“Oops, they did it again” – Remarks on the intertemporal application of the recast Insolvency Regulation

Robert Freitag, Professor for private, European and international law at the University of Erlangen, Germany, has kindly provided us with his following thoughts on the recast Insolvency Regulation.

It is already some time since regulation Rome I on the law applicable to contractual obligations was published in the Official Journal. Some dinosaurs of private international law might still remember that pursuant to art. 29 (2) of regulation Rome I, the regulation was (as a general rule) supposed to be applied “from” December 17, 2009. Quite amazingly, art. 28 of the regulation stated that only contracts concluded “after” December 17, 2009, were to be governed by the new conflicts of law-regime. This lapse in the drafting of the regulation gave rise to a great amount of laughter as well as to some sincere discussions on the correct interpretation of the new law. The European legislator reacted in time by publishing a “Corrigendum” (OJ 2009 L 309, p. 87) clarifying that regulation Rome I is to be applied to all contracts concluded “as from” December 17, 2009.

Although one can thoroughly debate whether history generally repeats itself, it obviously does so on the European legislative level at least with regard to the intertemporal provisions of European private international law. The 2015 recast regulation on insolvency proceedings (Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, p. 19) has, according to its art. 92 (1), entered into force already on June, 26, 2015. However, the European legislator has accorded a lengthy transitional period to practitioners and national authorities. The recast regulation therefore foresees in art. 92 (2) that it will only be applicable “from” June 26, 2017. This correlates well with art. 84 (2) of the recast regulation, according to which “Regulation (EC) No 1346/2000 shall continue to apply to insolvency proceedings which fall within the scope of that Regulation and which have been opened *before* 26 June 2017”. Since the old regime will be applicable only before June 26, 2017,

the uninitiated reader would expect the new regime to replace the current one for all insolvency proceedings to be opened "as of" or "from" June 26, 2017. This is, hélas, not true under art. 84 (1) of the recast regulation which states that "[…] this Regulation shall apply only to insolvency proceedings opened *after* 26 June 2017." The discrepancy between the two paragraphs of art. 84 is unfortunately not limited to the English version of the recast regulation; they can be observed in the French and the German text as well. The renewed display of incompetence in the drafting of intertemporal provisions would be practically insignificant if on June 26, 2017, all insolvency courts will be closed within the territorial realm of the recast regulation. Unfortunately, June 26, 2017 will be a Monday and therefore (subject to national holidays) an ordinary working day even for insolvency courts. The assumption seems rather farfetched that on one single day next summer no European insolvency regime at all will be in place and that the courts shall – at least for one day – revert to their long forgotten national laws. Art. 84 (1) of the recast regulation is therefore to be interpreted against its wordings as if stating that the new regime will be applicable "as of" (or "from") June 26, 2017. This view is supported not only by art. 92 (2) and art. 84 (2), but also by art. 25 (2). The latter provision obliges the Commission to adopt certain implementation measures "by 26 June 2019".

It would be kind of the Commission if once again it would publish a corrigendum prior to the relevant date. And it would be even kinder if the members of the "European legislative triangle", i.e. the Commission, the European Parliament and the Counsel, would succeed in avoiding making the same mistake again in the future although there is the famous German saying "Aller guten Dinge sind drei" and it is time for an overhaul of regulation Rome II namely with respect to claims for damages for missing, wrong or misleading information given to investors on capital markets …

RIDOC 2016: Rijeka Doctoral

Conference

Rijeka Doctoral Conference is intended for doctoral candidates who wish to present and test their preliminary research findings before academics and practicing lawyers, as well as to discuss these findings with their peers. It is limited to topics of law or closely related to law, including of course private international law. RIDOC 2016 will be held on 2 December 2016 at the University of Rijeka Faculty of Law.
Details about the conference and call for papers are available here.

