RiDoc

Pravni fakultet Faculty of Law

Sveučilište u Rijeci
University of Rijeka

Book of Abstracts

Rijeka Doctoral Conference RIDOC 2018

Editor

Ivana Kunda

Rijeka Doctoral Conference

RIDOC 2018

Book of Abstracts

Rijeka, 3 December 2018

Key Title Book of Abstracts (Rijeka Doctoral Conference)

Short Key Title Book abstr. (Rij. Dr. Conf.)

Editor Ivana Kunda (University of Rijeka)

Proofreader Katja Dobrić Basaneže

Front Cover Picture Želimir Gržančić

Publishing Editor • Design Ivana Kunda

Publisher Faculty of Law of the University of Rijeka, Croatia

First Publication 2018

Publication Frequency Biannual

ISSN 2459-7201

This Book of Abstracts is double-blind peer reviewed. Responsibility for the information and views set out in this Book of Abstracts lies entirely with the authors. It is issued biannually and available for download in a .pdf format from the Faculty of Law of the University of Rijeka website: www.pravri.uniri.hr.

Table of Contents

Candidate: Latifah Almeer

Institution of employment: University of Dundee, Scotland

Institution of doctoral study: University of Dundee, Scotland

Mentors: Ms. Aude Fiorini, Senior Lecturer, and Prof. Dr. Peter McEleavy

HARMONISATION OF LAW FROM A CROSS-BORDER PERSPECTIVE WITH SOME REFLECTIONS ON THE GCC AND THE EU

Over the past years, with the increased movement of persons, services and goods, the ease of communication technology and travel, and the newly introduced markets, the movement towards private international law harmonisation has expanded as a response to such changes regionally and globally. Different governmental and non-governmental organisations have become involved in harmonisation projects. The variety of organisations involved in the harmonisation process, their different specialisations and legislation powers, and the covered areas and degrees of harmonisation result in different methods and techniques of harmonisation, such as the harmonisation of conflict of laws rules or of substantive rules, and harmonisation by using binding or non-binding law instruments. In light of the widespread harmonisation projects and their acceptance, it has become clear that such projects are needed, but there are still debates about the best method to achieve desirable harmonisation project objectives. The Gulf Cooperation Council (GCC), a regional economic and political organisation, established in May 1981 and composed of the six Gulf States (United Arab Emirates, Kingdom of Bahrain, Kingdom of Saudi Arabia, Sultanate of Oman, State of Qatar and State of Kuwait), has taken some steps towards harmonisation of laws. However, both the policy of unifying Gulf laws and the idea of mandatory circulation of judgments in all Member States are progressing very slowly. There is a need for deep assessment to detect the difficulties and weaknesses, to suggest solutions in order to move forward, to find the extent to which these harmonised laws are consistent with national laws and international standards, and to establish how new developments in the region may impact the harmonisation endeavour. The purpose of this paper is to compare and contrast harmonisation and unification on the one hand, and conflict rules and substantive rules on the other. This will help in identifying the most appropriate method and technique to be adopted by the GCC to achieve the desirable harmonisation.

The paper is composed of three sections. The first section provides an overview of the concept of harmonisation. The term harmonisation is defined and distinguished from unification. Upon discussing different justifications for harmonisation, the process leading to harmonisation and common obstacles encountered in the course of this process are examined in detail. The second section outlines various harmonising and unifying techniques, and identifies the factors which affect the choice of the most suitable one. The final section focuses on the issue of whether it is more appropriate to harmonise conflict of laws rules or substantive rules and analyses the arguments in favour and against

substantive harmonisation. From this discussion, some parallels are drawn between the situation in the GCC and the experience of the European Union, the leading economic integration organisation. It follows that there is hardly a single method or technique that would perfectly fit the GCC's interests and thus be adopted directly. Therefore, each project of harmonisation within the GCC should be studied and examined individually.

Candidate: M. Z. Ashraful

Institution of employment: Metropolitan University, Sylhet, Bangladesh

Institution of doctoral study: South Asian University, New Delhi, India

Mentor: Assist. Prof. Dr. Sai Ramani Garimella

SHOULD BANGLADESH ACCEDE TO THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS?

The existing sale of goods law regime in Bangladesh regulated under the Sale of Goods Act, 1930, is apparently very old and in many circumstances, inadequate to meet the global need for dealing with transnational trading activities. As Bangladesh attempts to become an economic player within the South Asian region, there is an increased need for unshackling from the archaic legal architecture that the country has derived from its colonial connections. As a matter of fact, a large number of states including major trade partners of Bangladesh have already acceded to the United Nations Convention on Contracts for the International Sale of Goods (CISG), the Convention which is globally accepted and plays an important role in international commercial transactions.

Considering the present scenario of the sale of goods laws in Bangladesh, the pertinent question that requires pondering upon is the extent of necessity to adopt the CISG in the legal system of Bangladesh in pursuit of convenient transnational trading activities. This paper examines the role of the CISG and outlines the challenges and benefits of joining this Convention. In this paper we seek to answer the question whether adopting the CISG will facilitate the ability of the existing legal regime to handle the challenges of the cross-border sale of goods contracts in Bangladesh. The main proposition of this study is that it would be more beneficial for Bangladesh to adopt the CISG. In order to validate the hypothesis, the paper examines two standpoints, one in favour of the CISG and the other against it. Finally, the paper addresses the possibility that the two standpoints might/can be brought closer together.

Candidate: Agata Cevc

Institution of employment: Supreme Court of the Republic of Slovenia

Institution of doctoral study: University of Ljubljana, Slovenia

Mentor: Prof. Dr. Aleš Galič

CIVIL LIABILITY OF JUDGES AND ARBITRATORS

Civil liability of judges is a sensitive question because of the need to find a balance between the right to compensation for damages and the independence and impartiality of the judiciary. Judges must be able to decide impartially, without fear of being sued by the parties dissatisfied with the judgment. Another argument against civil liability is that a system of appeal can correct flawed decisions. There is a concern that judicial liability may lead to endless proceedings, endangering the concept of "res judicata". Since arbitrators exercise a similar function as judges, this research also addresses their civil liability. The hypothesis is that due to the similarity of functions performed by judges and arbitrators, most countries grant a certain degree of immunity to arbitrators with respect to their judicial capacity. But since their power derives from a private contract and they receive payment from the parties in exchange for professional services, it is also necessary to examine their contractual liability. Therefore, the contractual liability of arbitrators and their liability for the performance of judicial function are in this paper examined separately.

The study of the civil liability of judges and arbitrators is carried out from the perspective of both common law and civil law countries, because the approach in common law and civil law countries differs fundamentally. In common law countries judges enjoy absolute immunity for acts performed in their judicial role. Immunity protects them even in cases of clear *ultra vires*, corrupt or malicious acts, as long as they act within the court's general jurisdiction. The doctrine of judicial immunity is heavily criticized. Most authors think that the system of qualified immunity which exists in civil law countries is more appropriate. Although national liability regimes among civil law countries differ, the scope of civil liability for judicial acts is much broader than in common law countries. The aim of the comparative analysis of national jurisdictions, which includes the analysis of legislation, case law and scientific research, is to identify the conditions which must be met for the compensation claim to succeed.

The following hypotheses are put forward: 1. All civil law countries recognize the right to reimbursement for damage caused by judicial errors. 2. In most countries, only the state is directly responsible for damages, given the fact that, if judges would be personally liable, this would threaten their independence and impartiality. 3. The state has the right to recourse claim against judges who act maliciously. 4. In most countries judges do not enjoy absolute immunity but can be liable indirectly (through recourse claims). In this regard the paper studies the influence of EU law on the state's liability for judicial errors – the judgments of the Court of Justice of the European Union in *Köbler* and *Traghetti*.

With respect to the civil liability of arbitral institutions, the key issues are contractual exclusions and restrictions on liability. Despite frequent recourse to international arbitration courts, where a panel consists of arbitrators from different countries, there is

still no uniform approach to the arbitrator's liability for damages. When comparing different legal orders, it is important to determine whether and how the law on civil liability of arbitrators could be unified.

