Conference Report: Annual meeting of the Alumni of the Hague Academy of International Law/Hamburg 2017 – Thorn and Lasthaus on Brexit and Private International Law

By Stephan Walter, Research Fellow at the Research Center for Transnational Commercial Dispute Resolution (TCDR), EBS Law School, Wiesbaden, Germany, and attendee of the 2017 Summer Courses on Private International Law at the Hague Academy of International Law

On 13 October 2017, the Alumni of the Hague Academy of International Law/Hamburg, the German section of Attenders and Alumni of the Hague Academy of International Law, A.A.A., hosted their annual meeting. At the invitation of Professor Karsten Thorn (Bucerius Law School, Hamburg), who lectured a Special Course on "The Protection of Small and Medium Enterprises in Private International Law" at the Academy during the 2016 Summer Courses, the meeting was held at Bucerius Law School, Hamburg. The academic programme consisted of four presentations, two of them dealt with issues of Private International Law after Brexit.

Professor Karsten Thorn's presentation on "European Private International Law after Brexit" was divided into two parts. In the first part he discussed direct legal consequences of Brexit on Private International Law in relations between the United Kingdom (in particular England) and Germany. He highlighted the importance of Union Law and especially the duties to recognise derived from the fundamental freedoms for the rise of England as a legal hub. Therefore, Brexit would have grave consequences for the attractiveness of England in a number of legal areas. This would apply, for example, to company law. Whereas under Union Law the recognition of a company established in accordance with the law of one Member State must not be refused by another Member State, each Member State

would apply its own rules on this issue post-Brexit. This could also impact companies established before Brexit, although it was disputed whether this would infringe their legitimate expectations and if so, whether this protection was subject to a certain time limit. In any event, the companies should act rather sooner than later to avoid any legal uncertainty. Comparable issues would arise in insolvency law. First and foremost, there would be – in contrast to the current legal situation – no duty for a Member State's court to recognise a decision of an English court on the existence of the centre of the debtor's main interests (COMI) in England anymore. Again, each Member State would apply its national rules on the recognition of foreign insolvency proceedings. Secondly, an English scheme of arrangement, a court-approved private debt restructuring solution, would likely not be recognised by the Member States after Brexit. By contrast, fewer negative consequences would arise with regard to the right to a name because even now Article 21 TFEU only guaranteed the recognition of a name rightfully obtained in the EU citizen's State of nationality or residence and this freedom is further limited by the Constitution of the recognising Member State. Finally, he highlighted the negative impact of Brexit on procedural law. Post-Brexit, English decisions will no longer benefit from mutual trust in the EU Member States. A revival of bilateral treaties with Member States or instruments of the Hague Conference could only serve as sectoral solutions. Under these conditions, he presumed an increased usage of arbitration in the UK post-Brexit, not least because the United Kingdom is a Contracting State to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Moreover, he pointed out that English courts would return to traditional instruments of the English procedural law such as anti-suit injunctions. The second part of his presentation dealt with indirect consequences of Brexit on the European Private International Law. Firstly, he submitted that a number of provisions in EU legislation can be regarded as legal transplants from English law. This applies, e.g., to Article 9 paragraph 3 Rome I Regulation and Article 6 lit. a EU Succession Regulation. In his opinion, post-Brexit at least the former provision will be discarded after a revision of the respective EU legislation. Secondly, he turned to the question of the usage of English as working language of the EU bodies. He stated that most EU legislation was drafted in English. Because legal English was very different to the legal language used in all other Member States this was still noticeable in the official translations. Therefore, English shaped the spirit of the EU legislation. Although he believed that English would still be the dominant language in the EU bodies after Brexit, he argued that the continental legal

thinking could gain more significance.