Journal of Private International Law Conference 2017

The next Journal of Private International Law Conference will take place in Rio de Janeiro, Brazil from 3-5 August 2017. We are now issuing a call for papers on any aspect of private international law. Abstracts of a maximum of 500 words should be sent to jprivintlrioconference2017@gmail.com by 15 November 2016. The previous conferences at Aberdeen, Birmingham, New York, Milan, Madrid and Cambridge have been extremely successful. The conference is the leading opportunity for private international law academics of all levels of seniority from around the world to gather together to advance our subject.

Speakers will not have to pay a registration fee for the conference but will be expected to fund their own travel expenses and accommodation costs. In addition, speakers will be expected to submit the finalised version of their articles for consideration for publication in the Journal of Private International Law in the first instance.

Regulatory competition in a post-Brexit EU

Dr. Chris Thomale, University of Heidelberg, has kindly provided us with the following thoughts on the possible consequences of Brexit for European private international law.

Hitherto, academic debate is only starting to appreciate the full ambit and impact a Brexit would have on the European legal landscape. Notably, two important aspects have been neglected, despite their crucial importance in upcoming negotiations about withdrawal arrangements between the EU and the UK under Art. 50 section 2 TEU: First, the vital British interest to leave in force the fundamental freedom of establishment. Second, a possible revival of regulatory competition of corporate laws among remaining Member States, once UK Limited Companies and Limited Liability Partnerships were to lose their EU or EEA status.

As *Hess* and *Requejo-Isidro* are correct in pointing out, Brexit will directly hit the UK judicial market. Brussels I*bis* and its ancillary instruments will cease to apply. It remains yet to be seen if and to what extent new bilateral or multilateral agreements with Member States will make up for this suspension of EU free movement of judgments. This includes an accession to the Lugano Convention, which in itself is due to be reformed. In the meantime, negotiations will have to be based on a default position, according to which not only EU secondary law on jurisdiction and enforcement but notably mutual trust with regard to its application by UK courts will be suspended. The latter aspect cannot be emphasized enough: British insolvency proceedings in particular have been displaying tendencies to find a Centre of Main Interest of companies and entire global corporate groups inside the UK, often based on hardly understandable factual assertions and the most laconic reasonings given by UK courts (see, e.g. the *Nortel* case).

The mentioned expansionist aspect of the UK judicial market neatly ties in with a similar regulatory export of corporate forms. Under the aegis of Art. 49 seqq. TFEU and Art. 31 seqq. of the EEA Agreement, UK companies profit from being recognised throughout the EEA in their original British legal form of

establishment, regardless of their actual place of management. This privilege has been incentivizing a common form of legal arbitrage: Investors establish a Ltd or LLP in the UK, while doing business anywhere else inside the EEA, thereby being able to circumvent mandatory rules applying at their state of business such as laws on co-determination, minimum capital, or mandatory insurance requirements. Such setups will not be available anymore once the UK were to leave the EEA. Putting it bluntly, from the moment UK effectively leaves the EU and the EEA, British companies operating e.g. in France or Germany will be subject to the corporate laws of their administrative seat. For these countries follow the 'real seat' theory, i.e. a conflict of company laws rule that designates the substantive law of the administrative seat as the applicable company law. UK companies not having to show any registration as, say, a *Société à responsabilité limitée* at their real seat, by default will immediately be treated as partnerships, entailing, *inter alia*, unlimited shareholder liability. In order to avoid this, UK companies operating inside the EU will be well advised to reincorporate, i.e. convert into a EU legal form, which better serves their economic interests.