Candidate: Maja Čarni Pretnar

Institution of employment: Ministry of Public Administration & Ministry of Justice, Republic of Slovenia

Institution of doctoral study: University of Ljubljana, Slovenia

Mentor: Assoc. Prof. Dr. Jerca Kramberger Škerl

THE SPECIAL NATURE OF PROCEDURES USED IN INTERNATIONAL CHILD ABDUCTION PROCEEDINGS

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (HAC) is considered to be one of the most successful multilateral conventions with 99 Contracting Parties. The HAC dates to 1980, an era with a social reality different from the present one. Consequently, expectations that have arisen in the meantime or are still arising require a revision of the mechanisms put in place by the HAC. The operation of the HAC has been affected by a number of international and regional documents. One of the most important is certainly the UN Convention on the Rights of the Child from 1989 (and the Protocols thereto). This research, however, focuses on a regional instrument, i.e. the 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 (Brussels II bis Regulation). Of particular interest is the relationship between the Regulation and the HAC, since the Regulation did not replace the provisions of the HAC, but rather upgraded them, which also applies to the assimilating procedures of the EU Member States. Therefore, the enablement of procedural solutions for providing effective remedies in cases of wrongful removal of children remains the purpose of these combined provisions. This needs to be accomplished by considering the best interest of the child, which is in cases of wrongful removal generally defined as returning the child to the country of his or her habitual residence and enabling its court to seize jurisdiction. Considering that the underlying principle of both documents is the best interest of the child, the paper elaborates upon the standards of procedural rules used in EU Member States, set in the HAC and the Regulation, as well as upon the question whether the provisions used in these proceedings indeed meet the specific procedural standards needed to protect the best interest of the child.

In the first section of the paper, a short overview of the HAC is provided, followed by an outline of the relevant provisions in the Brussels II bis Regulation and their influence on, or rather interaction with, the HAC. Based on the case law of the European Court of Human Rights, the Court of Justice of the European Union and national courts, especially the Slovenian ones, the paper draws conclusions as to whether the procedural rules used in the proceedings concerning child abduction before Slovenian courts allow special protection intended to guarantee “the best interests of the child” standard.

Candidate: Laura Deschuyteneer

Institution of employment: University of Ghent, Belgium

Institution of doctoral study: University of Ghent, Belgium

Mentor: Prof. Dr. Jinske Verhellen

THE INFLUENCE OF EU PRIVATE INTERNATIONAL LAW ON THE EXCEPTION OF INTERNATIONAL PUBLIC POLICY IN MATTERS OF RECOGNITION AND ENFORCEMENT OF JUDGMENTS

In Private International Law (PIL), the recognition or enforcement of a foreign judgment can be refused under the exception of international public policy when it runs counter to the core fundamental values of the state. The exception is traditionally a national concept and is interpreted and applied in accordance with the most essential principles of each state. It functions as a safeguard against foreign solutions that cannot be tolerated in the domestic legal order. Within the EU, this distinct, national notion of public policy has been undergoing a change due to the growing Europeanization of PIL and the consequent interpretation by the Court of Justice of the European Union (CJEU). The CJEU has consistently limited the scope of application of the notion of exception and has put its stamp on the understanding of the term. After all, exception is a direct obstruction to the free movement of judgments within the EU, an important objective in the context of creating a well-functioning internal market. The CJEU found that the EU Member States can still determine the meaning of the notion of public policy and that it is not up to the national courts to determine the content of public policy. Nevertheless, the CJEU will review the limits within which the national courts of an EU Member State can refuse the recognition or enforcement of judgment from another Member State. The idea is that mutual trust between Member States should lead to mutual recognition and consequently, a very limited application of the exception to foster the free movement of judgments.

The research focuses on the impact of the CJEU case law upon the notion of international public policy in national law. It then elaborates upon the question whether this has potentially led to a move towards an EU public policy. Apart from *Krombach* (Case C-7/98), which represents a landmark case in the context the Brussels regime, the CJEU has interpreted the notion of exception on many occasions, each time providing further guidelines. The explanation given by the CJEU is in the paper compared with the results of the analysis of Belgian case law. This approach allows us to grasp the influence of EU PIL on the national understanding of the notion of exception, by comparing how the notion is applied both with regard to the judgments coming from EU Member States and from non-EU States. The conducted research of Belgian case law, both in commercial and family law matters, reveals a very limited impact of the EU interpretation of public policy. As a matter of fact, the CJEU case law is hardly referred to by the Belgian courts.

Candidate: Katarzyna Dziewulska

Institution of employment: Opole University, Poland

Institution of doctoral study: Opole University, Poland

Mentor: Prof. Dr. Piotr Stec

WHAT WOULD HAPPEN IF THERE WERE THE "GOLDEN TRAIN" FROM WAŁBRZYCH?

There is a legend about a train carrying gold, jewellery, works of art and other valuable items, as well as the Amber Chamber. The legend was created in 1701 and has actually become a symbol of lost treasure. It is believed that these items were stolen during World War II by the Nazis. According to the legend, the train disappeared on its journey to Wałbrzych. Even though it has never been found, it is possible that the story of the "golden train" is not only a legend. There is evidence that in 1945 in Hungary there was another similar train carrying the same kind of treasure. A few years ago the Polish media reported that the location of the "golden train" has been discovered. As a result, many entities claimed their rights to the contents of the "golden train". Although nothing was found on the location, this situation suggests that if it occurs, issues concerning the ownership of treasures will arise.

The purpose of this research is to examine the laws which might be applicable to the hypothetical "golden train" situation and to attempt to resolve the potential problems concerning the ownership of treasure items. There are many such problems are many and they depend on the location and the contents of the "golden train". For instance, if we assume that the train was found on the Polish territory and carried the Nazis' (looted) gold, according to post-war arrangements, it would probably pass to Poland. However, there are opposing opinions suggesting that in this type of scenario, the content of the "golden train" should belong to Russia as the successor to the Soviet Union in order to make part of the Wold War II reparations. Furthermore, if it turned out that some items found in the "golden train" belonged to some individuals, regardless of their citizenship, the property should be returned to their heirs. Problems might occur if the heirs cannot be determined or if there are no heirs. Under the Polish law, the Polish National Treasury is the last heir in such circumstances. Works of art, for instance, should be returned to the institutions from which they were stolen (e.g. museums), regardless of where they were found.

The legal status of treasure carried by the "golden train" is far from being unambiguous and depends upon different circumstances related to its location and contents. These considerations are important not only for the future owners of these valuable items, but also for the future relations among several neighbouring countries. Apart from international treaties, such as the 1945 Potsdam Agreement, the paper focuses on Polish national legal sources relevant for these considerations. In this regard, special emphasis is put on the 1945 Deserted and Abandoned Property Act, the 1946 Decree on Abandoned and Post-German Property, the 1964 Civil Code and the 2015 Found Items Act.

Candidate: Aleksandrs Fillers

Institution of employment: University of Antwerp, Belgium

Institution of doctoral study: University of Antwerp, Belgium

Mentor: Prof. Dr. Johan Meeusen

FREE MOVEMENT OF COMPANIES: IN SEARCH OF NEW METHODS AND OBJECTIVES

Since the creation of the European Economic Community, which over time became absorbed by the later established European Union, scholars have contemplated a tension between its primary law and national conflict-of-laws rules. Nevertheless, in general, this tension has remained limited and sporadic. However, there is one exception. For decades the freedom of establishment has had noticeable influence on the functioning of the conflict-of-laws rules in the EU Member States. The first seminal ruling of the Court of Justice of the European Union (CJEU) on the freedom of establishment directly addressing its co-existence with the national conflict-of-laws rules was rendered in the *Daily Mail* case. That ruling was followed by a number of similar cases (*Centros*, *Überseering* and *Inspire Art*) greatly affecting the functioning of the real seat doctrine in the national conflict-of-laws rules. Finally, in 2017, the CJEU rendered the ruling in the *Polbud* case that opened the door to the unprecedented liberalization of cross-border movement of companies in the EU.

At the current stage of development the free movement of companies has been conceptualised through a number of different concepts: the principle of mutual recognition, the protection of acquired rights and the concept of party autonomy. At the same time, some scholars perceive the CJEU's jurisprudence as a system of conflict-of-laws rules that determines the applicable law and, in that sense may be compared to the traditional systems of conflict-of-laws rules. Some of these conceptual constructions have to a certain degree become less adequate after the ruling in the *Polbud* case.

The purpose of this presentation is to offer a critical analysis of the CJEU's jurisprudence on the free movement of companies with a view to identifying the main objectives and methods behind the free movement of companies and assessing the adequacy of the methods employed by the CJEU. Such an analysis is particularly valuable now when the CJEU has rendered the *Polbud* ruling, posing a legitimate question whether this case is a natural continuation of the methods of coordination between national legal orders previously developed by the CJEU or whether it marks an important innovation in the CJEU's methodology and a possible change in the policies underlying the free movement of companies in Europe.

