

Recent developments in the approximation of EU private international laws: towards mutual trust, mutual recognition and enhancing social justice in civil and commercial matters

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INTRODUCTION

<quotation>(T)he growing visibility of the social-policy provisions [in the Treaty] requires the definition of the notion of rights and principles and their implications for private parties.¹</quotation>

The last 15 years have witnessed the development of a particular set of EU norms for determining jurisdiction and applicable law for cross-border contracts in disputes brought before the courts of a Member State. These norms have and continue to be devised in response to the increasing cross-border nature of commercial activities and the need for parties, especially weaker parties, to be able to 'access [social] justice',² and for the EU to demonstrate and reflect 'global ethical values through new human rights'.³ In particular, the post Lisbon-era has witnessed the further advancement of a third wave⁴ of EU private international laws. These particular EU rules are illustrative of a set of 'methodological, institutional and procedural'⁵ norms, intended to meet the objective⁶ of securing mutual trust and recognition in civil and commercial matters. The purpose of this chapter is to review recent legislative and interpretative developments in EU private international law and to consider future questions on the role of the third wave of EU private international laws as an emerging set of techniques⁷ for enabling access to social justice. Reflecting the three wave development of private international law rules at EU level, Part I of this chapter considers how Treaty objectives act as the procedural underpinning in the approximation of national private international laws in furtherance of 'optimal [EU] integration'.⁸ Part II then reviews the technique of approximation of laws through selected secondary and recast EU Regulations. Specifically this has been demonstrated first by the introduction of EU Regulations on applicable law for contract and non-contractual obligations which have sought to provide a coherent basis for party autonomy to underpin rules determining the applicable law for contracts and non-contractual obligations in civil and commercial matters and, second, most recently in the revision and replacement of the Brussels I Regulation. Since 10 January 2015, Regulation EU 1215/2012 (the Brussels I Recast) has introduced a number of significant changes including the introduction of a new ground of jurisdiction for the recovery

¹ C Semmelmann, 'The European Union's economic constitution under the Lisbon Treaty: soul-searching among lawyers shifts the focus to procedure' [2010] *European Law Review* 516, 532. Words in brackets added for emphasis.

² H-W Micklitz, 'Introduction,' in H-W Micklitz (ed.), *The Many Concepts of Social Justice* (Edward Elgar, 2011), 5.

³ I Benöhr and H-W Micklitz, 'Consumer Protection and Human Rights,' in G Howells, I Ramsay and T Wilhelmsson (eds), *Handbook of Research on International Consumer Law* (Edward Elgar, 2010), 18.

⁴ L Gillies, 'Creation of subsidiary jurisdiction rules in the Recast of Brussels I: Back to the drawing board?' (2012) 8 *Journal of Private International Law* 490.

⁵ Semmelmann (n.1), 532.

⁶ Cf S Weatherill, *EU Consumer Law and Policy*, 2nd edn (Edward Elgar, 2013), 283.

⁷ I Ramsay, *Consumer Law and Policy*, 3rd edn (Hart Publishing, 2012), 29.

⁸ R. Fentiman, 'Choice of law in Europe: Uniformity and integration' (2008) 82 *Tulane Law Review* 2012, 2051. Word in bracket added for syntax.

of cultural objects;⁹ a basis upon which there may be a stay of proceedings in favour of prior proceedings in a non-Member State; clarification of the position of the court first seised in the cases where proceedings have been brought contrary to a jurisdiction or arbitration agreement; and the extension of the dual¹⁰ operation of national residual jurisdiction through the gradual extension of the EU *acquis* via the ‘partial *reflex effect*’. The legislative approach to approximation of EU private international laws for the promotion of the internal market has also been evident in recent proposals for Regulations on Collective Consumer Redress and a Common European Sales Law. Part III of this chapter focusses on the interpretative approach of the Court of Justice of the European Union (CJEU) in asserting mutual trust, mutual recognition and fundamental rights in civil and commercial matters under the Brussels I Recast Regulation and Rome I and II Regulations. Part IV examines procedural developments for the effective enforcement of judgments from the courts of a Member State through the abolition of *exequatur* in the Brussels I Recast. Combining these parts, this chapter concludes that in order to effectively regulate internal market behaviour and respect the continued divergences in national laws, the current stage of approximation of EU private international laws requires to be applied in tandem with substantive EU and national laws. Only then will EU private international law be regarded as a methodological, institutional and procedural¹¹ gatekeeper in enhancing fundamental social rights in the resolution of cross-border disputes.