In her presentation on “Pluralism of Legal Sources with regard to International Choice of Court Agreements”, Caroline Lasthaus (Bucerius Law School, Hamburg) examined – after a brief overview of the interplay between the German autonomous national rules on jurisdiction, the Brussels I Regulation Recast, the 2007 Lugano Convention and the 2005 Hague Choice of Court Convention –options of the United Kingdom to foster the enforcement of choice of court agreements in favour of UK courts post-Brexit. An accession to the 2007 Lugano Convention would require either the membership of the United Kingdom in the European Free Trade Association or a unanimous agreement of the Contracting Parties. However, both options were, in her opinion, unlikely. Furthermore, the rules of the 2007 Lugano Convention would be outdated and the United Kingdom would have to accept the CJEU’s jurisdiction over questions of interpretation of the Convention. Therefore, she scrutinised whether an accession to the 2005 Hague Choice of Court Convention could be a suitable solution. The accession itself would not raise any difficulties, since the United Kingdom could accede to the Convention unilaterally. Hence, the decisive question was whether the Convention would serve the needs of the United Kingdom. Lasthaus argued that neither the applicability of the Convention only to international exclusive choice of court agreements nor the exclusion of agreements with a consumer would make the Convention less attractive for the United Kingdom. Moreover, both the Brussels I Regulation Recast and the 2005 Hague Choice of Court Convention would allow the choice of a neutral forum. However, she stressed that the Convention was rather strict with regard to the formal requirements of an agreement, whereas the Brussels I Regulation Recast followed a much more flexible approach. Even though a violation of formal requirements would not lead to the agreement to be null and void by virtue of the Convention, the Convention’s rules on recognition and enforcement would not apply to judgements rendered based on such an agreement. Finally, one crucial downside of the Convention would be the necessity of an exequatur procedure with regard to the judgements rendered based on a choice of court agreement. This would lead to higher costs for the litigants and to a longer procedure. As a result, she conceded that an accession to the 2005 Hague Choice of Court Convention could not mend all the consequences of the non-applicability of the Brussels I Regulation Recast post-Brexit. Nonetheless, an accession would still make sense for the United Kingdom and could also boost the conclusion of a worldwide Convention on the recognition

and enforcement of foreign judgements.

Both presentations were followed by lively discussions among the speakers and participants. It was agreed that the implementation of existing EU legislation into domestic law could not cushion the consequences of Brexit, especially because the fundamental freedoms would no longer apply to the United Kingdom. Additionally, it became clear once more that the final outcome of Brexit is still uncertain. In this vein, it is noteworthy from a Private International Law point of view that there was some disagreement on whether the United Kingdom would need to accede to the Convention at all or if it would still be a Contracting State of the Convention after Brexit by way of a succession of State.

Conference on International Sales, London, 16-17 April 2018

King's College School of Law is organising a conference on **Unity and Diversity in the Law of the International Sale of Goods.** This conference will bring together prominent academics and practitioners from all over the world to discuss pressing issues pertaining to international sales transactions.The focus will be on the UN Convention on Contracts for the International Sale of Goods. The speakers will explore the current state of the law of sale of goods by examining how sales contracts, particularly those used in international trade, are governed in the modern world. The central theme concerns two competing forces within the sale of goods law:

- Those leading to disintegration,
- Those pushing towards uniformity, consolidation and standardisation.

The conference will take place on 16-17th of April 2018 at King's College London. For more information and the programme, please click here.

For the registration page, please click here.

Conferenza annuale: Corti europee e giudici nazionali

On 30 October 2017 the Jean Monnet Module on European Civil Procedure will host its annual conference on ‘Corti europee e giudici nazionali’ in Milan. The conference language is Italian. For further information see here.

Cross-Border Business Crisis: a Conference in Rome

On 3-4 November 2017 the LUISS «Guido Carli» University School of Law, with the support of the International Law Association (Italian Branch) and the auspices of the International Insolvency Institute, will host in Rome a conference on «Cross-Border Business Crisis: International and European Horizons».

Three bilingual (English/Italian) sessions are scheduled: I) International and European Policies on Business Crisis (Chairperson: Luciano Panzani); II) Regulation 2015/848 within the European System of Private International Law (Chairperson: Stefania Bariatti); III) Cross-Border Insolvency and Italian Legal Order: Old and New Challenges (Chairperson: Sergio M. Carbone).

Speakers include academics and practitioners (Massimo V. Benedettelli, Giorgio Corno, Domenico Damascelli, Luigi Fumagalli, Anna Gardella, Lucio Ghia, Francisco J. Garcimartín Alférez, Antonio Leandro, Maria Chiara Malaguti, Fabrizio Marongiu Buonaiuti, Alberto Mazzoni, Paul Omar, Antonio Tullio, Robert van Galen, Francesca Villata, Ivo-Meinert Willrodt).

Most of them are members of the ILA-Italy Study Group on «Cross-Border

Insolvency and National Legal Orders» and will discuss the findings of their research during the conference.

Program and details on registration are available here

Out now: Encyclopedia of Private International Law!

