Berichte

Discussion Report

The Communitarisation of Private International Law

Max Planck Institute for Comparative and International Private Law, Hamburg, 7 June 2008

Rome was not built in a day. The same may be said of the various "Rome Regulations" of the European Community (EC), which aim at creating common rules of private international law on a wide range of private law issues. The regulations are currently at different stages of the legislative procedure. The Rome II Regulation on the law applicable to non-contractual obligations came into force in January 2009. Rome I concerning the law applicable to contractual obligations has been adopted already and will take effect in December 2009. In addition, following proposals by the European Commission, the preparation of regulations on the law applicable to matrimonial matters ("Rome III") as well as maintenance obligations is under way. Finally, the Commission has also issued a Green Paper on succession and wills as a preliminary step towards a regulation on choice of law rules in this field.

The alumni conference on "The Communitarisation of Private International Law", held at the Max Planck Institute for Comparative and International Private Law in Hamburg on 7 June 2008, provided a fresh look at the current status of the harmonisation process. Legal scholars from all over Europe gathered to discuss the results already achieved as well as the plans for what is still to come.

1. "Of Older Siblings and Distant Cousins: The Contribution of the Rome II Regulation to the Communitarisation of Private International Law" (*Jan von Hein*)

Following *Jürgen Basedow's* (MPI Hamburg) introductory address and *Jan von Hein's* (University of Trier) presentation on the Rome II Regulation, *Peter Mankowski* (University of Hamburg) opened the discussion by addressing the issue of party autonomy under the Rome II Regulation. He pointed out that Art. 14(1), barring a consumer from choosing the law applicable to the dispute prior to the occurrence of the damage, is analogous to Art. 17 of the Brussels I Regulation, which restricts the freedom to choose the forum

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in consumer contract litigation before the dispute has arisen. Moreover, he wondered whether a choice of law agreement based on a standard form clause would satisfy the requirement of "an agreement freely negotiated" under Art. 14(1) lit. b of the regulation.

Von Hein took the view that the language of the provision seems to exclude the use of standard form clauses for a valid agreement on the applicable law. As to rules governing the substantial validity of the parties' choice, *von Hein* argued that, in the absence of a specific reference in the Rome II Regulation, two different approaches appear possible. First, one may apply, by way of analogy, the rules of the Rome I Regulation according to which the validity of the agreement is subject to the law to be chosen. Alternatively, one may draw upon the law which would have been applicable in the absence of an agreement.

Basedow questioned the practical relevance of the freedom to choose the applicable law prior to the event giving rise to liability. He argued that such agreements will rarely occur outside a contractual setting. If, however, a contractual relationship between the parties already exists, then, on the basis of Art. 4(3) of the regulation, the law applicable to the contract will also govern the tort claim. Given the parties' freedom of choice as to the law applicable to the contract, the freedom of choice rule under Rome II amounts to nothing more than "free-market lyrics" which fail to substantially increase party autonomy.

Paul Beaumont (University of Aberdeen) and *von Hein* both defended the provision. The rationale of the rule is to provide more clarity. Contracting parties can now make an explicit choice regarding the law applicable to their mutual non-contractual obligations. In the absence of the freedom of choice rule, parties may be unaware that their choice as to the law applicable to the contractual obligations also affects non-contractual claims. Moreover, Art. 4(3) is a "soft" rule: by no means is it assured that the law chosen for the contract will automatically govern the non-contractual obligations as well. Thus, Art. 14(1) lit. b of the Rome II Regulation will eliminate many uncertainties.

2. "International Family Law in Europe – The Maintenance Project, the Hague Conference and the EC" (*Paul Beaumont*)

Ulrich Magnus (University of Hamburg) replied to *Beaumont's* talk on "International family law in Europe" by pointing out that the real test for the success of the Hague Maintenance Convention is the ratification process rather than the negotiations. Whereas EC regulations take effect immediately, conventions are subject to ratification. This may explain why certain states tend to be more cooperative in the Hague Conference than they are during the legislative procedure at the EC level. Experience shows that a state supporting a convention in the negotiation process does not automatically ratify that convention, as was the case with the United Kingdom (UK)

with respect to the United Nations Convention on Contracts for the International Sale of Goods (CISG).

Similarly, *Kurt Siehr* (MPI Hamburg) voiced his doubts about the "reverse subsidiarity" model. He argued that the Hague Conference may provide a good institutional framework for the harmonisation of choice of law rules on narrow issues such as the law applicable to maintenance obligations. Broader topics, as the conflict-of-laws rules regarding contractual or non-contractual obligations, are better dealt with in the legislative procedure of the EC where, for example, the unanimity principle does not apply.

Michael Bogdan (University of Lund) criticised the failure of the Rome III Regulation. He argued that countries like Sweden or the UK resisted the harmonisation of the choice of law in divorce because they do not want their courts to apply foreign divorce laws which, as compared with their own no-fault systems, may be more restrictive of marriage dissolution. However, those critics were "naïve" in that they failed to realize that a common private international law works in two directions. Thus, under harmonised choice of law rules, countries such as Malta, where the existence of divorce is not even recognised, might have to apply the 'liberal' Swedish divorce rules in certain circumstances.

3. "Succession and Wills in the Conflict of Laws on the Eve of Europeanisation" (*Anatol Dutta*)

In reaction to *Anatol Dutta's* presentation on the private international law of wills and succession, *Bernd von Hoffmann* (University of Trier) and *Stefania Bariatti* (University of Milan) voiced scepticism about the demand for unrestricted freedom of choice of law. *Bariatti* pointed out that in countries where the domestic conflict-of-laws rules provide for party autonomy (e.g. Italy) the choice is usually limited to the laws of the country of residence and the laws of the country of citizenship of the deceased. *Von Hoffmann* argued that the future deceased may exercise the freedom of choice at the expense of the interests of family members.