PART I: CONFLICTS JUSTICE AND THE EMERGENCE OF SOCIAL JUSTICE IN THE THIRD WAVE EU PRIVATE INTERNATIONAL LAWS

The aim, or ‘social obligation’,¹² of private international law is to provide parties to a cross-border dispute with ‘conflicts justice’. This distinct form of social justice seeks to recognise foreign laws and sustain cross-border legal relationships through the operation of ‘secondary rules’.¹³ When one party contracts with a seller in another jurisdiction, the cross-border nature of such a contract continues to necessitate reference to such rules. In particular, these rules determine where the aggrieved party may bring a dispute to court, what law applies to their dispute and in what circumstances a foreign judgment may be recognised and enforced. Depending on the scope and objective of the rules in question, the formation of private international laws are either subject to the exclusive competence of the EU or continue to remain (for the time being)¹⁴ residual to the Member States.

Whilst the EU strives towards the approximation of private international laws, it is helpful to briefly reflect on the traditional and EU objectives of ‘conflicts justice’. The first objective – ‘maintain[ing] regulatory diversity’¹⁵ – reflects a general premise to enable parties to predict, determine and select the forum and law applicable to their cross-border relationships.¹⁶ The second objective of traditional conflicts justice, as this author has previously commented, is to complement¹⁷ techniques of social justice underpinned in substantive law. When questions of jurisdiction (where to adjudicate) arise, private international law rules enable both parties to predict the ‘litigation and transactional risk’¹⁸

⁹ L Gillies, ‘The conflict of laws as a technique of demand side regulation in claims for the recovery of cultural objects,’ (2015) 11 *Journal of Private International Law* 295.

¹⁰ H Unberath and A Johnston, ‘The double-headed approach of the ECJ concerning consumer protection’ (2007) 44 *Common Market Law Review* 1237.

¹¹ Semmelmann (n.1), 532.

¹² Benöhr and Micklitz (n.3), 25.

¹³ A Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiary in the International Constitutional Ordering of Private Law* (Cambridge University Press, 2009), 19.

¹⁴ Gillies (2012) (n.4).

¹⁵ F Cafaggi and H Muir-Watt, ‘Introduction,’ in F Cafaggi and H Muir-Watt (eds), *Making European Private Law* (Edward Elgar, 2008), 15. Words modified for syntax.

¹⁶ Mills (n.13), 8–10.

¹⁷ L Gillies, *Electronic Commerce and International Private Law* (Ashgate, 2008).

¹⁸ R Fentiman, *International Commercial Litigation*, 2nd edn (Oxford University Press, 2015), 37.

associated with potential contractual – and non-contractual – relations. In cross-border cases concerned with commercial interests, party autonomy remains the prevalent rationale in the design and application of jurisdiction and applicable law rules. Commercial parties can and do negotiate and allocate jurisdiction to a particular judicial or arbitral court, as well as selecting the law applicable to their contractual and non-contractual obligations. Having made such choices, commercial parties are then able to determine whether their chosen court can issue provisional or protective measures, whether special jurisdiction rules may be utilised and the effect of the *lex fori*'s mandatory rules on the parties' obligations.