However, will the UK simply let them go? Once Brexit becomes effective, the Directive 2005/56/EC on cross-border mergers will not apply anymore; neither will rulings rendered by the CJEU in *Cartesio* or *Vale*. Restrictions may be put into place, similar to those displayed by British authorities in *Daily Mail*, when corporate mobility required consent by UK Treasury. This may induce a corporate exodus from the UK while its EU membership is still active. Still, leaving UK company forms behind represents only one side of the deal. A second uncertainty rests with the question, exactly which new legal forms UK companies operating abroad will choose instead. Will they go for an Irish Private Company Limited by Shares, a Dutch *Besloten vennootschap met beperkte aansprakelijkheid* or a German *Gesellschaft mit beschränkter Haftung*? We could witness a revival of regulatory competition within the EU. However, even before that, Member States' interests in the Art. 50 section 2 TEU withdrawal negotiations, regarding the question of preserving or abolishing freedom of establishment between the UK and the EU, will be influenced by their individual prospects and ambitions in such regulatory competition. At this point, there is no telling, who will win the race nor whether it will lead to the top of legal reform or to the bottom of deregulation. Be this as it may, exciting days have found us – not only for game theorists.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2016: Abstracts

The latest issue of the "Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)" features the following articles:

F. Eichel, **Private International Law Aspects of Arbitration Clauses in Favor of the Court of Arbitration for Sport**
The validity of arbitration clauses in favor of the Court of Arbitration for Sport (CAS) has been called into question by German courts in the long running proceedings of Claudia Pechstein against the International Skating Union. The courts held that the arbitration clause in the athletes' admission form was void. They referred to provisions in German Civil Law (s. 138 German Civil Code – BGB; s. 19 Act against Restraints of Competition – GWB) which are recognized as being internationally applicable so that the German courts could apply them even though the validity of the arbitration clause was governed by Swiss law. The article reflects the Private International Law aspects of these arbitration clauses illustrating that both the relevant law of International Civil Procedure as well as the choice of law provisions primarily serve the interests of commercial arbitration and thereby reinforce the structural imbalance existing between the sports association and the athlete when signing such arbitration clauses. Against this background, the article argues that the special circumstances of sport arbitration would allow the application of the German law of standard terms (s. 307 BGB) although it is, in principle, not considered to form part of the general ordre public-reservation in Private International Law.

Th. Pfeiffer, **Ruhestandsmigration und EU-Erbrechtsverordnung**
From a German perspective, the most significant change that was brought about by the EU Succession Regulation is the transition from referring to the deceased's nationality as the general connecting factor to the deceased's habitual residence. This transition reflects an analysis of interests which is primarily based on cases

of migrant professionals or workers and their families. However, there is also a large group of migrants already retired at the time of their migration (e.g. the large group of German pensioners on the Spanish island of Mallorca). Their situation is different from migrant workers insofar as their migration occurs at a moment when the most significant decisions in their lives have been made already; as a consequence, migration at that age, usually, does not include following generations. Moreover, it is not unlikely that, in many cases, migrating pensioners, when planning for their estates, will not consider the laws of their new habitual residence. Based on this analysis, this article asks how the EU Succession Regulation addresses these particularities of migrating pensioners. In particular, it is discussed under which circumstances the laws of their home state (based on their nationality) may remain applicable. In this context, the article considers: (1) provisions which do not refer to the moment of deceased's death but to an earlier event, (2) the need for an appropriate definition of habitual residence, (3) the escape clause in Art. 21 (2) of the Regulation, (4) a choice of law by the deceased and (5) waivers of succession. The article concludes that the Regulation is open for applying the laws of the deceased's nationality to a certain extent but that this law must not be applied automatically if the principle of referring to the deceased's habitual residence is taken seriously.

A. Brand, **Damages Claims and Torpedo Actions – The Principle of Priority of Art. 29 para 1 Brussels I-Regulation with a particular focus on Cartel Damages Claims.**

Forum shopping by way of „Torpedo actions" is an unwanted means of a tortfeasor to secure the jurisdiction of their home country rather than having to defend themselves before the courts at the seat of the injured plaintiff. This has gained particular relevance in proceedings concerning cartel-damages claims. The race hunt to the court could and should be avoided by strictly applying the principles of procedural efficiency and fair trial and the requirement of a justified interest for an action for (negative) declaration. As under domestic law, the principle of priority as laid down in art. 29 para. 1 of the Brussels I-Regulation cannot be applied to torpedo actions in case of tort.

