

A CONCEPTUAL ANALYSIS OF EUROPEAN PRIVATE
INTERNATIONAL LAW

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The General Issues in the EU
and its Member States

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A Conceptual Analysis of European Private International Law. The General
Issues in the EU and its Member States

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To My Family

FOREWORD

Not long ago, genuine European private international law consisted, beyond the Brussels Convention, of a few isolated choice-of-law provisions in specific EU instruments, in particular consumer directives. Since then, we have witnessed an astonishing growth in the number of instruments of European provenance, many of which directed at establishing the applicable law. EU private international law has moved from the margins to the centre. By now, it is a venerable field of its own.

While we do have European private international law, what we do not have is a comprehensive and systematically uniform approach to private international law on a European level. Different Regulations on private international law stand in sometimes unclear relation to each other. Moreover, general issues of private international law – doctrinal tools like characterisation, renvoi, and the public policy exception – are not regulated on a level that would transcend these individual instruments. Some tools, like the public policy exception, can be found in each of the Regulations. Other tools, like characterisation, exist in a form that is doctrinally different from that in domestic law, often as provisions concerning the scope of an instrument and the scope of the applicable law. And some tools, like the incidental question, find no regulation at all.

This lack of uniformity is the focus of this most welcome book. Felix M. Wilke, a young scholar from the University of Bayreuth in Germany, has focused on this topic before: he was prominently involved in a project established at a conference in 2012, and in a corresponding collection of essays published in 2013, which aimed at establishing the potential for a general part of European private international law. The project set out to produce a legislative instrument, cleverly named a “Rome 0 Regulation”, that could serve as a legislative general part that would both supplement and connect the existing private international law regulations. Both book and project were in German and brought together scholars from German-speaking universities. Now, Wilke addresses this question in a comprehensive fashion in English.

And he deserves our gratitude for this. This is a thoroughly researched work that is both comparative-empirical and prescriptive in nature, a study that both surveys existing law and makes proposals on the basis of its findings. The comparison is more doctrinal than functional in nature, which seems adequate for its topic of a conceptual analysis: Wilke is interested in establishing techniques, not resolving concrete cases, so a functional approach would not

have been of much use to him. He analyses not just the existing EU instruments for what they reveal regarding general issues; in addition, his study relies on a comparison of the existing domestic private international law systems, both codified and uncodified, in all EU member states. Wilke thus departs from his earlier view that only a few domestic models exist – he finds, in fact, that general issues are more thoroughly discussed and regulated in domestic legislation than in European law, and therefore finds the existing material most helpful for European concepts. He even includes the United Kingdom – despite Brexit, and despite the differences one should expect between a common law approach in England and the civil law approaches of most other member states.

The result is an impressive survey of approaches concerning these questions; and Wilke's results are surprising and interesting. One might have expected to find significant differences; after all, although private international law was once a significantly international discipline, it has, over much of the 20th century, become domestic, with the consequence of different domestic traditions. In fact, even within domestic traditions, differences exist, at least insofar as that the relevant questions have not been resolved legislatively. Although European private international law does create uniformity, it often differs from domestic law. However, Wilke proposes that there are enough commonalities to justify a common understanding. Most conflicts rules, he suggests, have a tripartite structure—subject matter, connecting factor, and applicable law. Each of these elements itself raises certain general issues that he discusses in detail; further general issues exist, too. Wilke's normative conclusion is clear: general issues are necessarily part of private international law, and the EU ought to codify them in a regulation. He does not, unfortunately, put forth a draft of what such a regulation may resemble – maybe he will do so in a later publication?

Will his argument convince the discipline? The general part of private international law, and the focus on general issues, is something of a German peculiarity (though it needs to be said that US doctrine, despite its rejection of a general part *per se*, is even more obsessed with general issues). Scholars and practitioners in many other European countries tend to be less interested in them, so far. The general part is viewed by many as representative of the abstract *a priori* character of German private international law doctrine, which Dicey juxtaposed long ago with an English pragmatic approach. Moreover, some scholars will deplore that Wilke focuses on genuine private international law and largely leaves out the role that general European Union law plays for private international law. The principle of recognition is deliberately ignored, as are the four freedoms and the country-of-origin principle. In this sense, Wilke's general issues are not as general as some may wish for.

