Convergence of insolvency frameworks within the European Union – the way forward?

by Lukas Schmidt, Research Fellow at the Center for Transnational Commercial Dispute Resolution (TCDR) of the EBS Law School, Wiesbaden, Germany.

In the wake of the Juncker Plan, the Action Plan on Building a Capital Markets Union and the Single Market Strategy the European Commission has made the strengthening of Europe´s Economy and the stimulation of investments in Europe some of its top priorities. In doing so the Commission has identified insolvency and restructuring proceedings as an important factor for creating a strong capital market. Thus insolvency law has increasingly attracted the Commission's attention. The recast of the European Insolvency Regulation on (cross-border) insolvency proceedings which will be applicable from June 26, 2017 (or the day after? See https://conflictoflaws.de/2016/oops-they-did-it-again-remarks-on-the-intertemporal-application-of-the-recast-insolvency-regulation/) is only an intermediate step towards a European Insolvency Law.

Already back in 2014 the Commission formulated the non-binding recommendation on a new approach to business failure and insolvency encouraging the member states to create "a framework that enables the efficient restructuring of viable enterprises in financial difficulty" and to "give honest entrepreneurs a second chance". Now, the Commission is far more ambitious as it is preparing an "insolvency initiative" on certain aspects of substantive insolvency laws to be adopted in autumn this year, as Vera Jourová, EU Commissioner for Justice, Consumers and Gender Equality, announced at last week´s conference on the "Convergence of insolvency frameworks within the European Union – the way forward" in Brussels. This conference was intended to contribute to the preparatory work of the Commission on the insolvency initiative.

Accompanying the conference the Commission has also published an insightful comparative study on substantive insolvency law throughout the EU prepared by a team from the School of Law at the University of Leeds. It is highly interesting

how far-reaching the Commission´s legislative proposal will be. Is the Commission even planning to harmonize the member state´s rules on the ranking of claims? Will there be minimum standards for insolvency practitioners and courts throughout the EU? Will there be special rules for insolvencies of corporate groups? As indicated by the Commission´s "Inception Impact Assessment" on the insolvency initiative published earlier this year we can at least expect an EU Directive on a preventive restructuring procedure. Either way international insolvency law will be a highly interesting and dynamic area of international law for the next years.

The Stream of the conference is still available at: https://webcast.ec.europa.eu/insolvency-conference

The Impact Assessment is available at: http://ec.europa.eu/justice/civil/files/insolvency/impact_assessment_en.pdf

The comparative study is available at: http://ec.europa.eu/justice/civil/files/insolvency/insolvency_study_2016_final_en.pdf

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Out now: Hay/Rösler on Private International Law

A few days ago, the 5th of edition of a (German language) classic on private international law, the "Hay", was released. Fully revised and updated by Hannes Rösler, a Professor for Civil Law, Comparative Law and Private International Law at the University of Siegen (Germany), it now appears as Hay/Rösler, Internationales Privat- und Zivilverfahrensrecht, 5th edition, C.H. Beck 2016 (XXXI + 326 pages).

The book covers nearly every aspect of private international law through 229 questions and cases. The first part of the book (about 40 percent) covers procedural aspects. It starts with international jurisdiction under the Brussels Ibis

Regulation, further EU regulations (including the Regulations on maintenance and succession) and German law. It continues with questions of proof of facts and service of documents and finishes with recognition and enforcement of foreign judgments.

The second part deals with private international law in the narrower sense. It first addresses key concepts ("Allgemeiner Teil") and then covers the Rome I and Rome II Regulations, property law, family law (including the relatively new Rom III Regulation), succession law and company law.

The books is an excellent and up-to-date introduction to private international law. It provides easy access to complex legal issues. Thanks to its case-orientation it will be especially helpful for students preparing for classes and exams. In addition, it will prove helpful for lawyers and practitioners interested in private international law.

Further information, including a table of contents, can be found here.