In cross-border cases where special interests are involved – contracts involving weaker parties such as consumers – the particular emphasis on conflicts justice and private international law rules is the 'inequality'¹⁹ of power between the parties and the consequential risks of cross-border contracts for the weaker party. When the dispute concerns a 'protected'²⁰ consumer contract, 'privileged'²¹ jurisdiction rules have been devised, applied and interpreted at EU level to balance competing notions of 'justice and convenience'²² between contracting parties located in different jurisdictions. As Briggs remarks the 'real novelty'²³ in seeking 'contractual equality'²⁴ from the consumer's perspective²⁵ is being able to sue the seller – and be sued – in his home jurisdiction. In determining the applicable law for consumer contracts, the tensions between consumer protection and party autonomy resulted in a special choice of law rule which preserved the latter via a combination of mandatory rules of the consumer's habitual residence and the public policy of the *lex fori*. More recently, a series of special choice of law rules have been introduced for a range of disputes concerned with non-contractual obligations in Regulation EC 864/2007 (the Rome II Regulation) involving product liability, anti-competitive behaviour or acts restricting competition, environmental damage, infringement of intellectual property rights and industrial action. Claims for anti-competitive behaviour or acts restricting competition may ultimately be facilitated through the ability of consumers or their representatives to raise collective claims for damages.

The Procedural Framework of EU Private International Law

The development of EU private international law rules has progressed in three 'waves'. The first wave was the objective towards the reciprocal recognition and enforcement of foreign judgments and of rules of jurisdiction through the introduction of the Brussels Convention 1968. The change of the pillar structure by the Amsterdam Treaty brought jurisdiction for civil and commercial matters within the 'scope of the EU-based legislation'²⁶ and was intended to improve access to justice through improving and simplifying rules of conflict of laws and jurisdiction where an internal market need was demonstrated and where action by Member States alone was regarded as insufficient. In 2007, the Lugano Opinion supplemented this approach by confirming the EU's competence²⁷ to legislate on those external matters having an impact on the internal market. Regulation EC 44/2001 (the Brussels I Regulation)

¹⁹ A Briggs, *The Conflict of Laws*, 3rd edn (Clarendon, 2013), 72.

²⁰ P, *EU Private International Law*, 3rd edn (Edward Elgar, 2014), 125.

²¹ Briggs (n.19), 72.

²² AE Jaffey, *Topics in Choice of Law* (British Institute of International and Comparative Law, 1996), 49–51.

²³ Briggs (n.19), 72.

²⁴ D Leczykiewicz, 'Horizontal application of the Charter of Fundamental Rights' (2013) *European Law Review* 479, 494.

²⁵ Briggs (n.19), 72.

²⁶ C Twigg-Flesner, *A Cross-Border-Only Regulation for Consumer Transactions in the EU: a Fresh Approach to EU Consumer Law* (Springer, 2011), 4.

²⁷ Opinion 1/03 of the Court on the competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2006] ECR I-1145.

introduced revised jurisdiction rules for consumer contracts to take account of developments not foreseen when the Brussels Convention 1968 was being negotiated. It reaffirmed the 'Country of Destination' approach in the Brussels Convention 1968 by enabling a consumer (subject to particular criteria) to sue a foreign business in the consumer's jurisdiction. More recently, the third wave of approximated EU private international laws continues as a result of Article 81 of the Treaty of Lisbon, supported by the Stockholm Programme.²⁸ Article 81 provides for the approximation of laws and has been exemplified by the introduction of various EU Regulations on choice of law²⁹ and the interpretation and revision of key aspects of the Brussels I Regulation.