Candidate: Fulvio Marone

Institution of employment: University of Salerno, Italy

Institution of doctoral study: University of Salerno, Italy

Mentor: Prof. Dr. Andrea Federico

REFLECTIONS ON SELECTED ISSUES RELATING TO THE TRUST IN THE ENGLISH LEGAL SYSTEM

The aim of this paper is to assess the impact of the third party rule on the dynamic phase of trust management. It is argued that the legal nature of the trust's constituting document should be reconsidered, especially with regard to the connection between legal acts, taking into consideration, on one hand, the third party rule and, on the other, the fact that the legal position of the beneficiary is temporary and in the process of formation. An additional problematic aspect, which is also discussed by the English scholars, relates to the legal nature of the beneficiary's position. The problem needs to be reassessed for two main reasons. First, the application of the third party rule implies that, in the absence of beneficiary's consent, beneficial effects can be created in his or her favour. Such legal position of the beneficiary, however, is not fixed, given that it is subject to the beneficiary's possible release due to the need to protect the legal sphere of third parties. More specifically the legal position of the beneficiary should be regarded as a dynamic situation and in the process of formation because, in addition to the trust's constituting document, further acts are needed for achieving the trust's purpose. As a result, the beneficiary's legal position may be characterised as that of an expectant. Second issue related to the beneficiary's legal position in the trust relationship concerns the possibility to allow the assignment of beneficiary's right. The question which arises involves not only the personal nature of beneficiary's right, but also the classification of beneficiary's right as an absolute one, for the purpose of the application of Section 136 of the Law Property Act 1925, which is in force in England and Wales. The classification of the third party's position as an expectant at the time of the acceptance of office by the trustee, leads to the impossibility of attributing an absolute right to the third party.

A further controversial aspect relates to the form of the implementing acts of the trust's constituting document concluded between the trustee and the beneficiary. It seems appropriate to theorise as follows. The form of the implementing acts of the trust concluded between the trustee and the beneficiary should respect the form used for the trust's constituting document, even if the constituting document concluded by the settlor was made in a particular form, and even if the law provides the written form for only some transfers to the trust fund. Hence, it is necessary to focus on other problematic aspects. It is reasonable to ask whether or not the rule *simul stabunt simul cadent* applies. The issue should be resolved by considering the validity of the so-called "asynchronous trust". In addition, the trustee's liability towards the beneficiary should be regarded as a pre-contractual liability.

Candidate: Justyna Gumuła-Kędracka

Institution of employment: University of Silesia in Katowice, Poland

Institution of doctoral study: University of Silesia in Katowice, Poland

Mentor: Prof. Dr. Monika Jagielska

THE EUROPEAN UNION LAW ON INTERNATIONAL CHILD ABDUCTION: IS THE DUTY OF MUTUAL TRUST ENOUGH?

Freedom of movement and residence for persons in the European Union is the cornerstone of EU citizenship, established by the Treaties. The right enjoyed by many Europeans contributes to the ever-increasing movement of people within the EU. Both individuals and families move from one EU Member State to another. The social changes are responsible for an increase in the number of transborder family conflicts in the EU. These factors consequently contribute to the growing number of what is known as international parental child abduction and the resulting private international law cases. International child abduction is understood as the wrongful removal or retention of a child, whenever it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention and whenever those rights were exercises at the time of removal or retention, either jointly or alone, or would have been so exercised but for the removal or retention.

In the EU, this phenomenon is regulated by two legal instruments, the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (HAC) and the Council Regulation 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 (Brussels II bis Regulation). The HAC seeks to protect children from the harmful effects of abduction across international boundaries by providing a procedure to bring about their prompt return. The HAC is supplemented in the EU by the Council Regulation No 2201/2003. Even though these two legal instruments lay down a clear set of rules to be used in cases of international child abduction, the phenomenon raises many legal questions. The European Commission has taken an action to resolve the most problematic aspects of international parental abduction and prepared a reform of the Brussels II bis Regulation. The aim of the research is to establish whatever the proposal of the European Commission with regards to the most problematic issues is adequate and sufficient.

Among many issues that arise in the application of international abduction law, the following ones are discussed in the paper: 1. Should the grounds for refusal of return of the child established in the HAC be understood differently within the EU with regard to the duty of mutual trust in the EU private law? 2. If time is of the essence in child abduction cases, what could be done within the EU to expedite the HAC proceedings? 3. What could be done within the EU to improve the enforcement of return orders? Answers to these questions aim to establish whether the mechanisms already familiar in the EU

private law are sufficient or whether the specificities of family realities and law in the EU require revisited enforcement mechanisms.

Candidate: Jakub Hablovič

Institution of employment: University of West Bohemia in Plzeň, Czech Republic

Institution of doctoral study: University of West Bohemia in Plzeň, Czech Republic

Mentor: Prof. Dr. Jan Hurdík

PROTECTION OF PERSONALITY: RESPECT AND HONOUR

Protection of personality is one of the most important domains of law, because it is an expression of what a "person" means in law – what he or she stands for. The law in fact provides the methodology for defining the concept of person. The concept of personality protection is not clearly defined in Czech law. Moreover, the legal doctrine is striving to find an appropriate way to approach the interpretation of the meaning of this concept, or at least to find one general definition. Absence of such definition causes problems, especially because without a definition it is impossible to guarantee an effective protection of this legal institute. We are well aware of the fact that in order to ensure protection, a certain degree of legal certainty is necessary.

The concept itself is identified by two terms: by the term "protection", which is guaranteed through civil law actions, and the term "personality", which is in Czech law outlined in Article 81(2) of the Civil Code. The Article suggests that "life and dignity of an individual, his health and the right to live in a favourable environment, his respect, honour, privacy and expressions of personal nature enjoy particular protection." This list is an expression of attributes of a person, which are protected by law. It is only an exemplary list, which means that one is entitled to claim protection of any other attribute of a person through a civil lawsuit. The question then arises as to what the attributes of a person are. Is there any definition that determines them both individually and generally and how exactly can they be affected?

In the process of determining the definition of honour and dignity it is crucial to realize that these values are an integral part of all legal systems, but they overlap only to some extent, and their scope is not clearly defined. Therefore, there is a need to examine their general understanding and meaning. Objectively speaking, "honour" is considered to be a sum of the opinion or conceit which a person has of herself or himself and the opinion which others have of that person. Subjectively speaking, it represents the inner state of a person's mind regarding self-value. This definition already encompasses the concept of dignity. Another important issue arises as to whether legal and non-legal meanings of the concept are identical. All things considered, it is possible to view this definition as a starting point, from which one can discern certain qualities of the concept, and therefore examine and take into account its individual attributes. These aspects can then lead to systematisation on the grounds of qualities, divisions, relations between certain attributes or concepts themselves and/or subject matters they denote, their scope or conditions to enjoy, all in a strictly legal sense. It is necessary to individualise both choice and evaluations of these aspects, because full generalization of each case is impossible.

It is possible to approach the issue from another perspective in order to resolve the issue of legal protection of personality, hence, from the perspective of unlawful interference

with personality rights. This was often the subject of discussions of legal scholars and was often dealt with in case law. The most frequent forms of interference are the so-called "factual claims". These claims have an objective nature, where the key attribute to be taken into account when deciding on violation of personality right is truth. Satire is a special category of these claims and it requires careful examination and balancing of various interests. On the grounds of special criteria and attributes, it is possible to decide whether a critique (as a factual claim) affects personality rights or not. Within the context of factual claims, it is crucial to take into account the fact that the right to protection of both personal honour and dignity need to be weighed against the right to the freedom of speech. This is not an easy task, since both rights are fundamental human rights and are thus of the same value. Another form of claims is the so-called "assessing accounts". These are, contrary to factual claims, subjective in their nature, which is why it is crucial to determine special criteria and attributes based on which they can be examined.