W.-H. Roth, **Jurisdictional issues of competition damages claims**

In its CDC-judgment the Court of Justice for the first time had the chance to rule on several issues of jurisdiction concerning cartel-inflicted damages. Claimant was an undertaking specifically set up for the purpose of pursuing such damage

claims that had been transferred to her by potential cartel victims. The Court deals with jurisdiction over multiple defendants (Art. 6 No. 1 Regulation EC 44/2001), the scope of tort jurisdiction (Art. 5 No. 3), based on the place where the event giving rise to the damage occurred and on the place where the damage occurred, and with the interpretation of jurisdiction clauses (Art. 23) potentially covering cartel-inflicted damage claims. The results reached and the arguments advanced by the Court, taken all in all, deserve applause. Given that the judgment deals with a setting of a follow-on action (with a binding decision by the EU-Commission) it will have to be clarified whether the main results of the judgment can also be applied in stand-alone actions.

R. Hüßtege, **A tree must be bent while it is young**

The Federal Constitutional Court of Germany reprimands that the district court in an adoption procedure did not use all sources of knowledge in accordance to the Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters and to the European Judicial Network, in order to determine whether an effective Romanian adoption exists. Due to this omission fundamental rights of the complainant were injured in the adoption case concerning the recognition of the Romanian decision. This case shows that instruments, like the mentioned regulation and the European Judicial Network in commercial and civil matters are not well known to courts. There is an urgent need for training of judges.

C. F. Nordmeier, **Lis pendens under art. 16 Brussels IIa and Art. 32 Brussels Ia when proceedings are stayed**

The case at hand deals with the decisive moment for lis pendens according to art. 16 (1) (a) Brussels IIa (equivalent to art. 32 (1) (a) Brussels Ia) if proceedings are stayed before service in order to reach an amicable arrangement. The provision contains an own obligation of the applicant. Whether a delay of service restrains lis pendens depends on the breach of this obligation being imputable to the applicant. Intention or negligence should not serve as a basis to impute the breach. The present contribution analyses different types of delay and its imputability: stay of proceedings to reach an amicable arrangement, deficiencies of the documents submitted for service and mistakes of the court while effecting service. For the continuance of lis pendens the author argues that a stay or an interruption of proceedings does not abolish the effects of lis pendens.

B. Heiderhoff, **Perpetuatio fori in custody proceedings**

Even if parents, as in the case at hand, have joint parental responsibility with the exception of the right to determine the child's place of residence, the parent who has the sole right to determine the child's place of residence may lawfully move abroad with the child. The other parent has to accept the complications in exercising parental responsibility. If the child is relocating its habitual residence to a state that is not a member state of the EU, but a signatory state to the Hague 1996 Children's Convention, the Convention must be applied. This is clearly stated in Art. 61 Brussels II-Regulation. Unlike Art. 8 Brussels II-Regulation, the 1996 Children's Convention does not follow the principle of perpetuatio fori. In order to prevent a parent from taking a child abroad during ongoing court proceedings, the courts should regularly consider an injunction by which the right to determine residence of the child is limited to Germany. This applies particularly when both parents have joint responsibility and merely the isolated right to determine the child's place of residence is assigned to one parent. If one parent has sole custody at the beginning of the procedure, the interests must be weighed differently. The right to move abroad with the child during the proceedings should, in general, only be excluded if there is a rather serious chance for the affected parent to lose sole custody.

U. P. Gruber, **How to modify decisions on maintenance obligations**

In scholarly writing, proceedings to modify decisions on maintenance obligations have only attracted limited attention. However, these proceedings raise very intricate und unsolved problems of characterization. The Bundesgerichtshof, in a new decision, has tackled some of the questions while leaving others unanswered. In the author's opinion, the modification of decisions on maintenance obligations is governed by the Hague Protocol of 23 November 2007. The convention's predecessor, the Hague Convention of 2 October 1973, also covered the modification of decisions, and it can be presumed that the Hague Protocol, as far as its scope is concerned, follows the Hague Convention. The procedural framework of the proceedings to modify decisions on maintenance obligations, however, is governed by the lex fori, i.e. the law of the state in which the proceedings to modify the decision are brought. The Hague Protocol of 23 November 2007 is part of EU law. Therefore, it seems likely that the ECJ will be requested to decide on the issue. Whether or not the ECJ will support the application of the Hague Protocol seems impossible to predict.