Hard to believe, but true: The Encyclopedia of Private International Law, published by Edward Elgar and edited by Jürgen Basedow (Max Planck Institute Hamburg), Franco Ferrari (NYU Law School), Pedro de Miguel Asensio (Universidad Complutense de Madrid) and me, has finally been released end of September. Bringing together more than 180 authors from 57 countries the Encyclopedia sheds light on the current state of Private International Law around the globe and provides insights into how the discipline has been affected by globalization and increased regional integration over the last decades.

The Encyclopedia is available both in print and via Elgaronline and consists of four volumes. The first two volumes describe topical aspects of Private International Law in form of 247 alphabetically sorted entries. The third volume describes the Private International Law regimes of 80 countries in form of national reports. The fourth volume contains a collection of national codifications and provisions of Private International Law in English translation. More information is available here and here.

I take the opportunity to thank everybody who has helped to make the Encyclopedia come true, notably the authors and translators (many of them editors or readers of this blog), my fellow editors, my team at the University of Jena and last but not least the team over at Edward Elgar!

Should you be interested in receiving a review copy please send an email to reviews@e-elgar.co.uk.

Court of Appeal allows in England claims against English-based multinational for overseas human rights violations

Written by Ekaterina Aristova, PhD in Law Candidate, University of Cambridge

On 14 October 2017, the London's Court of Appeal passed its long awaited decision in *Lungowe v Vedanta* confirming that foreign citizens can pursue in England legal claims against English-based multinationals for their overseas activities.

In 2015, Zambian villagers commenced proceedings against Vedanta, an English-based mining corporation, and its indirect Zambian subsidiary, KCM, alleging responsibility of both companies for the environmental pollution arising out of the operation in Zambia of the Nchanga Copper Mine by KCM. In 2016, the High Court allowed claims against both companies to be heard in England. The overall analysis of the judgement (see the author's earlier post on this blog) suggested that (1) claims against the parent company on the breach of duty of care in relation to the overseas operations of the foreign subsidiary can be heard in the English courts and (2) the existence of an arguable claim against the English-domiciled parent company also establishes jurisdiction of the English courts over the subsidiary even if the factual basis of the case occurs almost exclusively in the foreign state. The Court of Appeal has entirely upheld a High Court ruling.

Vedanta has focused their argument on the fact that Article 4 of the Brussels I Regulation Recast does not automatically allow an English-domiciled parent company to be sued in England and, despite the CJEU's ruling in *Owusu v Jackson*, there is always discretion as to whether the English court should allow the claims to be tried in England. In response, the three appeal judges were very clear in confirming the univocal effect of *Owusu* decision which precludes English

courts from declining a mandatory jurisdiction to try claims against the English-domiciled defendant. Logically, analysis further moved to KCM's applications. KCM as a foreign defendant was brought into proceedings on the basis of a 'necessary or proper party' gateway under the English traditional rules of jurisdictions. It allows service out of the jurisdiction subject to two additional conditions: (1) there is between the claimant and English-domiciled defendant a real issue which it is reasonable for the court to try; and (2) England is the proper forum for trying the claims. Unsurprisingly, an initial question of whether uncustomary claims alleging liability of the local parent company for overseas damages are viable in England was a major stumbling block for the corporate defendants.

First of all, Lord Justice Simon, who delivered a leading judgement, confirmed that absence of the reported cases on the breach of duty of care by the parent company owed to the persons affected by its subsidiary's operations does not automatically render such a claim unarguable. He then relied on several well-known English cases to derive basic principles for the imposition of such duty of care on the parent company: (1) The three-part test of foreseeability, proximity and reasonableness set out in *Caparo Industries Plc v Dickman* constitutes a starting point of the analysis; 2) A duty of care may be owed, in appropriate circumstances, to the employees of the parent company and those directly affected by the subsidiary's operations; 3) Such a duty of care arises when the parent company has taken direct responsibility for devising a material health and safety policy the adequacy of which is the subject of the claim, or controls the operations which give rise to the claim; 4) Some of the circumstances in which the existence of the duty of care may, or may not, be established can be traced in *Chandler v Cape* and *Thompson v The Renwick Group*; 5) It is necessary to determine whether the parent company was well placed, because of its knowledge and expertise to protect the claimants; proving that parent company and the subsidiary run the same business is not sufficient; (6) The evidence sufficient to establish the duty may not be available at the early stages of the case. Following these principles, it was concluded that, irrespective of the strength or the weakness of the claim against the parent company (as opposed to the claim against the subsidiary as an operator of the mine) and in light of the supporting evidence already presented by the claimants, the claim against Vedanta cannot be dismissed as not properly arguable.