Candidate: Tea Hasić

Institution of employment: Juraj Dobrila University of Pula, Croatia

Institution of doctoral study: University of Zagreb, Croatia

Mentor: Assist. Prof. Dr. Ana Rački Marinković

INTELLECTUAL PROPERTY RIGHTS AS A TOOL TO PROTECT TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS

The aim of the research is to examine the most appropriate means of an effective and comprehensive protection of traditional knowledge (TK) and traditional cultural expressions or folklore (TCEs). Can this be achieved through the application of conventional (or modified) intellectual property (IP) rights (such as copyright and related rights, industrial design, trademarks, geographical indications and patent) or by applying *sui generis* intellectual property rights (tailor-made to protect traditional knowledge and folklore)? Alternatively, can this be achieved better through means other than those of IP law? The latter question needs to be considered in view of the argument that, no matter the extent to which IP law is modified, it seems to be inadequate for ensuring protection of traditional knowledge and folklore, since it fails to provide the level of protection expected by traditional knowledge holders without breaching fundamental postulates of IP law, such as the limited duration of protection and the entrance into the public domain after the expiration of protection.

In order to reach the aforementioned goal, the following three hypotheses are tested: 1. TK and TCEs are products of intellectual activity. Nevertheless, according to other features, TK and TCEs are not eligible for effective and comprehensive protection through conventional IP rights. 2. Theoretically, the *sui generis* IP rights might be an effective instrument for TK and TCEs protection. However, there are many reasons that make those rights unenforceable in practice. 3. Effective and comprehensive protection of TK and TCEs in the area of IP law is not expected. Therefore, at this stage of research it is assumed that different protection models that fall outside the framework of IP law could be more appropriate solutions.

The methods used in this research are both doctrinal and normative. Namely, solutions *de lege lata* (national, regional and international) as well as *de lege ferenda* are analysed in detail applying various methods of legal research, including the comparative one. In the course of research the attention is paid not only to legal literature, but to a lesser extent also anthropological, biotechnological and philosophical. In discussing and putting forward own *de lege ferenda* solutions on national and international levels, the following three steps will be taken: 1. The identification of TK and TCEs forms or segments that can (to a certain extent) be protected through IP rights (without violating fundamental postulates of IP law), 2. The proposal of optimal *de lege ferenda* solutions for the "so-called" fragmentary or indirect protection of traditional knowledge and folklore, and 3.

The suggestion of different models for further action (as regards protection of TK & TCEs) at the international level.

Candidate: Alexander Hiller

Institution of employment: Ruprecht-Karls University in Heidelberg, Germany

Institution of doctoral study: Ruprecht-Karls University in Heidelberg, Germany

Mentors: Prof. Dr. Christoph Alexander Kern and Prof. Emeritus Omaia Elwan

EXTRATERRITORIAL ARBITRATION AND THE NEW YORK CONVENTION: THE CASE OF THE NEW UAE ARBITRATION LAW

On 3 May 2018, the President of the United Arab Emirates (UAE) signed into law the new Arbitration Act which had been in preparation for more than a decade. In comparison to the 1985 UNCITRAL Model Law on International Commercial Arbitration and the 1994 Egyptian Arbitration Act, both of which have served as models for the UAE Law, it expands judicial control over awards in two directions. First, the number of grounds for setting aside domestic awards is increased to ten, including such grounds as the failure to apply the law chosen by the parties and their incapacity to dispose of the right subject to arbitration. Second, the scope of its application is extended beyond awards made in the territory of the UAE to awards which have been submitted to that law and awards in relationships governed by UAE law, giving rise to what Badr has dubbed "extraterritorial arbitral awards".

The paper explores the treatment of such awards under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC). In particular, it discusses whether the NYC allows the setting aside (and, consequently, the denial of enforcement) of extraterritorial awards. This idea has been put forward as a result of the combined reading of articles I(1) and V(1)(e) of the NYC under the United States Federal Arbitration Act, as well as the former Indian Arbitration and Conciliation Act. The paper re-examines different concepts of determining an award's nationality with a special view to what was formerly known as the procedural principle. Under this concept, the connecting factor is not the State in which the award was made, but the State the procedural rules of which are applied as the *lex arbitri*.

A close analysis of the *travaux préparatoires* for Articles I(1) and V(1)(e) of the NYC reveals that these provisions are the result of an attempt by Western European Countries to implement the procedural principle in the NYC. It also shows that this attempt has failed half-way and that, as a result, the State in which the award was made takes precedence over any other connecting factor for the award's nationality. Under the NYC, the reading of the "the law under which the award was made" criterion is far narrower than the wording implies. It does not generally permit the Contracting States to treat extraterritorial awards as domestic, set them aside and refuse their enforcement. The award may only be set aside in the State under the law of which it was made if it is considered non-domestic at the place of arbitration.

Therefore, even though the UAE Arbitration Act considers extraterritorial awards as domestic, they are considered foreign under the NYC. This finding applies to any jurisdiction implementing the concept of extraterritorial arbitral awards, including the United States and some Arab States, such as Bahrain, Egypt, Oman, Qatar, and Saudi

Arabia. These results call upon legislators and national judges to take the territoriality principle seriously and may serve as a guidance for arbitrators and counsels when determining the enforceability of an award.

Candidate: Anna-Lena Hoffmann

Institution of employment: SGT Rechtsanwälte, Germany

Institution of doctoral study: University of Rijeka, Croatia

Mentors: Prof. Dr. Nada Bodiroga-Vukobrat and Prof. Dr. Gerald Sander

REQUIREMENTS FOR CONSENT TO THE PROCESSING OF HEALTH DATA UNDER THE GENERAL DATA PROTECTION REGULATION

The General Data Protection Regulation 2016/679 (GDPR), applicable as of 25 May 2018, aims to harmonise data protection law throughout the European Union. It replaces the Data Protection Directive 95/46/EC (DPD) of 1995 which has become technologically outdated. In 1995, phones were not *smar*t and *clouds* were a weather phenomenon, not a symbol of information technology. The drafters of the GDPR rendered it to be technologically neutral. It is so broad that there are (almost) no specifications for different fields of application in which personal data are being processed. What the GDPR does recognise, just like its predecessor, is that not all personal data should be treated the same. Therefore, specific conditions apply to "special categories of personal data", including health data. With regard to the fields of application, the scenarios in which and the conditions under which personal health data are obtained are manifold and vastly different (e.g. locally, online, by humans, by technical devices, individually, massively, directly, indirectly). They are all subject to the same criteria and rules under the GDPR.

One of the legal grounds for lawful data processing is consent, regulated by Articles 7 and 9 of the GDPR and several GDPR recitals (32, 33, 42 and 43). According to Article 4(11) of the GDPR, the following conditions need to be fulfilled for a valid consent: 1. that the subject expresses his or her agreement to the processing of his or her personal data 2. that this is indicated through a statement or a clear affirmative action 3. that the indication is given freely, hence, that the consent is specific, informed and unambiguous. Additionally, when consent is requested for the processing of special categories of personal data, under Article 9(1)(a) of the GDPR, it has to be 4. explicit and 5. for one or more specified purposes.

Even though the definition in terms of its wording has not changed significantly since the DPD, the exigencies of consent were changed by the GDPR, because the context has changed, in particular with regard to the processing of health data. In practice, the validity of consent differs depending on the circumstances of obtaining consent, for example, the location where it is requested and obtained (e.g. doctor's office, patients house; online or offline), the form in which it is given (written, orally, conduct), the relationship between the controller and data subject (e.g. imbalance or equated; considering age, knowledge, profession), the quality (e.g. data subject needs to understand the information on which consent is based, the manner in which the request for consent is made, and timing (e.g. consent before processing, time to understand the information provided, time to decide; pressing need for medical action).

The dissertation analyses the flaws of the definition of consent, how the shortcomings can be amended and how valid consent can be obtained under different circumstances in

the medical field, such as in doctor's offices and hospitals, both locally and remotely (e.g. for telemedicine), for scientific research, big data analytics and artificial intelligence applications.

Candidate: Aliz Káposznyák

Institution of employment: KNP LAW Nagy Koppany Varga and Partners Law Firm, Hungary

Institution of doctoral study: Eötvös Loránd University in Budapest, Hungary

Mentor: Prof. Dr. István Varga

RECOGNITION AND ENFORCEMENT OF INVESTMENT ARBITRAL AWARDS IN LIGHT OF THE MOST RECENT DEVELOPMENTS IN THE EUROPEAN UNION: WHERE DO WE STAND NOW?