K. Siehr, **Execution of Foreign Order to Return an Abducted Child**

A child was abducted by his mother from Germany to Poland and after one year re-abducted by his father to Germany. Instead of asking German courts for a return order under the EU Regulation No. 2201/2003 on Matrimonial Matters and Matters of Parental Responsibility the father turned to Polish courts and asked for a return order. Such an order was turned down because the child, in the meantime, had been abducted by the father to Germany. The mother asked the Polish court for a return order and got it as an urgent order because of the habitual residence of the child in Poland. The mother asked German courts to recognize and enforce this Polish order to return the child to Poland. The Court of Appeals of Munich recognized and enforced the Polish return order. The Munich court did not recognize the return order neither under Art. 42 nor under Art. 28 et seq. Regulation 2201/2003 because relevant certificates were missing or some enforcement obstacles (hearing of the father in Poland) were given. The German court decided that the Polish return order should be recognized and enforced under the Hague Convention of 1996 on the Protection of Children without taking care of Art. 61 of the Regulation 2201/2003 which give precedence to the Regulation in this case. Jurisdiction of the Polish court is determined according to Art. 20 of the Regulation and Art. 11 of the Hague Convention of 1996 which granted only territorially limited jurisdiction to local courts in urgent matters. In this case, however, the child was not any more in Poland but in Germany. The German court is criticized because of not explaining properly the application of the Hague Convention of 1996 under Art. 61 of Regulation 2201/2003 and because of misinterpreting Art. 20 of the Regulation 2201/2203 and of Art. 11 Hague Convention by giving them universal jurisdiction.

D. Looschelders, **Problems of Characterization and Adaptation in German-Italian Successions**

German-Italian successions often raise difficult legal questions. In its decision, the Higher Regional Court of Duesseldorf firstly deals with the invalidity of joint wills under Italian law. The main part of the decision is concerned with problems of characterization and adaptation. In the present case, these problems arise due to the parallel applicability of Italian Succession Law and German Matrimonial Property Law. The author supports the decision in general. However, it is stated that the courts considerations with regard to the necessity of adaptation are not convincing in all respects. Finally, it is shown how the problems of the case were to be solved in accordance with the European Succession Regulation which was not yet applicable.

C. Mayer, **Ancillary matrimonial property regime and conflict of laws – characterization of claims arising from an undisclosed partnership between spouses.**

While it is generally agreed that the legal regime for undisclosed partnerships follows the law applicable to contractual obligations, there is debate as regards undisclosed partnerships between spouses. Due to their special connection with the matrimonial property regime, it is argued that compensation claims arising from undisclosed partnerships between spouses are to be characterized as matrimonial. Along with the prevailing opinion, the German Federal Court of Justice now correctly supports a characterization as contractual. Given, however, the close relation to the matrimonial property regime, the court proposes an accessory connection: the partnership agreement is closest connected to the law governing matrimonial property. Subject to criticism is, however, the far-reaching willingness of the court to find an implied choice of law by the spouses.

M. Stöber, **Discharge of Residual Debt and Insolvency Avoidance Actions in Cross-Border Insolvencies with Main and Secondary Proceedings**

15 years after the adoption of the European Regulation on Insolvency Proceedings in the year 2000, it is still difficult to answer the question which national insolvency law applies to cross-border insolvency proceedings within the European Union. The case that – in addition to main insolvency proceedings in one member state – secondary insolvency proceedings have been opened in another member state of the European Union is of particular complexity. In two recent judgments, the German Supreme Court has decided on the impact the opening of secondary proceedings in another state has on a discharge of residual debt (judgement of 18 September 2014) and on insolvency avoidance actions respectively (judgement of 20 November 2014) granted by the national law applicable to the main proceedings opened in the first state.