Nevertheless, this book clearly shows its background in German thinking, and it displays that at its best. The fact that the book is written in English provides the discipline with a formidable opportunity to learn about and engage with a

specific kind of position towards conceptual issues of private international law. That position will undoubtedly influence European discussions in a fruitful manner. I, for one, look forward to those further discussions, and congratulate Felix M. Wilke on his considerable achievement.

Ralf Michaels

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Chair in Global Law, Queen Mary University of London
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Comparative and International Private Law

January 2019

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The main work for this book project – for a long time under the working title of “The General Issues of Private International Law: A European Concept” – was carried out at the Faculty of Law and Economics (*Rechts- und Wirtschaftswissenschaftliche Fakultät*) of the University of Bayreuth, Germany. It was done under the tutelage of Prof. Hannes Unberath until his untimely passing. His brilliant mind, his instructive scholarly contributions, and his great kindness have made a lasting impression on me as they have on everyone who has known him.

Prof. Stefan Leible took over my academic mentorship without hesitation. For that I would like to thank him, as well as for supporting my choice of this topic. I would also like to express my gratitude to him for giving me all the freedom I could wish for in preparing this book and for his quick review of its final version. I would further like to thank Prof. Michael Grünberger for his speedy evaluation of my work, and for defying a sudden injury that might have prevented him from showing up for the formal presentation of my work. Moreover, I would like to thank Prof. Jörg Gundel for judiciously presiding over the presentation.

The thoughtful remarks from all the people mentioned above, as well as from three anonymous peer reviewers, have afforded me the opportunity to refine some points further before the book went to the press. Legal developments up until September 2018 have been taken into account as far as possible.

I would further like to thank Prof. Oliver Lepsius. He sparked my academic career when he saw something in me after only half a year of law school and employed me as a student assistant for the entire remainder of my legal studies. His ideas and research in general, and his remarks on “general parts” in German public law (or rather the lack thereof) in particular, have strongly influenced my own understanding of law and my choice of this topic.

Many other people have supported the genesis of this book in many ways. For this I would like to thank my colleagues at the University of Bayreuth, in particular Dr. Michael F. Müller; the student assistants at the Chair for Private Law, Private International Law, and Comparative Law; the library staff at the University of Bayreuth, particularly the inter-library loan team who were able to procure almost every item I asked for, no matter how obscure; Asja Bernd for offering a non-legal and thus very welcome perspective

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Bayreuth, autumn 2018

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LIST OF ABBREVIATIONS

AG	Amtsgericht [German District Court]
Agency Convention	Convention on the Law Applicable to Agency (Concluded 14 March 1978)
Better Regulation Guidelines	Commission Staff Working Document, Better Regulation Guidelines, COM(2015) 215 final (available online at http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf , last visited 21 April 2016)
BGB	Bürgerliches Gesetzbuch [German Civil Code]
BGBL	Bundesgesetzblatt [German Federal Law Gazette]
BGH	Bundesgerichtshof [German Federal Supreme Court]
Brussels I	Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L 12/1
Brussels Ibis	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L 351/1
Brussels IIbis	Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, [2003] OJ L 338/1
Brussels Convention	1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version: [1998] OJ C 27/1)
BT-Drucks.	Drucksache des Deutschen Bundestags [Parliamentary Materials of the German Bundestag]
BVerfGE	Entscheidungen des Bundesverfassungsgerichts [Collection of the decisions by the German Federal Constitutional Court, published by Mohr Siebeck, Tübingen]
Cass. Ass. plén.	Cour de cassation, Assemblée plénière [France]
Cass. (1 ^{re}) civ.	Cour de cassation, (Première) Chambre civile [France]