Investment treaty arbitration is currently undergoing profound and far-reaching changes, particularly in Europe, which is well demonstrated by two recent developments. First, on 6 March 2018, the Court of Justice of the European Union (CJEU) rendered its long-awaited judgment in the *Achmea* case, in which it held that the investment arbitration clause contained in the Dutch-Czech-Slovakian intra-EU Bilateral Investment Treaty (BIT) had an adverse effect on the autonomy of the EU legal order and was therefore incompatible with EU law. Second, in order to remedy the deficiencies attributed to the current system of Investor-State Dispute Settlement (ISDS), the EU launched a systematic and comprehensive reform aiming to replace investor-State arbitration with a permanent adjudicatory body, consisting of a tribunal with publicly appointed judges, and an appellate tribunal. In connection with this initiative, the CJEU is expected to issue in early 2019 its Opinion 1/17 on the compatibility of this new model of investment dispute settlement with the EU Treaties and fundamental rights. These most recent developments taking place in the EU raise several additional questions regarding the currently pending and future investment arbitration proceedings, including how and under what conditions the arbitral awards rendered in these procedures can be recognized and enforced both within and outside the EU.

A party seeking enforcement of an intra-EU investment award rendered either in arbitration administered by an institution other than the International Centre for Settlement of Investment Disputes (ICSID) or in *ad hoc* arbitration usually invokes the provisions of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) which allows domestic courts to refuse recognition and enforcement of an award based on specific grounds set forth in Article V of the NYC. With regard to the fact that in the *Achmea* judgment the CJEU qualified the autonomy of the EU legal order as a fundamental and mandatory rule of the EU law, which must prevail in all circumstances, in light of the legal standard laid down in *Eco Swiss* and *Mostaza Claro*, it can be concluded that the national courts of all EU Member States will most likely be obliged to refuse the recognition and enforcement of such an award under the public policy exception.

While it seems to be a clear-cut conclusion that non-ICSID intra-EU awards will not be enforceable within the EU, the situation is far less predictable in the case of the ICSID awards or non-ICSID awards which are intended to be enforced outside the EU. Although the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) provides no possibility of review of the award during the recognition and enforcement stage to the local courts in any particular

Contracting State, it is worth keeping in mind that the ordering of payment from the respondent EU Member State might be deemed (unlawful) state aid under Article 107 of the Treaty on the Functioning of the European Union (TFEU), which can lead to a significant impediment to the enforcement of the award, as evident from *Micula et al v Commission* brought before the General Court of the European Union. In addition, it is also questionable what the *Achmea* judgment's implications are for arbitration under the Energy Charter Treaty or under a BIT concluded with a third state and whether these awards can be enforced in the EU after the *Achmea* judgment.

Apart from the judgment in *Achmea*, the new court-like investment adjudicatory body proposed by the EU also gives rise to several questions related to the recognition and enforcement. Although according to the views of the majority, the decision rendered by this investment court can fall under the scope of the New York Convention, the future of this new ISDS model will greatly depend upon the opinion of the CJEU as to whether the investment court system can be considered compatible with EU law. In this regard, the findings of CJEU in *Achmea* as well as the Opinion 2/13 on accession of the EU to the ECHR can be of certain guidance.

In light of the above, the results of the research are intended to be given in the form of cautious answers to the question of where we stand now as to the recognition and enforcement of awards rendered in current and future investor-State arbitration proceedings with special regard to the most recent developments in the EU.

Candidate: Kevin Labner

Institution of employment: University of Vienna, Austria

Institution of doctoral study: University of Vienna, Austria

Mentors: Prof. Dr. Andreas Konecny

PARTIAL SETTLEMENT BY WAY OF "ADMISSION AGREEMENT": WHY IS CONTRACTUALISATION WITHIN THE LAW OF ADMISSION NOT FEASIBLE?

The research comprises a sub-topic of a wider doctoral research on the evidentiary agreement, in particular on the scope of party autonomy in the field of the law of evidence. It intends to analyse several (contractual) instruments available in the Austrian legal order to parties willing to settle certain elements of their dispute, such as facts or *questiones mixtae* at different stages of proceedings. The methodology applied is comparative. The issue at hand is the feasibility of a procedural agreement commonly termed "agreement on admission" and its legal nature. The proposition made here is that "agreement on admission" should be interpreted as a substantive agreement *sui generis*.

The term "agreement on admission" already indicates a relation to the (in-court) admission – an instrument that acts as a "shortcut" for the procedural establishment of facts, excluding the judge's competence to take and evaluate evidence. While many jurisdictions provide for an admission, most remain tacit on an "agreement on admission". As a procedural agreement, it establishes the obligation to perform an in-court admission – or not to contest the opponent's allegations of certain facts, depending on the precise design of an in-court admission in a specific jurisdiction (see Section 138(3) of the German Code of Civil Procedure) – in subsequent proceedings.

A clause which reads "[…] in a lawsuit, it shall be admitted that the painting was carried out correctly" can be considered an agreement on admission. It is assumed here that such an interpretation does not sufficiently reflect the parties' will, as they presumably intend that neither the factual conduct of the painting nor its classification as "correct" (i.e. according to the contract on the painting) shall subsequently be subject to contrary judicial assessment. It is argued that an interpretation of such clauses as agreements on admission shows several deficiencies and might run counter to the parties' expectation.

Since an admission only relates to the facts of the case, it follows that the same applies to the agreements on admission. Thus, an admission can only determine that certain works were actually carried out, but cannot determine their "correctness" because that would exceed the scope of admission. Considering the clause, an agreement on admission therefore entails only limited effects compared to the intended ones. Furthermore, it is highly unclear how the obligation to perform the in-court admission shall be enforced in case of refusal or non-compliance. Procedural rules do not provide for the direct enforcement of procedural obligations. This is especially true for procedural obligations created by parties' agreement. The final point addressed here relates to the fact that the contractual obligation can relatively easily be eliminated or adapted unilaterally; contrary to the principle of *pacta sunt servanda* in contract law, a party can revoke its

"performance" of the admission agreement. Procedural rules usually provide for the possibility to revoke an in-court admission (the specific legal consequences depend on the respective jurisdiction), which decisively mitigates the binding effect of the contractual obligation.

Candidate: Mindy Nunez Duffourc

Institution of employment: University of Passau, Germany

Institution of doctoral study: University of Passau, Germany

Mentor: Prof. Dr. Jörg Fedtke

USING THE GERMAN MODEL TO IMPROVE THE RELIABILITY OF MEDICAL MALPRACTICE LITIGATION OUTCOMES IN THE UNITED STATES

Erroneous and exorbitant medical malpractice judgments are often cited as a cause of high healthcare costs in the United States. Proponents of this theory argue that unjustified and extreme malpractice judgments increase medical malpractice premiums for physicians causing them to: 1. refrain from practicing in high-risk medical specialties, and 2. engage in the practice of defensive medicine, both of which increase the cost of healthcare for patients. Regardless of whether this causative reasoning is accurate, evidence that the US judicial system errs in its approximately one quarter of its malpractice judgments supports the underlying premise that medical malpractice judgments are neither reliable identifiers of negligent healthcare providers nor reliable sources of compensation for injured patients.

The US jury system is targeted as the main culprit of unreliable medical malpractice judgments with its critics citing the inability of lay people to understand the complex issues of medical science critical to decision-making in medical malpractice cases. Specialized health courts, a system similar to the German method of medical malpractice adjudication with no juries and specialized judges, is often proposed as an alternative to the jury system. While eliminating juries may seem like an attractive solution, the politicization of State court judges, partisanship of medical expert witnesses, and deeply ingrained right to a jury prevent the US from adopting the German model without substantial modification.

Unlike Germany, where career judges are chosen through a merit-based system, US State court judges are selected through popular partisan elections. As a result, they are susceptible to political influence, most notably by the attorneys who contribute to their election and re-election campaigns. Also unlike Germany, where medical experts are chosen by the court and paid a modest fee, US medical experts are chosen and paid handsomely by the litigating parties, thereby increasing the likelihood of biased and unreliable medical testimony.

Eliminating juries, a neutral factor amidst the US State courts' biased and political judicial landscape, would only serve to further decrease the reliability of medical malpractice judgments. However, adopting two features of the German model would instil a greater degree of accuracy, reliability, and fairness in the US medical malpractice system. First, the use of specialized judges would provide a more informed and uniform body of law for legal issues involved in medical malpractice cases. Second, the use of court-appointed medical experts would help eliminate biased expert testimony and allow jurors to base verdicts on reliable medical evidence. This neutralization of judges and expert witnesses would

increase the reliability of medical malpractice outcomes in the US without eliminating juries.

