# 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.

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# 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.

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# 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**.

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# 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.

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# 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

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# Job Vacancy: PhD Position/Fellow at the University of Bonn, Germany

The Institute for Private International and Comparative Law, University of Bonn, Germany, is looking for one highly skilled and motivated PhD candidate and fellow (Wissenschaftliche/r Mitarbeiter/in) on a part-time basis (50%) as of 1 June 2017.

The successful candidate holds a first law degree (ideally the First German State Examination) and is interested in the international dimensions of private law, in particular private international law, European law and/or comparative law. A very good command of German and English is expected; good IT skills are required.

The fellow will be given the opportunity to conduct his/her PhD project (according to the Faculty's regulations). The position is paid according to the German public salary scale E-13 TV-L, 50% (about 1300 Euro net per month). The initial contract period is two to three years, with an option to be extended. Responsibilities include supporting the Institute's director, Professor Dr Matthias Lehmann, in his research and teaching as well as independent teaching obligations (2 hours per week during term time).

If you are interested in this position, please send your application (cover letter in

German; CV; and relevant documents and certificates, notably university transcripts and a copy of law degree) to lehrstuhl.lehmann@jura.uni-bonn.de by April 10, 2017. The University of Bonn is an equal opportunity employer.

The job advert in full detail is accessible here.

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# Brexit: An Opportunity for Frankfurt to Become a New Hub of Litigation in Europe?

On March 30, 2017, the Minister of Justice of the Land Hessen (Federal State of Hesse), Eva Kühne-Hörmann, will organise a conference in Frankfurt to present the „Justizinitiative Frankfurt“ (Justice Initiative Frankfurt). This initiative was launched by Professor Hess (MPI Luxembourg for Procedural Law), Professor Pfeiffer (Heidelberg University), Professor Duve (Freshfields Bruckhaus Deringer) and Professor Poseck (President of the Frankfurt Court of Appeal). It suggests strengthening the regional and the higher regional courts in order to attract more financial disputes to Frankfurt. The initiative envisages both organisational and procedural improvements in order to raise the attractiveness of the courts in Frankfurt. The government of Hessen has endorsed the proposals which will be presented and discussed at the conference. The programme of the conference, together with a registration form (to be sent the 24 March at the latest), can be found here.

*Venue: Foyer des Präsidialgebäudes der Goethe-Universität Frankfurt am Main, Campus Westend, Theodor-W.-Adorno-Platz 1, 60323 Frankfurt am Main.*

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# The second meeting of the Special Commission charged with preparing the future Hague Convention on judgments

The Special Commission set up by the Council on General Affairs and Policy of the Hague Conference on Private International Law to prepare a preliminary draft convention on the recognition of judgments in civil and commercial matters (the Judgments Project) met for the second time between 16 and 24 February 2017.

Building on the draft text elaborated in 2016, the Special Commission completed a new draft (the February 2017 draft Convention), which should form the basis for a new round of discussions in November 2017.

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# Thank you, Martin, for 10 years of conflictoflaws.net!

Dear Martin, dear all,

We would like to take the opportunity and thank you, Martin, very much for setting up and taking care of the blog for more than 10 years! Under your supervision the blog has developed into one of the leading and most influential platforms in the field of conflict of laws and this is a great achievement.

We also thank you and the other editors for entrusting us with the responsibility for this blog, and we will certainly try to continue its success story in close cooperation with all editors and readers. We will keep you posted on how we will proceed in the future and hope for your continued support and input.

Giesela and Matthias

# Private International Law in an Era of Globalisation (paper)

A short working paper by Veerle Van Den Eeckhout on Private International Law in an Era of Globalisation has been published on SSRN. It is written in Dutch.

The English abstract reads as follows:

In times of (discussions about) globalisation, due attention must be given to the operation of rules of private international law. Examination of the ongoing developments in private international law itself and in private international law in its interaction with other disciplines from the perspective of “protection of weak parties” and “protection of planetary common goods” allows carrying out the analysis to which current developments invite.