Cass. req.	Cour de cassation, Chambre des requêtes [France]
CISG	United Nations Convention on Contracts for the International Sale of Goods
CISG-AC Bylaws	CISG Advisory Council Bylaws (available online at http://www.cisgac.com/default.php?ipkCat=149&sid=149 , last visited 3 June 2016)
Conflict of Nationality Laws Convention	Convention on Certain Questions Relating to the Conflict of Nationality Laws of 12 April 1930
Consumer Credit Directive 1986	Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, [1987] OJ L 42/48
Consumer Credit Directive 2008	Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, [2008] OJ L 133/66
Consumer Sales Directive	Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, [1999] OJ L 171/12
Consumer Rights Directive	Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, [2011] OJ L 304/64
Council Resolution on the Quality of Drafting of Community Legislation	Council Resolution of 8 June 1993 on the quality of drafting of community legislation, [1993] OJ C 166/1
DCFR	Draft Common Frame of Reference (see von Bar, Christian et al. (eds.), <i>Principles, Definitions and Model Rules of European Private Law</i>)
Distance Contract Directive	Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, [1997] OJ L 144/19

Distance Marketing of Consumer Financial Services Directive	Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, [2002] OJ L 271/16
Doorstep Selling Directive	Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, [1985] OJ L 372/31
ECJ	European Court of Justice (technically: Court of Justice of the Court of Justice of the European Union)
ECtHR	European Court of Human Rights
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuche [Introductory Act to the German Civil Code]
Enforcement Order Regulation	Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, [2004] OJ L 143/15
EU Charter of Fundamental Rights	Charter of Fundamental Rights of the European Union, [2012] OJ C 326/391
EU Justice Agenda for 2020	The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union, COM(2014) 144 final
European Convention on Nationality	European Convention on Nationality of 6 November 1997 (Council of Europe Treaty No. 166)
Framework Decision on the European Arrest Warrant	Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, [2002] OJ L 190/1
FS	Festschrift/Festschrift [Liber Amicorum]
Geneva Refugee Convention	Convention Relating to the Status of Refugees of 28 July 1951
GG	Grundgesetz (German Constitution)
Kamerstuk	[Document of the Dutch Parliament]
Insolvency Regulation	Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), [2015] OJ L 141/19
IPRspr.	Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts [Collection of German Jurisprudence Relating to Private International Law, published by Mohr Siebeck, Tübingen]

LA	Liber Amicorum
LG	Landgericht [German Regional Court]
Maintenance Protocol	Protocol on the law applicable to maintenance obligations of 23 November 2007 (available online at www.hcch.net , last visited 11 June 2016)
Maintenance Regulation	Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, [2009] OJ L 7/1
M-Property Regulation	Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and [e]nforcement of decisions in matters of matrimonial property regimes, [2016] OJ L 183/1
OGH	Oberster Gerichtshof [Austrian Supreme Court]
OJ	Official Journal of the European Union
OLG	Oberlandesgericht [German Higher Regional Court]
Order for Payment Procedure Regulation	Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, [2006] OJ L 399/1
Package Travel Directive	Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, [1990] OJ L 158/59
Product Liability Directive	Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, [1985] OJ L 210/29
Qualification Directive (Recast)	Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), [2011] OJ L 337/9
Refugee Protocol	Protocol Relating to the Status of Refugees of 31 January 1967
RGBL.	Reichsgesetzblatt [German Imperial Law Gazette]
Rome I	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), [2008] OJ L 177/6

RGZ	Entscheidungen des Reichsgerichts in Zivilsachen [Decisions of the German Imperial Court in Civil Matters]
Rome II	Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), [2007] OJ L 199/40
Rome III	Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, [2010] OJ L 343/10
Rome Convention	Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, [1980] OJ L 266/1
RP-Property Regulation	Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, [2016] OJ L 183/30
Self-Employed Commercial Agents Directive	Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, [1986] OJ L 382/17
Small Claims Procedure Regulation	Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, [2007] OJ L 199/1
Social Security Regulation No. 1408/71	Council Regulation (EC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, [1997] OJ L 28/1
Stateless Persons Convention	Convention Relating to the Status of Stateless Persons of 28 September 1954
Stockholm Programme	The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, [2010] OJ C 115/1
Succession Regulation	Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, [2012] OJ L 201/107

TEC	Treaty establishing the European Community (consolidated version: [2006] OJ C 321/E37)
TEU	Treaty on European Union (consolidated version: [2012] OJ C 326/13)
TFEU	Treaty on the Functioning of the European Union (consolidated version: [2012] OJ C 326/47)
Testamentary Form Convention	Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions
Unfair Terms Directive	Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, [1993] OJ L 95/29
ZPO	Zivilprozessordnung [German Code of Civil Procedure]