Candidate: Mary O'Connor

Institution of employment: Queen's University Belfast, Northern Ireland

Institution of doctoral study: Queen's University Belfast, Northern Ireland

Mentors: Dr. Ronagh McQuigg, Lecturer and Dr. Yassin Brunger, Lecturer

THE ECHR AND THE RIGHTS OF THE CROSS-BORDER SURROGATE CHILD

The phenomenon of international surrogacy raises issues of increasing complexity relating to family formation which are presenting before the European Court of Human Rights (ECtHR). These issues include, clarification on the existence of family life, recognition of the intending father's genetic connection with the cross-border surrogate child, acknowledgement of the legal status of the commissioning mother who is either the wife or partner of the commissioning father, circumstances where there is no genetic connection between the commissioning parents and the cross-border surrogate child, and the right of that child to an official identity in the receiving state and the legality of the surrogate child's foreign birth certificate. However, the overarching principle which is central to these cases is that of a conflict of laws between the cross-border surrogate child's state of birth and the state of habitual residence of the commissioning parents which is reflected in situations of "limping parentage" and the problems it generates.

The matters complained of by the applicant commissioning parents were considered under Article 8(1) of the European Convention on Human Rights and Fundamental Freedoms (ECHR) which protects the right to respect for private and family life, and decided by the ECtHR in the cross-border surrogacy cases, *D & Others v Belgium*, *Mennesson v France* and *Paradiso and Campanelli v Italy*. However, the failure by the ECtHR to acknowledge the non-genetic commissioning mother in Mennesson has led to three recent applications being made to the ECtHR by parents of cross-border surrogate children, complaining of the refusal of the French authorities to recognise the intending mother as "mother". The applications, *Braun v France*, *Saenz and Saenz v France* and *Maillard v France* were made on 23 May 2018.

The suggestion that the ECtHR distinguished between "legitimate" and "illegitimate" families in *Paradiso*, a distinction rejected by the ECtHR in *Johnston v Ireland*, was raised in the dissenting opinion of five judges. This gives added cause for concern that cross-border surrogate children could be branded as the new "illegitimates". Furthermore, the failure of the ECtHR in *Paradiso* to consider the rights of the non-genetically related Russian-born surrogate child who was left without a formal identity for a period of two years, gives grave cause for concern. Moreover, the applicants in the case, the commissioning parents, could not bring a complaint on behalf of the child as they were considered not to have standing since they had no genetic connection with him and were not the guardians or representatives of the child under domestic law. The net impact of these circumstances was that the rights of the child were not the focal point of the case. His best interests were considered through the prism of the actions of adults and the child was regarded as an object and not a subject of rights.

This paper proposes to consider issues raised and unresolved by the ECtHR in *Mennesson* and *Paradiso* and suggests a way forward to ensure the rights of the cross-border surrogate child to the legal parentage of both commissioning parents from the moment of birth, in light of recent research undertaken by the Hague Conference on Private International Law in its Parentage/Surrogacy Project, the International Social Service and academic research.

Candidate: Paolo Palminteri

Institution of employment: Ministry of Foreign Affairs, Italian Republic

Institution of doctoral study: University of Rijeka, Croatia

Mentors: Prof. Dr. Vesna Crnić-Grotić

IMMUNITY OF STATE OFFICIALS

The regulation of personal immunities of state officials is an area of international law that still requires further research. Customary law and multilateral treaties focus only on a specific category of state officials, i.e. diplomatic and consular personnel. However, the actual development of international relations has increased the number of state officials contributing to the implementation of foreign policy. Therefore, international law must adapt to these changes. In particular, this research is focused on the immunity from foreign jurisdiction and the trend in the States' practices towards progressive development of the norms relating to immunities.

From a theoretical point of view, the need to respect the principle of sovereign equality of States, the rationale of immunities, has to be balanced with other important values of the international legal system, which are also essential for its stability, such as the norms of *jus cogens* protecting basic human rights. The International Law Commission (ILC) has been considering the issue of immunity from foreign criminal jurisdiction since 2008 and its Special Rapporteur proposed several draft articles. The ILC offers a comprehensive view on the political will of States, which thus merits attention in this paper.

Considering positive law, in the *Case Concerning Arrest Warrant* of 11 April 2002 the ICJ recognised the existence of a customary international rule granting personal immunity from jurisdiction to "holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs". The judgment was not unanimous and dissenting or separate opinions by judges reveal the intricacies of the matter. Legal scholars also expressed dividing opinions on the identification of the beneficiaries of immunity. In the aftermath of this judgment, national judges granted personal immunities to other top state officials, such as the Minister of Defence, regardless of the fact that the ICJ focuses on the so-called *trojka*, composed of Head of State, Prime Minister and Minister of Foreign Affairs. Moreover, in its 2002 judgment the ICJ did not draw a distinction between two different categories of immunity from foreign jurisdiction: *ratione personae* and *ratione materiae*. The former covers every act performed and it is granted to top state officials while in office. The latter covers without time limitations the official acts performed on behalf of the State. It is not clear which state officials enjoy the immunity *ratione materiae* and what constitutes an act performed in an official capacity.

The functional immunity is also closely linked to the immunity of State and to the issue of making effective the fundamental right of access to justice. For instance, in 2014 the Italian Constitutional Court declared that the law adopted by the Italian Parliament to enforce the ICJ Judgment of 2012 in *Germany v. Italy*, the case concerning jurisdictional immunity of the State, is contrary to the Italian Constitution.

Based on the above, the issue of immunities needs to be examined from the perspective of both positive law and progressive development, taking account the situations covered

by special regimes on human rights. Universal jurisdiction is another issue to be duly taken into consideration. According to the view of the majority view of legal scholars, an exception to the immunity from jurisdiction can be envisaged if state officials commit serious international crimes. Although this exception is disputed with respect to the immunity *ratione personae*, it is widely accepted in the application of the immunity *ratione materiae*. In practice, there is a trend towards limiting functional immunity in case of serious international crimes, such as torture, genocide, etc.

Candidate: Nexhmi Rexhepi

Institution of employment: Ministry of Foreign Affairs, Republic of Kosovo

Institution of doctoral study: University of Rijeka, Croatia

Mentors: Prof. Dr. Vesna Crnić-Grotić

THROUGH TRANSITIONAL JUSTICE: JURISDICTION OF THE KOSOVO SPECIALIST CHAMBERS AND THE SPECIALIST PROSECUTOR'S OFFICE

This paper examines the multidimensional features of transitional justice in Kosovo after 1999 and its impact on building jurisdictional capacities.

Societies affected by war face multifaceted problems since the conflict destroys all bridges of trust between members of society belonging to the conflicting sides. Kosovo was strongly affected by war and the brutality of atrocities committed against Kosovo people was confirmed by the judgments of the International Criminal Tribunal for the former Yugoslavia (ICTY). The ICTY had jurisdiction over Kosovo, and issued few indictments against Kosovars. In addition, the United Nations Interim Administration Mission (UNMIK) established its international panels to adjudicate crimes committed during the war. Afterwards, this authority was vested in the European Union Rule of Law Mission in Kosovo (EULEX). They both had exclusive authority to try war-related crimes and other serious crimes. Against this background and under the external pressure, the Assembly of the Republic of Kosovo adopted Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office on 5 August 2015. The adoption of the Law No. 05/L-053 laid the formal basis for establishing a tribunal under domestic law, but outside of the country of origin. The tribunal was envisaged as a type of hybrid court regulated by Kosovo law, but staffed by foreign judges, prosecutors, investigators. The court registry is also made of foreign personnel. The law to be applied by this hybrid court as stipulated under the foundational principles laid down by Article 3 and Chapter III, includes the Constitution of Kosovo, domestic substantive criminal law, international customary law (war crimes and crimes against humanity), and international human rights law related to criminal justice standards. Moreover, an extension of applicable law is envisaged by the Law No. 05/L-053 to include certain criminal law provisions validated by the United Nations Interim Administration Mission (UNMIK) in 1999.

This research paper will examine the jurisdictional aspects of this court as provided under the Law No. 05/L-053. It will also shed light on the work of previous judicial panels and other judicial authorities operating in Kosovo in the last two decades. This approach is considered necessary because the formation of this court is on one hand seen as a result of the inefficiency of international mechanisms, whose task was to deliver justice in Kosovo, and on the other, as a consequence of the Kosovo's reluctance to make sure that these mechanisms are used to effectively prosecute and adjudicate all alleged crimes, regardless the fact who were the alleged perpetrators.