C. Kohler, **Claims for the payment of holiday allowances by a public fund for paid leave for workers: "civil and commercial" or "administrative" matters?**

By its ruling in BGE 141 III 28 the Swiss Federal Court refused to enforce in Switzerland an Austrian judgment according to which a Swiss company had to make payments to the Austrian fund for paid leave for workers in the construction industry that were due for workers posted to Austria by the defendant company. According to the Federal Court, the judgment is outside the scope of the Lugano-

Convention as it has not been given in a “civil and commercial matter” as required by art. 1 thereof. The ways and means by which the Austrian fund claimed the payments constituted the exercise of public powers and differed from the legal relationship between the parties to an employment contract. The author submits that the judgment of the Federal Court is not in line with the ECJ’s case-law on art. 1 of the Brussels instruments. In order to assess whether a case is a “civil and commercial matter”, one has to look not at the modalities for the enforcement but at the origin of the right which forms the subject matter of the proceedings. In the instant case the right to paid leave stems from the employment contract and is of a private law character. As the Federal Court sees no legal basis for the enforcement of the Austrian judgment outside the Lugano-Convention, its judgment leaves a gap in the judicial protection of posted workers’ rights as between Austria and Switzerland contrary to the objective of Directive 96/71 which applies according to the bilateral agreements between Switzerland and the EU.

Francisco Javier Zamora Cabot on the US Supreme Court case of Obb Personenverkehr AG v. Sachs

Francisco Javier Zamora Cabot has placed the following paper on SSRN:

Access of Victims to Justice and Foreign Conducts: The U.S.S.C. Gives Another Turning of the Screw in the Obb Personenverkeher V. Sachs Case, on Sovereign Immunity

The text is in Spanish, but the English abstract reads:

This Note addresses an outline and a critical approach of the Decision of the Supreme Court of the United States of America in Sachs case. After an introduction bringing to the fore in tune with the rulings made by the High Court in its recent and well-known jurisprudence, outstanding among which are Kiobel

and Daimler, we present the precedents of the case and the main arguments put forward by the reporting Justice Roberts. Such arguments are debated afterwards in a long and detailed way, following overall assessments on the Decision. With respect to our conclusive comments we refer to the possibility of introducing into both the US jurisdictional system and sovereign immunity the foundations of the methodological approaches of the US modern doctrine as far as the choice of the applicable law is concerned, advocating for a greater awareness on the part of the Supreme Court with regard to the critical problem of access to justice.

Brussels IIbis recast

The European Commission today published the Proposal for the Brussels IIbis Recast and issued a press release.

There are no changes to jurisdiction in divorce matters, but quite a few significant ones on parental responsibility.

The Proposed Regulation clearly seeks to **enhance children's rights**, referring explicitly to the EU's Charter of Fundamental Rights and to the UN Convention on the Rights of the Child (see recitals 13 and 23). It also introduces a separate provision on the obligation for courts to give children the opportunity to be heard (Art. 20).

Furthermore the Proposal aims to **improve the efficacy of return proceedings** after international parental child abduction. It requires Member States to concentrate the local jurisdiction for these procedures on a limited number of courts (Art. 22) and to limit the number of appeals to one (Art. 25(4)). It clarifies that the six-weeks time frame applies to each instance (Art. 23(1)). Courts will also have to examine the possibility of mediation and agreed solutions without losing time (Art. 23(2)).

As expected, the Commission seeks to **abolish exequatur proceedings** for all parental responsibility cases (Art. 30). The proposal contains a mechanism to request the refusal of recognition or enforcement (Arts. 40-42). This is similar to

the route eventually taken in Brussels Ibis (Regulation 1215/2012).