The Court of Appeal's decision is particularly interesting for two reasons. The first issue relates to how its conclusions should be approached in the context of similar environmental litigation against English-based multinational in *Okpabi v Shell*. Earlier this year, Fraser J, sitting as a judge in the Technology and Construction Court, ruled that a claim against English-based parent company and the Nigerian subsidiary of the Shell group for oil pollution in Nigeria will not proceed in the English courts. The judge himself did not make any conclusions which would question the ultimate decision reached by the two instances in *Lungowe v Vedanta*. More importantly, his analysis fairly suggests that determination of the parent company liability should be approached on a case-by-case basis weighing the particular characteristics of the corporate organisation of the group and the nexus between the parent company and its subsidiaries (see the author's earlier post on this blog). Nevertheless, the reasoning of Fraser J could be criticised for the scrupulousness of identifying whether sufficient evidence on each factor of the duty of care test was presented by the claimants at such an early stage of the proceedings. The jurisdictional inquiry into existence of an arguable claim against the parent company should not substitute the determination of the substantive argument and the trial itself. This approach was rightly emphasised by the Court of Appeal in *Vedanta*. By contrast, thorough analysis of the liability argument carried by Fraser J in *Okpabi v Shell* is arguably very close to the resolution of the case on the merits. The decision was appealed by the claimants, the Nigerian citizens, on these very grounds.

The second set of issues arises from the Court of Appeal's reluctance to engage in the discussion of the regulatory significance of the litigation against major transnational corporations for their overseas operations in the English courts. In the course of appeal's hearing Vedanta argued that allowing cases against English multinationals in their home state was not in the public interest. The judgement itself refrained to consider whether public interest factors have any impact on the jurisdictional inquiry in the disputes concerned with the private interests of the litigants. Therefore, foreign direct liability claims against powerful corporate groups were placed in the context of conventional theoretical public/private divide of the rules of private international law. The Parliament and the Government have at least twice engaged into discussion of the UK role in promoting responsibility and ensuring accountability of its companies in the course of 2009 and 2017 human rights and business inquiries. Further increase in the number of legal claims against English-based transnational corporations

brought by the foreign citizens in the English courts may revive interest in the role of the discipline of private international law to take part in the global governance debate.

Conference: The well-being of children in international child abduction cases, Antwerp, 23-24 November

Child Focus, the University of Antwerp, Center IKO, CFPE-Enfants Disparus, Missing Children Europe and the French Central Authority invite you to the final conference of their research project, EWELL, co-funded by the European Commission.

The project partners conducted a large scale research study on the psychological effects of international child abduction on the well-being of abducted children. Their results will be presented at the final conference. This will be conbined with workshops on topics of psychology and law (including Brussels IIa).

The full programme is available here.

This conference is free of charge, but registration is required.

Travel and accommodation expenses will not be reimbursed.

Postdoctoral fellowships in commercial private international law / international commercial law, Johannesburg

Postdoctoral fellowships in commercial private international law / international commercial law are available at the Research Centre for Private International Law in Emerging Countries at the University of Johannesburg.

See the application form here.

The submission link is here.

The closing date is **31 October 2017**.

For administrative enquires: Ms Dudu Mbatha rdmbatha@uj.ac.za

For academic enquiries: Prof Jan Neels jlneels@uj.ac.za

Prix du Livre Juridique awarded to Éléments d'histoire du droit international privé

On Saturday, October 7, Professor Bertrand Ancel's *Éléments d'histoire du droit international privé* , already presented here, was awarded the Prix du livre juridique at the Salon du livre juridique du Conseil Constitutionnel.

As Professor Ancel said in his thank you speech, *Éléments d'histoire du droit international privé* is the fruit of more than fifteen years of teaching in the history of private international law. Bertrand Ancel was an associate in private law and criminal sciences, specializing in civil law, comparative private law and private international law, but was not prepared to teach legal history. He has devoted himself to the writing of these *Éléments* out of passion for an area whose knowledge embraces both Greco-Roman Antiquity and the Middle Ages and the contemporary world. Written on the eve of the twenty-first century, the book is an extension of the great works in French by Armand Lainé, Eduard Maurits Meijers and Max Gutzwiller prior to the Second World War, to which *Elements of History of Private International Law* pays tribute. Thus aggregated, *Éléments* give an innovative view of the history of private international law.