Candidate: Alessia Sbroiavacca

Institution of employment: University of Udine/University of Trieste, Italy

Institution of doctoral study: University of Udine/University of Trieste, Italy

Mentor: Prof. Dr. Dario Stevanato and Prof. Dr. Mario Nussi

"SIN TAXES" AS A MEANS FOR ORIENTING CONSUMERS' BEHAVIOUR: BETWEEN HEALTH CARE POLICIES AND TAX CONCERNS

Fighting against sin has recently reached a new dimension. Worldwide, policy makers have started to evaluate potential benefits of imposing taxes on specific behaviours and goods thought to be harmful to society, in order to discourage their enacting and consumption. In the last decades the so-called "sin taxes", usually structured as excise taxes, have flourished in the European countries as well as in the US and have been chiefly designed to address socially undesirable activities. The ever-expanding list of taxable sins now includes tobacco, fatty foods, high-sugar-content foods and beverages, and many other similar products.

The rationale for levying taxes on these items relies on the concern that, in the long run, the consumption of unhealthy products could result in grave diseases for the individuals (e.g. obesity, diabetes) as well as cause negative externalities for the society, driving up the costs of health care services. Under this perspective, the power to tax becomes a useful means to (try to) influence consumers' behaviours and "save them from their own choices" (Cordato, 2006). According to the law of demand, an increase in the price caused by "behaviour-correcting" excise taxes should indeed be followed by a consistent decrease in the consumption, hence, avoiding (or, at least, reducing the likely realization of) the before mentioned health issues. Pursuing to adjust consumers' behaviour patterns and expenditure preferences, the deployment of "sin taxes" has expanded many countries' portfolio of taxes, affecting the prices of packaged products with a high sugar content (Hungary, 2011 and Mexico, 2013), of saturated fats (Denmark, 2011), of drinks with sweeteners (France, 2011), etc.

However, to date few research reports have inquired into the effectiveness of these kinds of taxes on the unhealthy products' consumption – and the few existing seem to conclude that there is no meaningful impact on individuals' choices. When deciding to introduce excise taxes on "sin" products, policy makers have indeed failed to consider the substitution and cross-price effects, as well as the cunning measures implemented by industries. On the consumers' side, economic studies showed that rather than opting for healthier products, consumers tend to choose less expensive, but equally harmful products. On the industries' side, they started to use raw materials outside the scope of "sin taxes", maintaining stability in their products' prices, but selling potentially worse products because of the poorer ingredients used. Furthermore, "sin taxes" turned out to have a severe regressive effect, falling disproportionately on low-income earners. Research suggest that this happens because low-income earners typically spend more of their income on food and beverages and, as healthier options are usually more expensive than "junk" foods, eating and drinking healthy is a mission impossible. These facts raise

undeniable equity concerns and it is not possible to affirm that "sin taxes" have achieved their original goal. On the contrary, they have rather become another means to raise more revenues.

Nevertheless, instead of evaluating possible adjustments in their tax policies in order to correct these undesired effects, countries are endorsing the "tax behaviour" movement, and new "sin taxes" are looming on the horizon. Especially in the US, recent proposals still reveal the plans to introduce excise taxes on "sin" products, which have not been "properly" taxed yet (such as soda and beer), or to increase existing taxes (such as the tax on cigarettes) as well as to affect the supply side actions by establishing specific limits to the tax deductibility of costs somehow related to the production of sin outputs.

These topics involve sensitive issues – namely, individuals' health care and tax policy choices – and should be subject to an in-depth expert analysis in order to answer multiple and complex questions: Is it possible to avoid the undesired regressive effects? Are actions on the supply side, directed at limiting tax deductibility of costs, consistent with provisions in the tax codes? What should policy makers do if it is established that "sin taxes" do not improve public health outcomes?

Candidate: Martina Scopsi

Institution of employment: Bocconi University, Italy

Institution of doctoral study: Bocconi University, Italy

Mentor: Assoc. Prof. Dr. Filippo Annunziata

VOLUNTARY DELISTING IN EUROPE: DIFFERENT RULES, SAME GOALS?

Delisting involves removal of thecompany's listed securities from a stock exchange where they are traded on a permanent basis. It can be done either by a voluntary decision of the company or compulsorily by the Stock Exchange because of some wrongdoing by the company. Voluntary delisting can occur not only "at the request of the company" (regular delisting), but also because of corporate restructuring, such as a merger of a listed company into a non-listed one, or takeovers (cold delisting). Over the last years, we have been witnessing a significant increase in the number of companies interested in pursuing voluntary delisting in all major stock exchanges and markets.

Despite some harmonisation at the European Union level, admission to trading and delisting are mostly subject to domestic laws. In this regard, it is common to all major EU jurisdictions to leave the decision to list in the hands of corporations, hence, that they on the basis of a cost-benefit analysis decide whether to comply with the stock exchange conditions and procedures for admission and to pose limits or conditions to their freedom to exit the capital market. It is generally acknowledged that corporations can freely decide to enter the capital market but they are allowed to delist only provided that "adequate protections" are in place.

As to delisting rules, however, important differences exist across jurisdictions. Focusing on major EU markets, UK company law does not provide any rules on delisting; it is rather the Financial Conduct Authority (FCA) that provides the rule of a two-tier supermajority approval for delisting decisions. Under the amended German Stock Exchange Act, delisting does not require shareholders' approval but a way out must be offered to all shareholders throughout a mandatory bid. Italian law, on the other hand, contains a company law rule that allows dissenting shareholders to withdraw whenever a resolution is adopted at a shareholders' meeting that results in the delisting of the company. Delisting has been hitherto largely underexplored from a legal perspective, especially in less mature stock exchanges such as the Italian one. It is still unclear what are the reasons for capital markets having exit barriers, thereby limiting the freedom of corporations to withdraw to the mere basis of a cost-benefit analysis. Consequently, it is also unclear whether, in the interplay of securities and company law, the existing different rules pursue the same objective and offer the same means and levels of protection.

This paper argues that the existing rules aim at striking a balance between the company's freedom to withdraw from the market and investors' expectations. On the one hand, the degree to which a legal system allows delisting transactions affects both the propensity of closely held corporations to go public and the functioning of stock exchanges as sources of capital. On the other hand, investors' expectations about the continuity of information and liquidity must be protected. Company and securities law are to this end intertwined and they can both contribute to building efficient delisting rules. In addition, the existing

different means of protection show that such a balance can be struck at different levels, depending on the market structure and protection policies.

Candidate: Gerardo Javier Ulloa Bellorin

Institution of employment: University of Zulia, Venezuela

Institution of doctoral study: University of Camerino, Italy

Mentor: Prof. Dr. Rocco Favale

TOURIST PROTECTION IN CONSUMER CONTRACTS: A COMPARATIVE STUDY BETWEEN THE ITALIAN LEGISLATION AND THE PROPOSAL FOR A HAGUE CONVENTION

Tourism is a social, cultural and economic phenomenon that involves the transfer of people to countries or places outside their usual residence for personal, professional or business reasons (UNWTO 2008). The International Tourism Organization has established that today, the volume of tourism-related business is equal to or greater than the volume of oil, food and automotive industry. Tourism includes a variety of activities tourists engage in, goods they buy and services they order. In this sense, a tourist usually becomes a consumer of goods and services in the place other than his legal residence. A consumer, on the other hand, is "any natural person acting for private purposes to meet personal needs". Recently, states have used/tested different methods for establishing clear and effective rules for consumer and business satisfaction, an evolutionary process, of Italy is also part of.

The protection of person in "specific situations" is also a phenomenon present in modern laws created by the influence of the process of *depatrimonializzazione*, especially in private law. It also includes the protection of tourist when he or she enters into a consumer contract. The tourist is especially vulnerable, thus deserving special protection, and other measures to prevent damage, especially access to information and quick access to assistance channels, as well as the facilitation of solutions to their problems and disputes.

The development of legislation that regulates this subject has been presented in different forms by each individual state or international organization. Italy has its own national legislation, also operating within the broader context of the European Union law. Countries in America, on the other hand, propose a harmonization of this matter through an international convention, which is being studied by the Hague Conference on Private International Law. A comparative study is considered an appropriate approach to the analysis of the level of legal protection enjoyed by tourists in their consumer contracts. In this sense, the present research attempts to identify the similarities, differences and the causes of the relationship between the regulatory frameworks in the two legal systems, hence, the Italian law and the proposal for a Hague Convention.

