law School) has authored a book on trademark and unfair competition conflicts that has been released by Cambridge University Press a few weeks ago.

The official abstract kindly provided by the publisher reads as follows:

With the rise of internet marketing and e-commerce around the world, international and cross-border conflicts in trademark and unfair competition law have become increasingly important. In this groundbreaking work, Tim Dornis – who, in addition to his scholarly pursuits, has worked as an attorney, a public prosecutor, and a judge, giving him experience in both civil and common-law jurisdictions – presents the historical-comparative, doctrinal, and economic aspects of trademark and unfair competition conflicts law. The book should be read by any scholar or practitioner interested in the international aspects of intellectual property generally, and trademark and unfair competition law specifically. This title is available as Open Access.

Further information is available on the publisher’s website:

http://admin.cambridge.org/academic/subjects/law/intellectual-property/trademark-and-unfair-competition-conflicts-historical-comparative-doctrinal-and-economic-perspectives?format=HB