In the last ten years, the regulatory function and framework of EU private international law has pursued the objective of approximation of laws, promoted the function of the internal market, sustained the principle of mutual recognition and more recently sought to support the enforcement of transnational fundamental rights.³⁰ Private international laws require to be utilised in cases of *lis pendens* (parallel proceedings), in litigation involving multiple parties in different jurisdictions, in litigation concerning arbitration and jurisdiction agreements and in determining jurisdiction over disputes connected to non-EU Member States. Two key developments have contributed towards the creation of a transnational framework of EU private international law. First, the basis and technique of formulating private international laws shifted from national interests and international cooperation to a focus on transnational interests. This was achieved through a combination of competence changes brought about by the Treaty of Amsterdam and the Treaty of Lisbon and by EU Regulations introduced and interpreted by the EU Institutions. Second, it is recognised that private international laws offer a discrete regulatory function for the global ordering of private disputes.³¹ The effect of this framework is intended to have continued impact where cross-border disputes have connections external to the EU. However, as Muir-Watt confirms, the wider function of private international law must serve not just the individual's right to access justice through proceedings in a foreign court, or the application of a foreign law, or the enforcement of a judgment. According to Muir-Watt, private international law must be used as a regulatory technique which responds to emerging trends in global governance and cross-border litigation.³² Private international law must also continue to respond to the increasing role of businesses as well as institutions in the regulation of legal relationships conducted via electronic commerce. It is in this context that the 'need [for and] acceptance'³³ of EU private international laws as a technique of social justice must be sustained.

First, the introduction of two new Regulations have sought to provide a coherent basis for party autonomy to underpin rules determining the applicable law for contracts and non-contractual obligations in civil and commercial matters. Second, the revision of Regulation EC44/2001 by Regulation EU1215/2012, the Brussels I Recast Regulation, has with effect from 10 January 2015 sought to 'respect fundamental rights [...] in particular [...]

²⁸ 'The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens,' OJ 2010 C115/01; for example at 1.1 where two political priorities identified were (i) the 'promoti(on) [of] citizenship and fundamental rights' to provide '(A)llowance ... for the special needs of vulnerable people,' and (ii) '(A) Europe of law and justice' via 'mechanisms that facilitate access to justice ... so people can enforce their rights ...' words removed and added for syntax.

²⁹ By contrast to the range and breadth of case law on the Brussels I Regulation, Preliminary References on the Rome I and II Regulations have been less frequent; as regards Article 4(4) of the Rome Convention 1980 (the precursor to Rome I), see Case C-133/08, *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV* [2009] ECR I-9687.

³⁰ L Gillies, 'Fundamental rights and judicial cooperation in the decisions of the Court of Justice on the Brussels I Regulation 2009–2014: The story so far,' in S Morano-Foadi and L Vickers (eds), *Fundamental Rights in the EU: A Matter for Two Courts* (Hart Publishing, 2015).

³¹ H. Muir Watt, 'The role of the conflict of laws in European private law' in C. Twigg-Flesner (ed.), *The Cambridge Companion to European Union Private Law* (Cambridge University Press, 2010).

³² Cafaggi and Muir-Watt (n.15), 14; Mills (n.13), 1, 28, and Muir-Watt, *ibid*.

³³ Benöhr and Micklitz (n.3), 25.

Article 47 of the Charter³⁴ introduced a basis for the stay of proceedings in favour of pending proceedings in a non-Member State; clarified the position as regards the operation of jurisdiction and arbitration agreements under the EU Regime and extended the dual³⁵ operation of national residual jurisdiction through the gradual extension of the EU *acquis* via 'partial *reflex effect*.' Part II of this chapter will now turn to the interpretative approach of the CJEU in asserting mutual trust and recognition in jurisdiction rules under the Brussels I Regulation for civil and commercial matters and consider the changes that have been brought into effect by the Brussels I Recast.