Basedow on Brexit and Private International Law

Professor Dr. Dr. h.c. mult. Jürgen Basedow, Director of the Max Planck Institute for Comparative and International Private Law (Hamburg), has analyzed the challenges that Brexit poses for private and commercial law in an editorial for issue 3/2016 of the Zeitschrift für Europäisches Privatrecht. The main contents of this article have been summarized in English on the Institute's website; this abstract is reproduced here with the kind permission of Professor Basedow.

As soon as the UK notifies the European Council of its intent to leave the EU in accordance with Article 50 para. 2 TEU, a two year period shall commence within which all negotiations must be conducted. Should negotiations exceed this two year period or if the outcomes meet resistance in the UK or the EU bodies, Art. 50 para. 3 TEU stipulates that Union Treaties shall simply cease to apply, unless the

Council and the UK unanimously agree to extend that period.

As sparing as the wording of Art. 50 para. 2 TEU is, it does make it very clear: should the EU and the UK not reach agreement within two years of notification, then the Treaties, including the freedom of movement they contain, cease to be in force. The possibility that access may be lost to the European single market and other guarantees provided by primary EU law puts the UK under economic and political pressure that may weaken their negotiating position against the EU. British voters were probably not aware of this consideration before the referendum.

The question of whether and how the international conventions of the EU, particularly those for a uniform system of private law, shall continue to apply is also complex. It may be that conventions like the Montreal Convention for the Unification of Certain Rules for International Carriage by Air or the Cape Town Convention on International Interests in Mobile Equipment and the Aviation Protocol will continue to apply, as they were ratified by both the UK and the EU, although relevant decisions handed down by the ECJ will no longer be binding on the UK courts. But what is the situation with regard to the Hague Jurisdiction Convention of 2005 that was ratified by the EU on behalf of all Member States, but not by the States themselves? These private and procedural law Conventions – just as all other international law agreements of the EU – must also be addressed during the exit negotiations.

Any change of Great Britain's status under the Brussels I Regulation 1215/2012 is also particularly significant for private law. It is for the British courts to decide whether they will continue to observe the rules of jurisdiction. Their judgments however will no longer be automatically enforceable across the whole Union, as Art. 36 only applies to "a judgment given by the courts of a Member State". Older bilateral agreements such as that existing between Germany and Britain may go some way to bridging the gap, as will the autonomous recognition of laws, but neither will suffice completely. International legal and commercial affairs must thus return to square one. As it currently stands, the Lugano Convention (OJ 2009 L 147) is also unable to cover the shortfall, signed as it was by the EU and not the individual Member States. According to Art. 70, Great Britain is not one of the states entitled to join the Convention. This effectively removes one of the fundamental pillars supporting the remarkable rise in the number of law firms in London, with a business model based on the simple promise that stipulating

London in a jurisdiction agreement would guarantee enforceability across the whole of Europe. This model will soon be a thing of the past, if viable solutions cannot be found for the exit agreement.

The agenda for the exit negotiations will thus be immensely broad in its scope. Even if the British government should drop EU primary law for the reasons listed above, they will try to include secondary legal guarantees for access to the European single market into their exit agreement. That would require the discussion of hundreds of Directives and Regulations. Considering that the entry negotiations with nine member states, divided into over 30 negotiation chapters, took so many years to complete, it is doubtful whether negotiations in the other direction can be completed within the two years stipulated by Art. 50 para. 3 TEU. Brexit has also shaken up international commercial competition in ways that have yet to be determined.

The complete article "Brexit und das Privat- und Wirtschaftsrecht" by Professor Jürgen Basedow will be published in the forthcoming issue 3/2016 of the ZEuP – Zeitschrift für Europäisches Privatrecht.

A comment on AG Wathelet's opinion concerning Art. 15 Brussels II bis

In the case *Child and Family Agency v JD* (C-428/15) EU:C:2016:458, Advocate General Wathelet issued his Opinion about the transfer of the proceedings pursuant to Article 15 of the Bruseels II bis Regulation, in particular clarifying the considitions for such transfer.
An account of this Opinion is given by Agne Limante in yesterday's post in the Preliminary reference section of the Columbia Journal of European Law, available here.