There are many other proposed changes, on issues such as provisional measures, cooperation, the resourcing of Central Authorities, the placement of children in another Member State and a better coordination with the 1996 Hague Child Protection Convention, but I will leave the reader to discover them.

On Mutual Trust and the Brexit (Seminar)

A new session within the series *Seminario Julio D. González Campos*, organized by the Department of Private International Law of the Universidad Autónoma de Madrid, will be held on July 8th, 2016, starting at 10:30 pm. The speaker will be Dr. Matthias Weller, Professor of Civil Law, Civil Procedural Law and Private International Law at the EBS Universität für Wirtschaft und Recht; he will address the topic "Mutual Trust: Still Corner Stone for Judicial Cooperation in Civil Matters after the Brexit?"

Venue: Seminar room V (4th Floor), Faculty of Law.

For further information please contact mariajesus.elvira@uam.es.

Just in Time: A New Volume on the Consequences of Brexit

Following the United Kingdom's popular vote to exit the European Union, a very timely book on the various legal, political and economic impacts of Brexit has just

been released: “Britain Alone! The Implications and Consequences of United Kingdom Exit from the EU” (Kluwer Law International 2016), edited by Professor *Patrick Birkinshaw* (Institute of European Public Law, University of Hull) and Professor *Andrea Biondi* (King’s College London), covers practical topics such as the options available to the UK, the effects of Brexit on the constitutional level, the existing and potential role of jurisprudence, post-Brexit residence and labour rights as well as financial and economic governance.

The table of contents reads as follows:

Introduction
Patrick Birkinshaw & Andrea Biondi.

Part I Constitutional Issues

CHAPTER 1 Britain Alone Constitutionally: Brexit and Restitutio in Integrum
Patrick Birkinshaw & Mike Varney.

CHAPTER 2 A Tale of Two Referendums: Scotland, the UK and Europe
Stephen Tierney & Katie Boyle.

CHAPTER 3 ‘Britain Alone’: A View from Northern Ireland
Gordon Anthony.

CHAPTER 4 ‘Brexit’ and Welsh Devolution: The Likely Impact
Mike Varney.

CHAPTER 5 Responsibility, Voice and Exit: Britain Alone?
Paul Craig.

Part II Managing Alone?

CHAPTER 6 Which Options would Be Available for the United Kingdom in the Case of a Withdrawal from the EU?
Jean-Claude Piris.

CHAPTER 7 The UK and the World: Environmental Law
Ioanna Hadjiyianni.

CHAPTER 8 The EU’s External Relations: A Question of Competence
Daniel Denman.

CHAPTER 9 Judicial Protection and the UK's Opt-Outs: Is Britain Alone in the CJEU?
Maria Kendrick.

CHAPTER 10 Criminal Law
John R. Spencer.

CHAPTER 11 From EU Citizens to Third-Country Nationals: The Legacy of Polydor
Marja-Liisa Öberg.

CHAPTER 12 Britain Alone! The Implications and Consequences of United Kingdom Exit from the European Union: Social Policies
Aileen McColgan.

CHAPTER 13 The Death of Social Europe
Keith D. Ewing.

CHAPTER 14 The United Kingdom without the Charter of Fundamental Rights of the European Union: Putting Down the Dog That Did Not Bark?
Kieron Beal QC.

CHAPTER 15 State Aid Control, Government Spending and the Virtue of Loyalty
Andrea Biondi.

CHAPTER 16 Differentiated Integration and the Single Supervisory Mechanism: Which Way Forward for the European Banking Authority?
Pierre Schammo.

For further information, please see the publisher's website.

Brexit – Immediate Consequences

on the London Judicial Market

Prof. Burkhard Hess and Prof. Marta Requejo-Isidro, Max Planck Institute Luxembourg

One of the major misunderstandings of the Brexit is that it won't influence London's importance as a major place of dispute resolution in Europe. Up until now, the adverse consequences of leaving the European Judicial Area have been insufficiently discussed. A first seminar organized by the British Institute for International and Comparative Law and the Max Planck Institute Luxembourg for Procedural Law in May illustrated that the adverse legal consequences will start immediately, even within the transitional period of two years foreseen by Article 50 of the EU Treaty. We would like to briefly summarize the main findings of this seminar which can also be found (as a video) at the websites of the MPI Luxembourg and of BIICL.