PART II: METHODOLOGY OF EU 44/2001 IN RECENT CASE LAW OF THE CJEU AND THE EFFECT OF THE BRUSSELS I RECAST

During the last ten years, the interpretation of specific jurisdiction rules in the Brussels I Regulation by the Court of Justice has provided a particular insight into how the Regulation's scope and objectives have been re-affirmed 'by the language of its rules'.³⁶ There are four key areas where this has occurred; first, the assertion of jurisdiction in a Member State in breach of a jurisdiction or arbitration agreement; second, in the continued operation of Member States' internal jurisdiction rules; third in procedural measures designed to restrict proceedings abroad and fourth by the Court of Justice's particularised approach to the interpretation of business to business special jurisdiction based on breach of contract, torts and claims involving multiple parties. These '*square of impact*' judgments are reflective of the evolution of the four cornerstones of civil jurisdiction espoused by the Jenard Report³⁷ and Kruger.³⁸ In particular, they demonstrate the continuing role of the CJEU in determining on what basis the court of a Member State under the Brussels I Regime can assert jurisdiction and the response of the other EU institutions through the process of legislative review. Each of these four corners of the CJEU's interpretative square will be examined before the effect of the revision of the Brussels I Recast will be considered.

Business to Business Jurisdiction

The rationale of the Brussels I Regime is to ensure jurisdiction is allocated to a Member State in fulfilment of the Regulation's objectives. A related concern that, until recently, has persisted is whether the courts of a Member State are permitted to stay proceedings in favour of proceedings in the courts of a third or non-Member State. The Court of Justice confirmed in *Owusu v Jackson*³⁹ that the courts of a Member State are not, on the basis of *forum non conveniens*, permitted to stay proceedings in favour of the courts of another Member State or a third State.⁴⁰ In his Opinion in the case, AG Leger proposed three ways in which the Brussels Convention could operate by way of *reflex effect* either by the operation of Article 22 (now Article 24), a jurisdiction agreement in favour of a non-Member State or concurrent proceedings in a non-Member State. The Court of Justice confirmed that the Brussels Convention (the instrument applicable at the date of proceedings) provided a mandatory basis for jurisdiction so as to 'respect [...] the principle of legal certainty'⁴¹ and that in doing so the Convention could extend the 'obligations [...] of the courts of a Member State'⁴² to assert jurisdiction under the Regime, irrespective of any connections the dispute

³⁴ Regulation EU 1215/2012, Recital (38).

³⁵ Unberath and Johnston (n.10).

³⁶ R Fentiman, 'Civil jurisdiction and third states: *Owusu* and after' (2006) 43 *Common Market Law Review* 705.

³⁷ Jenard-Moller Report, OJ 1990 C189/65.

³⁸ T Kruger, *Civil Jurisdiction Rules of the EU and their Impact on Third States* (Oxford University Press, 2008).

³⁹ Case C-281/02 *Owusu v Jackson* [2005] ECR I-01383.

⁴⁰ *Owusu*, paras 37–41.

⁴¹ *Owusu*, para.38.

⁴² A Dickinson, 'Resurgence of the anti-suit injunction: the Brussels I Regulation as a source of civil obligations?' (2008) *International and Comparative Law Quarterly* 465, 469.

may have with the courts of a non-Member State. The introduction of Articles 33 and 34 of the Brussels I Recast which now enables the courts of a Member State to grant a stay proceedings in favour of prior related proceedings the courts of a non-Member State would now appear to have addressed the concern.

The second and third corners of the CJEU's square of impact decisions may be considered simultaneously.. The second corner of CJEU decisions has been concerned with the assertion of jurisdiction in one Member State in breach of a jurisdiction or arbitration agreement in favour of the courts of another Member State. The two predominant cases are *Gasser v MISAT*⁴³ and *Allianz Spa v West Tankers (The Front Comor)*.⁴⁴ In *Gasser v MISAT*, one of the parties commenced proceedings in the Italian court in breach of an exclusive jurisdiction agreement in favour of Austria. The Court of Justice affirmed that the Italian courts could assert jurisdiction as the court first seised, irrespective of the parties' prior jurisdiction agreement on the premise that mutual trust and confidence must be ensured in allocating jurisdiction under the Brussels Convention so as to 'prevent parallel proceedings [and] avoid conflicts between decisions'.⁴⁵ In similar fashion, the decision in *Allianz Spa* confirmed that proceedings could continue in the courts of a Member State (Italy) in breach of an agreement to arbitrate in the courts of another Member State (England).