Supreme Court of Canada Evolves Test for Taking Jurisdiction

The Supreme Court of Canada has released its decision in *Lapointe Rosenstein Marchand Melancon LLP v Cassels Brock & Blackwell LLP*, 2016 SCC 30 (available here). The decision builds on the court's foundational decision in *Club Resorts Ltd v Van Breda*, 2012 SCC 17, which altered the law on taking jurisdiction in cases not involving presence in the forum or submission to the forum.

In *Club Resorts* the court held that to take jurisdiction in service *ex juris* cases the plaintiff had to establish a presumptive connecting factor (PCF) and it identified four non-exhaustive PCFs for tort claims. The fourth of these was that a contract connected with the dispute was made in the forum. This was viewed as unusual: there was very little precedential support for considering such a connection sufficient to ground jurisdiction in tort cases. Commentators expressed concern about the weakness of the connection, based as it was on the place of making a contract, and about the lack of a clear test for determining whether such a contract was sufficiently connected to the tort claim. Both of these issues were squarely raised in *Lapointe Rosenstein*.

The majority (6-1) agreed with the motions judge and the Court of Appeal for Ontario that this PCF was established on the facts of this case. Justice Cote dissented, concluding both that the contract was not made in Ontario and that it was not sufficiently connected with the tort claim.

The facts are somewhat complex. After the 2008 financial crisis the Canadian government bailed out General Motors of Canada Ltd (GM Canada). In return for this financial support, GM Canada agreed to close dealerships (ultimately over 200) across Canada. Each dealership being closed was compensated under a Wind-Down Agreement (WDA) between GM Canada and the dealer. The WDA was governed by Ontario law and contained an exclusive jurisdiction clause for Ontario. The WDA required each dealer to obtain independent legal advice (ILA)

about the consequences of signing the WDA.

Some time after the dealerships closed over 200 dealers brought a class action in Ontario against GM Canada disputing the legality of the WDAs. They also sued Cassels Brock & Blackwell, the lawyers for the Canadian Automobile Dealers Association, for negligent advice to the dealers. In turn, Cassels Brock brought third-party claims against 150 law firms which had provided the ILA to the dealers. Many of the law firms, including those in Quebec, challenged the court's jurisdiction over the third-party claim. Cassels Brock argued that the WDAs were contracts made in Ontario and that the WDAs were connected with the tort claim Cassels Brock was advancing in the third-party claim (which was for negligence in providing the ILA).

The court had the chance to adjust or move away from this PCF, given the criticism which it had attracted (see para 88). But it affirmed it. Worse, the Court of Appeal for Ontario had at least expressed a willingness to be flexible in determining the place of making of the contract (which in part got around the central weakness in this PCF). In contrast the majority stresses the "traditional rules of contract formation" (para 31). Insisting on the traditional rules is what gives rise to the core difference between the majority (Ontario: paras 42-43) and the dissent (Quebec: paras 74-80) on where the WDAs were made. Those rules mean the dissent is right to point out (para 81) that related connections between the WDAs and Ontario (such as the applicable law and the jurisdiction clause: see para 48) do not, strictly speaking, have anything to do with where the contract is made and so must be ignored on that issue. The more robust approach of the Court of Appeal allows more to be assessed and thus for an easier (more consensual) conclusion that the WDAs were "made" in Ontario. There is reason to be quite concerned that the Supreme Court of Canada's approach will lead to more disputes about where a particular contract has been made, focusing on technical rules, which is unwelcome.

The court also splits on whether the contract, if made in Ontario, is connected to the tort claim. I am inclined to think the majority gets it right when it finds that it is. Note, though, that I think it is wrong to claim, as the majority does (para 47 last sentence), that somehow the law firms were brought "within the scope of the contractual relationship" by providing the advice about it. The best part of the dissent is the demolition of that claim (para 86). The real problem is that a close enough connection should be available to be found even in the absence of

bringing the defendant "within" that contractual relationship. This PCF, if the misguided narrow focus on place of contracting could be overcome, can be broader than that and thus broader than the dissent would make it (para 87).

