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.

Save the date! Conference on the "Europeanness" of European Private International Law: 2/3 March 2018, Berlin

Over the course of the last decades the European legislature has adopted a total of 18 Regulations in the area of private international law (including civil procedure). The resulting substantial degree of legislative unification has been described as the first true Europeanisation of private international law and even as a kind of "European Choice of Law Revolution". However, until today it is largely unclear whether the far-reaching unification of the "law on the books" has turned private international law into a truly European "law in action": To what extent is European private international law actually based on uniform European rules common to all Member States rather than on state treaties or instruments of enhanced cooperation? Is the way academics and practitioners analyse and interpret European private international law really different from previously

existing domestic approaches to private international law? Or is the actual application and interpretation of European private international law rather still influenced or even dominated by national legal traditions, leading to a re-fragmentation of a supposedly uniform body of law?

In order to discuss these (and other) questions Jürgen Basedow (Max Planck Institute Hamburg), Jan von Hein (University of Freiburg), Eva-Maria Kieninger (University of Würzburg) and Giesela Rühl (University of Jena) will be hosting a conference in **Berlin** on **2/3 March 2018**.

Registration will open later this year (We'll keep you posted!). Here is the Programme:

How "European" is European Private International Law?

Friday, 2 March 2018

9.00 am Registration

9.30 am Welcome addresses: *The Europeanisation of Private International Law*

- Prof. Dr. Dr. h.c. Jürgen Basedow, Max Planck Institute Hamburg (Germany)
- Prof. Dr. Giesela Rühl, University of Jena (Germany)
- Dr. Andreas Stein, Head of Unit, DG Justice and Consumers, European Commission

1st Part: Europeanness of Legal Sources

10.00 am *The relationship between EU and international Private International Law instruments*

- Speaker: Prof. Pietro Franzina, Università degli Studi di Ferrara (Italy)
- Commentator: Prof. Dr. Dr. h.c. Jürgen Basedow, Max Planck Institute Hamburg (Germany)

10.45 am Discussion

11.15 am Coffee break

11.45 am *The relationship between EU and Member State Private International*

Law

- Speaker: Prof. Johan Meeusen, Universiteit Antwerpen (Belgium)
- Commentator: Prof. Dr. Jan von Hein, University of Freiburg (Germany)

12.30 pm Discussion

1.00 pm Lunch break

2nd Part: Europeanness of Actual Court Practice

2.00 pm *The application of European Private International Law and the ascertainment of foreign law*

- Speaker: Prof. Marta Requejo Isidro, Max Planck Institute Luxembourg (Luxembourg)
- Commentator Prof. Paul Beaumont, University of Aberdeen (United Kingdom)

2.45 pm Discussion

3.15 pm Coffee break

3.45 pm *The application of European Private International Law and the role of national judges*

- Speaker: Prof. Agnieszka Frackowiak-Adamska, University Wroclaw (Poland)
- Commentator: Prof. Michael Hellner, Stockholms Universitet (Sweden)

4.30 pm Discussion

5.00 pm *The application of European Private International Law and the role of national court systems*

- Speaker: Prof. Xandra Kramer, Universiteit Rotterdam (Netherlands)
- Commentator: Prof. Pedro de Miguel Asensio, Universidad Complutense de Madrid (Spain)

5.45 pm Discussion

6.15 pm End of day 1

8.00 pm Conference dinner

Saturday, 3 March 2018

3rd Part: Europeanness of Academic Discourse and Legal Education

8.30 am *National styles of academic discourse and their impact on European Private International Law*

- Speaker: Prof. Sabine Corneloup, Université de Paris/Sorbonne (France)
- Commentator: Prof. Dário Moura Vicente, Universidade de Lisboa (Portugal)

9.15 am Discussion

9.45 am Coffee break

10.15 am *Overriding mandatory laws, public policy and European Private International Law*

- Speaker: Prof. Marc-Philippe Weller, University of Heidelberg (Germany)
- Commentator: Prof. Stephanie Francq, Université Catholique de Louvain (Belgium)

11.00 am Discussion

11.30 am *Legal education and European Private International Law*

- Speaker: Prof. Thomas Kadner Graziano, Université de Genève (Switzerland)
- Commentator: Prof. Gilles Cuniberti, Université de Luxembourg (Luxembourg)

12.15 pm Discussion

12.45 pm Lunch break

2.00 pm Panel discussion: *The future of European Private International Law in theory and practice*

- Opening statement: Karen Vandekerckhove, Former Head of Unit, DG Justice and Consumers, European Commission

- Discussants: Prof. Paul Beaumont, Prof. Gilles Cuniberti, Prof. Dr. Eva-Maria Kieninger Prof. Johan Meeusen, Prof. Marta Requejo Isidro

4.00 pm Concluding remarks

- Prof. Dr. Jan von Hein, University of Freiburg (Germany)

4.15 pm End of conference

EUFam's Project: A Report on the existing Internationally-Shared Good Practices

The EUFam's Project's Consortium is glad to announce that a new Report is available for download and consultation on the Project website.