Regarding private international and procedural law, all EU instruments on common rules for jurisdiction, parallel proceedings and cross-border enforcement will cease to exist after the transitional period, not only in areas such as insolvency and family matters, but also in the core areas of civil and commercial matters. Judgments given by English courts will no longer profit from the free movement of judgments. Their recognition and enforcement will depend on (outdated) bilateral agreements which were concluded between the 1930 and 1960s. As there are only six bilateral agreements, the autonomous, piecemeal provisions of EU Member States' regimes regarding the recognition of the judgments of third States will apply. Of course, there might be negotiations on a specific regime between the Union and the United Kingdom, but the EU Commission might be well advised to tackle the more pressing problems of the Union (i.e. the refugee crisis where no solidarity is to be expected from the UK) instead of losing time and strength in bilateral negotiations.

From the European perspective, there is now a need to carefully evaluate the benefits of a bilateral agreement with the United Kingdom on issues of private international law. The main interest of the Union won't be to maintain or to strengthen London's dominant position in the European judicial market: EU Member States might equally provide for modern and highly-qualified legal services ready to attract commercial litigants and high-value litigation &

arbitration. Examples in this respect are The Netherlands and Sweden. In addition, there is a genuine interest of the Union to see mandatory EU law applied in disputes related to the Internal Market by courts operating within its regulatory framework. A perfect example in this respect, as pointed out by Dr. Matteo Gargantini, – former senior research fellow at the MPI Luxembourg – is provided by the EU legal text concerning the financial markets. Here, the so-called MiFIR provides for a dense regulatory framework where a clear distinction is made between EU Member States and third States. In the future, the United Kingdom will qualify a third State in this respect. This entails that jurisdiction and arbitration clauses providing for the jurisdiction of English courts and/or for London as a seat of arbitration cannot be agreed. The pertinent provision (Article 46 § 6) of the MiFIR reads as follows:

> "Third-country firms providing services or performing activities in accordance with this Article shall, before providing any service or performing any activity in relation to a client established in the Union, offer to submit any disputes relating to those services or activities to the jurisdiction of a court or arbitral tribunal in a Member State."

This provision only applies to professional investors. For retail investors, Member States can even mandate that the investment firm establishes a branch in their territory, which of course would impact jurisdiction (also in the light of limitations to jurisdiction agreement vis-à-vis consumers). Here, the relevant provision is Art. 39 MiFID II, which says:

> "A Member State may require that a third-country firm intending to provide investment services or perform investment activities with or without any ancillary services to retail clients or to professional clients within the meaning of Section II of Annex II in its territory establish a branch in that Member State."

These provisions entail direct and immediate consequences. Jurisdiction and arbitration clauses in contracts will apply to future controversies, and as such, their validity will be scrutinized at the moment when a dispute arises. An agreement made today to establish London as the place of dispute resolution will no longer guarantee the validity of that respective clause in two years' time. In other words, law firms would be well advised to no longer agree to these clauses as their validity will be challenged in every civil court within the European Union.

Sending anti-suit injunctions abroad won't help either: firstly, their recognition by the courts of EU Member States is not guaranteed (and will depend on the fragmented autonomous laws of EU Member States). Secondly, mandatory EU law (the pertinent articles of MiFID II, for example) will certainly forbid any recognition within the Union. As a result, parties will lose additional money for unnecessary satellite litigation. Finally, the ratification of the Hague Choice of Court Convention or the Lugano Convention will not provide a means to overcome the problem as the MiFIR/MiFID will apply independently from any international framework. This example demonstrates that there might be much more interest on the English side in negotiating with the Union than the other way around. It also shows that there is a need to consider most carefully the immediate consequences of the Brexit.