Here a local Quebec law firm is asked by its local client to provide it with advice about the client's entering into the WDA. The terms of the WDA expressly say that to so enter into it the client has to get that advice. The WDA is clearly very connected to Ontario. It seems to me right to say that the WDA is a contract related to any subsequent negligent advice claim the client would advance against the firm. The WDA is not just context, bearing peripherally on the advice. The advice entirely centers on the WDA and whether the client should enter into it. The WDA is what the advice is about. The majority gets all of this right in para 47 except for its last sentence. Of the 11 judges who addressed this issue in the three levels of court, only Justice Cote finds the connection between the contract and the tort claim to be insufficient.

So I think the decision is right but the majority errs by stressing the traditional rules of contract formation for assessing the place of making and by using the "within the scope of the contractual relationship" test for the requisite connection.

Some smaller points:

1. I am somewhat puzzled by the idea (para 31) that parties would expressly think about how they would go about making their contracts so as to have them made in a particular place so as to get to subsequently take advantage of this PCF. Do parties think like that? Did they before this PCF was created? I suppose it is easier to say they now do think like that since they are being told to do so by the court.

2. For future debates about where contracts are made, I worry about some of the court's language. One example is para 40's reference to where the acceptance "took place". Is that compatible with the postal acceptance rule which looks, for some contracts, at the place of posting rather than place of receipt? Would we say the acceptance in such a case "took place" at the place of posting? See in contrast para 73.

3. Justice Cote's dissent could be seen as a covert attempt to eliminate this PCF. She insists on a very tight connection between the contract and the tort claim.

She refers to circumstances in which "the defendant's breach of contract and his tort are *indissociable*" (para 95; emphasis in original) and states that this PCF "only provides jurisdiction over claims where the defendant's liability in tort flows immediately from the defendant's own contractual obligations" (para. 90). In such cases, this PCF (tied to the place of contracting) might safely be abolished and replaced with other, better PCFs relating to tort and contract claims (especially in light of para 99 of *Club Resorts*). It would not be needed for the court to be able to take jurisdiction, as it was on the facts of *Club Resorts* and *Lapointe Rosenstein*. I am sympathetic to a desire to eliminate this PCF, but I think that result needed to be confronted directly rather than indirectly. In the wake of the majority decision, it is now unlikely to happen at all.

Corporations between International Private and Criminal Law

The most recent issue of the German „Zeitschrift für Unternehmens- und Gesellschaftsrecht" (ZGR, Journal of Enterprise and Corporate Law) has just been released. The volume is based on presentations given at a conference in Königstein/Taunus in January 2016. It contains several articles dealing with the relationship between private and criminal law and its impact on corporate governance. In particular, two articles approach the subject from a conflict-of-laws perspective. Here are the English abstracts:

Marc-Philippe Weller, Wissenszurechnung in internationalen Unternehmensstrafverfahren, ZGR 2016, pp. 384–413

The article deals with the imputation of knowledge in legal entities from a private and a criminal law perspective. Several foreign criminal proceedings against domestic companies induce this question. Firstly, the article demonstrates the

different ways to determine the applicable law to this imputation. Secondly, it discusses measures to limit the imputation via knowledge governance.

Jan von Hein, USA: Punitive Damages für unternehmerische Menschenrechtsverletzungen, ZGR 2016, pp. 414–436

While German Law traditionally neither accepts universal civil jurisdiction for violations of customary international law nor a penal responsibility of corporations, foreign companies have in the past been frequently sued in the United States on the basis of the Alien Tort Statute of 1789 for the payment of punitive damages for alleged human rights violations. However, the U.S. Supreme Court has severely curtailed the reach of this jurisdiction in its groundbreaking Kiobel judgment of 2013. The present article analyzes, in light of the subsequent jurisprudence, the impact of this decision on German-American legal relations and the defenses available to German corporations.

"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.