Provided with appendices and an extensive bibliography, this work of more than six hundred pages allows to read "l'inlassable réflexion doctrinale et les leçons d'une expérience sans cesse renouvelée des cas concrets". It is dedicated especially to master's students to whom this reflection offers a look at the positive data – essentially case law- and doctrinal constructions. Without history, it remains difficult to understand all the subtleties of private law: "la démarche historique restitue l'expérience" and "l'histoire est ici encore plus qu'ailleurs l'antidote du dogmatisme et l'indispensable auxiliaire de qui entreprend de connaître le droit international privé d'aujourd'hui". The reader will also find the most important judicial decisions and the most significant doctrinal comments.

Source: Université Paris II (Panthéon-Assas)

Conference in Macerata (25 October 2017): Freedom of Movement of Persons in the EU

and the Continuity of Family Status – Problems concerning Registered Partnerships and Cohabitation

(I am grateful to Prof. Fabrizio Marongiu Buonaiuti for providing this presentation of the Macerata conference)

The European Documentation Centre (EDC) established at the **Department of Law of the University of Macerata** is hosting a Conference (in Italian) on **Wednesday, 25th October 2017**, as part of a programme of initiatives launched by the European Commission's Permanent Representation to Italy for celebrating the 60th Anniversary of the Treaties of Rome: **"60 anni di libertà di circolazione delle persone nell'Unione europea e continuità degli status familiari: la problematica delle unioni civili e delle convivenze"** (60 Years of Freedom of Movement of Persons in the European Union and the Continuity of Family Status: Problems concerning Registered Partnerships and Cohabitation).

The Conference deals with the implications for the freedom of movement of persons within the EU of the problems related to the continuity of family *status* acquired abroad, with particular regard to registered partnerships and cohabitation. A discussion on this topic appears particularly timely, in consideration of the recent adoption by the Italian legislature of both the substantive regulation of registered parterships (unioni civili) and cohabitation (convivenze) under law No. 76 of 20 May 2016, and the relevant conflict of laws rules, as set out in Legislative Decree No. 7 of 19 January 2017. The parallel developments taking place at the European Union level will also be taken into consideration, with particular regard to the recent adoption, by the implementation of an enhanced cooperation, of Regulation (EU) No. 1104/2016, concerning jurisdiction, applicable law and the recognition and enforcement of judgments in matters of the property consequences of registered partnerships.

Here is the programme (available as .pdf; all presentations will be delivered in Italian):

Introductory remarks

- *Prof. Francesco Adornato* – Dean of the University of Macerata
- *Prof. Ermanno Calzolaio* – Director of the Department of Law

Ist Session: Freedom of Movement of Persons and Continuity of Personal and Family Status

Chair: *Prof. Angelo Davì*, University of Rome "La Sapienza"

- Registered Partnerships and Freedom of Movement of Persons in the European Space of Freedom, Security and Justice – *Prof. Claudia Morviducci*, University of Rome III
- European Guarantees and Rules concerning Continuity of *Status* as concerns Same-Sex Marriages and Registered Partnerships – *Prof. Francesco Salerno*, University of Ferrara
- Italian Conflict of Laws Rules concerning Registered Partnerships under Legislative Decree No. 7 of 19 January 2017 – *Prof. Cristina Campiglio*, University of Pavia
- Private International Law Rules concerning the Property Consequences of Registered Partnerships under Regulation (EU) No. 1104/2016 – *Prof. Gian Paolo Romano* – University of Geneva

Discussion

2nd Session: The Substantive Regulation of Registered Partnerships and Cohabitation in the Italian Legal System and Unsolved Problems

Chair: *Prof. Enrico del Prato*, University of Rome "La Sapienza"

- The Substantive Regulation of Same-Sex Registered Partnerships under Law No. 76 of 20 May 2016 – *Prof. Michele Sesta*, University of Bologna
- The Substantive Regulation of Cohabitation under Law No. 76 of 20 May 2016 – *Prof. Ubaldo Perfetti*, University of Macerata
- Adoption by Partners of Registered Partnerships – *Prof. Enrico Antonio Emiliozzi*, University of Macerata
- Problems Concerning the Registration of Partnerships Created Abroad in the Italian Civil *Status* Records – *Dr. Renzo Calvigioni* – National Association of Civil Status Officials

Discussion

Concluding Remarks