Dutta replied that the protection of family members is not, in itself, a sufficient justification for restricting the deceased's freedom of choice as to the applicable law. In terms of the interests of family members, using a personal criterion of the deceased as the connecting factor, i.e. the deceased's residence or nationality, is only a minimal solution, as it may be in the deceased's power to alter her residence or nationality. Furthermore, most legal systems grant family members some form of protection against the deceased's freedom of testation (e.g. through forced heirship) at the level of substantive law. Thus, there is no need for protective measures at the level of private international law. Moreover, the importance of forced heirship and equivalent rights of family members is currently diminishing throughout Europe.

Von Hoffmann pointed out that the conflict between the monist and the dualist approach in respect of movables and real estate is also relevant in the

context of international insolvency law. Here, the dualist model prevails. When designing the private international law of succession and wills, the European legislator should avoid inconsistencies between the two fields.

Finally, *Magnus* asked whether, with regard to third states, the European choice of law rules should exclude a *renvoi*. *Dutta* argued that the *renvoi* issue is a general problem in private international law and not specifically related to the succession aspects of private international law. The pros and cons should be decided at a general level. However, if the *renvoi* is to be accepted, it is important to exclude the application of a "partial" *renvoi* which refers movables and immovables in the deceased's estates to distinct legal regimes, thus vitiating the monist approach.

4. "The Law Applicable to Corporations in the EC" (*Eva-Maria Kieninger*)

Following *Eva-Maria Kieninger's* (University of Würzburg) talk on the law applicable to corporations in the EC, *Klaus J. Hopt* (MPI Hamburg) asked why the response to the *Centros* jurisprudence in Germany was so markedly different from that in other Member States, such as France, where legal science hardly took note. He also wondered how *Kieninger* might characterise the liability for *Existenzvernichtungshaftung* as developed in German case law.[1]

Kieninger pointed to the fact that France reacted very quickly to the *Centros* judgment and immediately created a "One-Euro-SARL". Hence, the desire for the Ltd. in France was satisfied by a national alternative. As far as the characterisation of *Existenzvernichtungshaftung* is concerned, it would be necessary to conduct research on functionally equivalent measures in other Member States to be able to arrive at a uniform characterisation. *Bariatti*, picking up on this train of thought, remarked that the European Société Anonyme (SA) has not been very popular: since its conception, only about 100 Sociétés Européennes (SEs) have come into existence, about 40 of those in Germany and a similar number in the Netherlands. The use of the Société Européenne in those two Member States, however, is mainly dominated by the wish to have a corporate form that will survive a move abroad, unlike the national creations in those two states.

Daniel Girsberger (University of Lucerne) suggested that a legislative proposal might include a rule on the law applicable to branches of a corporation located in a state other than that of the company's registered seat. He pointed out that this question is dealt with in Art. 106 of the Swiss PIL code.

Alexander Hellgardt (MPI Hamburg) pointed out that, especially in areas such as cross-border transfer of the registered office, international private

[1] Under the doctrine of *Existenzvernichtungshaftung*, a court may pierce the corporate veil by granting creditors of a corporation a direct cause of action against shareholders who have looted the assets of the corporation, and have thus caused its insolvency. See e.g. BGH 16. 7. 2007, BGHZ 173, 246 = NJW 2007, 2689.

and substantive law by necessity have to interact and be coordinated very closely. *Kieninger* agreed with this assessment. *Hellgardt* also cited a theory by *Wolfgang Schön* which seeks to bridge the gaps in the protection of companies during a cross-border merger by redefining the freedom of establishment as a freedom of the founder of the company rather than of the company itself, hence also applying at times when the company itself might not even exist. *Kieninger* agreed that this was one way of explaining the *Centros* jurisprudence but did not think it compatible with the wording of Art. 48 EC. The freedom of establishment is explicitly granted to a company and does not disappear when the company (temporarily) ceases to exist, as might be the case during a cross-border transaction.

5. "International Insolvencies in the EC" (*Stefania Bariatti*)

The Conference concluded with a discussion on the presentation on international insolvencies in the EC, given by *Bariatti*. *Basedow* asked whether one might define "centre of main interest" (COMI) under the Insolvency Regulation and "centre of activity" as employed by Art. 60 of the Brussels I Regulation as having the same meaning. If a company could be sued in a forum, why not allow it to initiate an insolvency procedure there? *Bariatti* clarified that she did not regard "centre of activity" and "centre of main interest" to be identical. *Beaumont* also disagreed with the idea of a common interpretation, arguing from a teleological perspective. The rationale behind Art. 60 Brussels I and the Insolvency Regulation was a very different one, in his opinion. Article 60 Brussels I served to extend the number of possible *fora* in which a plaintiff might sue a company; the Insolvency Regulation on the other hand was aimed at finding the appropriate place for insolvency proceedings, which would be the place of closest connection.

Luis de Lima Pinheiro (University of Lisbon) pointed out that, in addition to the "centre of main interest" requirement, the jurisdiction rule also demanded that this COMI be visible for third parties. He wondered whether this was not too restrictive an approach, since a COMI might frequently not be discernible to third parties. In his opinion, it seemed more reasonable to simply adhere to the registered seat. *Bariatti* stated that the courts have not implemented the criterion of recognisability in practice, but rather have gone on to interpret the centre of main interest as before. Hence, in this context few problems had arisen thus far.

Basedow voiced his doubts as to whether a contractually determined COMI could be invoked against new creditors who may trust that the COMI is located elsewhere. *Bariatti* stated that the contractually agreed COMI would probably not bind a court, but might result in claims for damages for the contracting party. In effect, the contractual agreement could only be binding as to the applicable law between the contracting parties, but not for the determination of the true COMI.

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