The **Report on Internationally-Shared Good Practices,** drafted by the EUFam's Team of the Max Planck Institute Luxembourg for Procedural Law, is based on the outcomes of the International Exchange Seminar that was held at the Institute on 11-12 May 2017.

Over 80 experts – judges, practitioners, academics, EU policymakers, and national civil servants – took part to the lively discussion by sharing their knowledge, experiences, and views on the application of the existing EU PIL Regulations in family matters in their daily practice.

This new Report further enriches the set of tools offered by the Project's Consortium to the wider public, such as the National Case-Law Database, the Additional ECtHR Case-Law Index, the First Assessment Report on the Collected Case-Law, the Report on the Outcomes of an Online Questionnaire circulated in the past months, and several reports on national good practices.

Website: www.eufams.unimi.it

Facebook page: www.facebook.com/eufams

The new German choice-of-law rule for agency: Improved translation

Readers of our blog will recall that we posted a translation of the new German choice-of-law rule for agency last week. That translation, however, was misleading because it referred to the law "applicable to a contract between principal and agent", thus implying that the provision applies to the agency contract itself. The provision, however, is only meant to fill the gap left by Article 1(2) lit. g) of the Rome I Regulation. It is, therefore, limited to the agent's authority (granted by contract). We thank an attentive reader for making this point and offer the following revised translation of the newly adopted Article 8 of the German Introductory Law to the German Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch – BGB):

> *(1) An agent's authority is governed by the law chosen by the principal before the agency is exercised, if the choice of law is known to both agent and third party. Principal, agent and third party are free to choose the applicable law at any time. The choice of law according to Sentence 2 of this Paragraph takes precedence over Sentence 1.*
>
> *(2) In the absence of a choice under Paragraph 1 and if the agent acts in exercise of his commercial activity, the agent's authority is governed by the substantive provisions of the country in which the agent has his habitual residence at the time he acted, unless this country is not identifiable by the third party.*

(3) In the absence of a choice under Paragraph 1 and if the agent acts as employee of the principal, the agent's authority is governed by the substantive provisions of the country in which the principal has his habitual residence, unless this country is not identifiable by the third party.

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

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

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

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

(8) The habitual residence in accordance with this Article is to be determined in line with Article 19, Paragraph 1 and 2, first alternative of Regulation (EG) No. 593/2008, provided that the exercise of the agency replaces contract formation. Article 19, Paragraph 1 and 2, first alternative of Regulation (EG) No. 593/2008 does not apply, if the country according to that Article is not identifiable by the third party.

Mandatory Mediation Procedures v Effective Access to Courts: CJEU Sets Down Criteria

Authored by Alexandre Biard

To what extent can mandatory mediation procedures be compatible with consumers' right to access to the judicial system? The preliminary ruling of the First Chamber of the CJEU delivered on 14 June 2017 (case C-75/16, *Menini & Rampanelli v Banco Popolare – Società Cooperativa,* and the associated Opinion of the Advocate General) brings interesting clarifications on this issue at a time where several Member States have – or are about to – introduce mandatory alternative dispute resolution procedures into their national legislations.

In 2015, two Italian individuals brought an appeal before the District Court of Verona (*Tribunale Ordinario di Verona*, hereafter "the referring court") against an order for payment obtained against them by the credit institution Banco Popolare. The order required them to pay the amount of 991,848 EUR corresponding to the balance that remained outstanding under a contract signed between the parties in 2009. However, as the referring court noted, under Italian law (Legislative Decree 28/2010), an application to have an order set aside is admissible only if the parties have first initiated a mediation procedure. The referring court therefore requested clarifications on the interpretation of Directive 2013/11 ("ADR Directive") and Directive 2008/52 ("Mediation Directive"), and on the compatibility of Italian legislation with EU law.

The Court used this opportunity to set down the criteria that mandatory mediation procedures should fulfil in order to be compatible with consumers' right to judicial access in the EU (I). Furthermore, although the case does not bring a definitive answer on the articulation between the ADR Directive and the Mediation Directive, it nonetheless provides some clarifications on the hierarchy and relationship between those two directives (II).

(I) Admissibility Criteria for Mandatory Mediation Procedures in the EU

The referring court sought to clarify whether the mandatory mediation procedure

imposed by Italian law is compatible with the provisions of the ADR Directive, whose Article 1 ambiguously provides that consumers can, on a "voluntary basis", submit complaints against traders by using ADR procedures, but also indicates that this is "without prejudice to national legislation making participation in such procedures mandatory (…)".