The scientific contribution of this research can be seen in the impact that tourism has on the market and the internal economy of each state. The development of rules which protect tourists as consumers would help improve legal certainty and would consequently create an environment of stronger confidence among tourists, thus leading to the growth of the tourism sector. Furthermore, the research finds its theoretical justification in the usefulness of the knowledge of the similarities and differences between the compared

systems, as well as of the reasons for particular regulatory choices. This would in turn allow us to evaluate the degree of protection of the tourist-consumer, to propose amendments to the national laws in some states (which is of great importance for the internal development of each state), to create international standards, and, finally, to harmonise the protection of the tourist-consumer in different states.

Candidate: Martina Vivirito Pellegrino

Institution of employment: University of Verona, Italy

Institution of doctoral study: University of Verona, Italy

Mentors: Prof. Dr. Alessandra Cordiano and Prof. Dr. Francesco Ruscello

THE PRECAUTIONARY PRINCIPLE IN PRIVATE LAW: THE CHALLENGE OF ITS IMPLEMENTATION IN HEALTHCARE SERVICES

This doctoral research has three general aims. The first is to highlight the presence of the so-called "precautionary principle" in law, including in rules and regulations. The second is to verify some general clauses in the Italian Civil Code (such as "duties of diligence" and "good faith") in the context of legal uncertainty. The final aim is to illustrate the PP's links with the mechanisms of protection on the one hand, and the self-responsibility of parties on the other.

In the attempt to verify the potential applications of the precautionary principle, the attention is given to the Italian civil law, using a multidisciplinary and multisectoral approach. The paper first analyses the genesis of the precautionary principle. From its philosophical inception, it was first applied to the field of environmental international law. It was then used in the decisions of the Court of Justice of the European Union (CJEU) and the actions of the World Trade Organization's Dispute Settlement Body in relation to the balance between the protection of free market principles, and the preservation of human health and ecosystems. Its legal definition has been progressively consolidated and it is now part of the EU's general principles (see Communication from the Commission COM/2000/0001).

Many diverse applications of the PP are revealed by the analytical examination of the General Product Safety Directive 2001/95/EC and other specific legislation, for instance, the ones regarding pharmaceuticals, cosmetics, toys and food (in particular, genetically modified organisms and novel food). This demonstrates that the precautionary principle not only complies with the controls on safety standards and public controls, but that it also imposes obligations on different types of traders (pre-market and post-market) and affects procedures for self-regulation (mandatory and comprehensive certification, voluntary certification process, accreditation systems, and compliance systems of quality and safety of products).

The present study includes examination of the impact of precautionary approach on law and economics. From the private law perspective, this research considers intermediation contracts, with a focus on the specific conduct of business obligations (i.e. the "suitability and appropriateness test of seller's products for buyer's purposes") and insurance models (i.e. on claims-made bases; full risks), in order to understand whether it is possible to find protection techniques that can be exported to other areas. Bearing in mind the above considerations, one may realise how the PP applies to the field of health services. In this area, the research is focused on the phenomenon of "patient's consumerization" (see Directive 2011/24/EU on patients' rights in cross-border healthcare) and involves

examination of different opportunities for health innovation (e.g. “human enhancement”), whilst also looking at supranational guarantees that reveal the precautionary approach (see European Court of Human Rights case law under Articles 2, 3, 8 and 10 of the European Convention on Human Rights and Fundamental Freedoms). In innovative health services, the lack of national regulation requires a re-examination of the traditional categories for the protection of private autonomy, in particular the rule of informed consent, the appropriateness of the system of authorization in disposition of the body, and allocation procedures of uncertain risks.

Candidate: Zef Vučaj

Institution of employment: University of Ljubljana, Slovenia

Institution of doctoral study: University of Ljubljana, Slovenia

Mentors: Assist. Prof. Dr. Boštjan Avar

THE ROLE OF EASEMENT AS AN INSURANCE ELEMENT IN ENERGY INVESTMENTS

The element of easement in commercial investments, as well as in cases of infrastructure and energy investments, is often overlooked. However, it has a potential to accelerate the exploitation of land, buildings and/or or their individual parts. The right of easement was used in the past mostly for allowing common access paths in rural or agricultural areas. Today, used as an instrument for insuring long-term investment projects, such as infrastructure and/or energy projects, easement can become a powerful legal instrument for sustainable growth.

There are also several other positive aspects pertaining to the usage and implementation of easement, both for the owner of the real estate and for the potential investor, irrespective of whether the investor is a public or private legal entity. Easement represents a solid element of insurance and/or collateral in cases of energy investments and can be perceived as a major reduction of business risk for both the owner of the property as well as for the investor. This paper examines the prospective development of renewable energy investments; hence, a specific joint venture scenario in renewable energy investment is described, where the easement right was used as a key element for the realisation of the project. Based on the theoretical discussion and analysis of the described scenario coupled with analysis of the scientific research this paper offers certain guidelines for developments in the field of infrastructure and energy investments.

The paper aims to prove the following hypotheses. 1. The use of easement right as a collateral and/or insurance can have a positive effect on the development of infrastructure and energy investments and can be perceived as a major reduction of business risk for both the owner of the property as well as for the investor. 2. A specific joint venture scenario in renewable energy investment is a good example in which the easement right was used as a key element for the realization of the project. 3. Easement has an important role in mitigating business risk, especially in cases of bankruptcy, foreclosures and/or other creditor related enforcement procedures (e.g. mortgage). 4. It is possible to develop guidelines, which will enable faster, more efficient and cheaper developments in the field of infrastructure and energy investments.

Candidate: Stephan Walter

Institution of employment: University of Bonn, Germany

Institution of doctoral study: University of Passau, Germany

Mentor: Prof. Dr. Dennis Solomon

ARBITRATION AS A DEFAULT RULE FOR RESOLVING INTERNATIONAL COMMERCIAL DISPUTES

It is a commonplace that arbitration is based on party autonomy. Therefore, it is almost uncontested that arbitral proceedings require the parties' mutual consent to arbitrate and that a party cannot be forced to arbitration against its will. It goes without saying that this also applies to international commercial disputes between private parties. In the current legal landscape, both on national and international level, absent an arbitration agreement, the parties of an international commercial contract are barred from seeking the protection for their rights before an arbitral tribunal. Instead, their legal disputes have to be resolved by way of litigation before national courts. However, this default rule no longer mirrors the legal reality, where the vast majority of international commercial contracts includes an arbitration clause because of the perceived downsides of litigation in international cases (e.g. its inefficiency, a possible home-field advantage of one party and the difficulties with regard to the judgement's enforcement in another country). In other words, arbitration has already become the *de facto* default rule for resolving international commercial disputes.

Due to this development and the assertion that litigation does not serve the interests of the parties in international cases well, a growing number of authors argues that legislators should adopt a new default rule (commonly referred to as "default arbitration"), which specifies that, if one party has its seat in a non-EU state, international commercial disputes should be resolved by way of arbitration, unless the parties mutually decide otherwise. Regardless of whether one agrees with the claim that arbitration is a more suitable dispute resolution mechanism, the feasibility of such radical change of the *status quo* can also be challenged on various legal grounds. The doctoral research addresses these legal challenges and scrutinises whether and under which conditions an EU Member State could implement "default arbitration" into domestic law. The research first examines the limits imposed by the European Convention on Human Rights, EU law and the domestic law of the Member State. It then discusses possible models of implementing "default arbitration", ranging from unilateral implementations into domestic law to bilateral or multilateral approaches through treaties. These models are assessed on the basis of several criteria, such as the possibility to enforce the "default arbitration agreement" or the resulting arbitral award in another country. Finally, the research proposes a concrete model based on the findings of the previous sections.

The research focuses on the compatibility of "default arbitration" with primary and secondary EU law. It first discusses whether EU law provides a blanket prohibition of "default arbitration" or whether this concept can be reconciled with the principles and guarantees enshrined in its various sources, such as the fundamental rights and fundamental freedoms, the autonomy of EU law and the principle of mutual trust.

Secondly, the research also addresses the question whether the EU Member States have the competence to enact a law or to conclude a treaty with a third state which prescribes default arbitration or whether this competence lies with the EU.

Postgraduate Doctoral Study Programme
at the University of Rijeka Faculty of Law is created for aspiring law graduates or graduates in other disciplines who wish to engage into an independent research of important and innovative legal topics.

Rijeka Doctoral Conference
is a scientific venue where doctoral candidates are given opportunity to present and test their preliminary research findings before academics and practicing lawyers, as well as to discuss these findings with their peers.

RiDoc