As the Court points out, "the voluntary" nature of ADR schemes does not lie in consumers' freedom of access, but in the freedom of process. In other words, what is important is not that the parties can choose whether or not to use ADR, but the fact that they should be "themselves in charge of the process, and may organise it as they wish and terminate it at any time". Put simply, "what is important is not whether the mediation system is mandatory or optional, but the fact that the parties' right of access to the judicial system is maintained". Therefore, the mere fact that a national legislation imposes a mandatory mediation procedure should not, as such, be regarded as being contrary to the provisions of the ADR Directive.

That said, the Court also acknowledges that mandatory mediation procedures introduce an additional layer of complexity for consumers. They may therefore ultimately prevent them from exercising their right to access to judicial bodies. While referring to and transposing the conditions set down by the Fourth Chamber of the CJEU in *Alassini and Others* (Case 317/08 to C-320/08 of 18 March 2010), which concerned a settlement procedure, the Court identifies six conditions for a mandatory mediation procedure to be compatible with the principle of effective judicial protection:

1. The mediation procedure should not result in a binding decision for the parties;
2. It should not cause substantial delays;
3. It should suspend the period for the time-barring of claims;
4. It should entail no (or very limited) costs;
5. Electronic means should not be the only means by which the procedure can be accessed; and
6. Interim measures should remain possible in exceptional circumstances.

It is up to the referring court to assess whether the mandatory procedure under consideration indeed complies with the criteria set above.

In parallel, national legislations should not include obligations deemed too burdensome for consumers. In particular:

- National legislation may not include an obligation for consumers to be assisted by a lawyer when they take part in a mediation procedure. This is in accordance with Article 8(b) and 9 of the ADR Directive; and
- Legislation should not authorize consumers to withdraw from a mediation procedure only under the condition that they can demonstrate valid reasons to do so. In accordance with Article 9(2) of the ADR Directive, such a withdrawal should remain possible at any time.

(II) Preliminary Clarifications on the Relationship Between the ADR Directive and the Mediation Directive

The referring court also sought to clarify the respective scopes of the Mediation Directive and the ADR Directive, as well as their articulation. In particular, the Italian court requested clarifications on whether the provisions of those two directives overlap, or if, on the contrary, the Mediation Directive only governs cases to which the ADR Directive does not apply.

The Court ultimately took the view that reference to the Mediation Directive was here not relevant as the Directive only applies to cross-border situations, which is not the case in the present situation (the litigants being all located in Italy). Although the Court did not address this issue, the conclusions of the Advocate General nonetheless provided some interesting food for thought. The latter indeed considered that, if a conflict between those two directives should arise, the Mediation Directive should, in his view, ultimately prevail. This is because Article 3(2) and Recital 19 of the ADR Directive clearly provide that the Directive "shall be without prejudice to Directive 2008/52/EC".

This decision is an important step towards combining consumers' effective access to judicial bodies on the one hand, and the use of mandatory alternative dispute resolution schemes on the other hand. The key issue is now to see how those criteria will be applied by national courts, and if they are likely to constitute sufficient safeguards to preserve consumers' rights in the EU.

Now on Video: Paris, 12 May 2017 –Symposium on the Recast of the Brussels IIbis Regulation

On Friday, 12 May 2017, Professor *Sabine Corneloup* and *Alexandre Boiché* organized a symposium on the recast of the Brussels II*bis* Regulation in Paris (see our previous post here). The symposium brought together experts from the academic and institutional worlds as well as from the bar, who shared their experience in order to work together to reach solutions to the problems and shortcomings observed. The conference has been recorded on video; the clips are now available here.

New Website on European Civil Procedure

Prof. Albert Henke (scientific coordinator) has set up a new website on European Civil Procedure. Its goal is to keep academics, professionals, students and all those involved in cross-border litigation in Europe updated about current trends and recent developments in legislation, case law and literature in this area, as well as to create an open educational resource and possibly promote scientific partnerships among Universities, Centres of Research and Institutions active in the field.

The website has been set up within the Jean Monnet Module on European Civil Procedure in a Comparative and Transnational Perspective, a teaching and research project funded by the EU and hosted by Università degli Studi in Milan.

The website is still under construction.

Solar Award Against Spain Confirmed in NY, Spain Moves for Annulment

The ICSID award in case *Eiser Infrastructure Limited and Energía Solar Luxembourg SARL v. Kingdom of Spain*, case number ARB/13/36, concluding that Spain had violated the Energy Charter Treaty, has been recognized on an ex parte petition by a New York court on June 27. Further information can be found here, edited by K. Duncan.

The award was issued on May 4 by an International Centre for Settlement of Investment Disputes tribunal after it unanimously determined that Spain had violated its international obligations to the companies by upending a series of subsidies aimed at encouraging investment in the renewable energy sector, several years after the companies sunk more than €126 million into three solar plants. The award also includes additional interest.

The case is *EISER Infrastructure Limited et al v. Kingdom of Spain*, case number 1:17-cv-03808, in the U.S. District Court for the Southern District of New York. Spain is seeking annulment of the decision for violation of the FSIA (1976).

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