The introduction of Regulation EU 1215/2012, the Brussels I Recast, now offers scope for a different outcome as regards the operation of a jurisdiction agreement and the role of the court seised. Recital (22) and Article 31(2) of that Regulation confirm that an 'exception to the general *lis pendens* rule'⁴⁶ is justified where an exclusive jurisdiction agreement operates and the court of a Member State is seised for that purpose. In such a situation, proceedings in the other court 'shall be stayed'⁴⁷ until the jurisdiction of the court 'designated'⁴⁸ in the jurisdiction agreement is determined. Whilst proceedings brought in breach of an arbitration agreement remain possible under the Recast, subject to Recital (12) and its *limited* 'effects',⁴⁹ the national court may still refer the parties to arbitration 'in accordance with [its] national law'.⁵⁰ The third corner is concerned with procedural measures designed to restrict proceedings abroad. The case of *Turner v Grovit*⁵¹ confirmed that it is incompatible with the Brussels Convention for the court of a Member State to grant an anti-suit injunction to restrict proceedings in the courts of another Member State. The position under the Brussels I Recast is – not surprisingly in the light of the scope and objectives of mutual trust in the allocation of jurisdiction and through the mutual, automatic recognition of judgments – unchanged.

The fourth corner of the square is illustrative through an emerging set of particularised interpretations from the Court of Justice on special jurisdiction rules for breach of contract, torts, disputes involving multiple parties and consumer contracts. In matters relating to contract, there have been a number of recent cases which have sought to emphasise the distinction between the special grounds of jurisdiction contained in Article 7(1) (ex Article 5(1)) and as between Articles 7(1) and 7(2) (ex Articles 5(1) and 5(3)). Three recent cases illustrate the scope of jurisdiction under Article 7(1)(a) (ex Article 5(1)(a)) for a matter relating to contract. In *eská sporitelna v Feichter*,⁵² the Court of Justice confirmed,

⁴³ Case C-116/02, *Gasser v MISAT* [2003] ECR I-14693.

⁴⁴ Case C-185/07 *Allianz Spa v West Tankers (The Front Comor)* [2009] ECR I-00663.

⁴⁵ *Gasser*, para.41.

⁴⁶ Brussels I Recast, Recital (22).

⁴⁷ Brussels I Recast, Article 31(2).

⁴⁸ Brussels I Recast, Recital (22).

⁴⁹ TC Hartley, 'The Brussels I Regulation and arbitration' (2014) *International and Comparative Law Quarterly* 843, 860.

⁵⁰ Brussels I Recast, Recital (12).

⁵¹ Hartley (n.49), 861.

⁵² Case C-419/11, *eská Sporitelna v Gerlad Feichter* [2013] ECR 0000, 14 March 2013.

inter alia,⁵³ that a claim regarding the issue of an incomplete promissory note and its subsequent issue constituted a 'legal obligation freely consented to by one person towards another'⁵⁴ and therefore a matter relating to contract under Article 5(1)(a) (now Article 7(1)(a)). In *Electrosteel Europe v Edil Centro*⁵⁵ the Court was requested to clarify the place of delivery as the 'place of performance of the obligation in question [...] under the contract'⁵⁶ for the purposes of Article 5(1)(b) (now Article 7(1)(b)) (ex). More recently, in *Brogstetter v Fabrication des Montres Normandes*,⁵⁷ the Court of Justice was required to determine whether the dispute in question constituted a matter relating to tort (following national law interpretation) or a matter relating to contract. The Court of Justice confirmed first, that for the latter basis to operate uniformly and in line with the objectives of the Regulation, the obligation must be classified as contractual; second, the dispute upon which jurisdiction is premised must constitute a breach of contractual rights and obligations in respect to which, third, regard should be given to 'the purpose of the contract'.⁵⁸ Following a series of decisions from *Falco Privastifung*⁵⁹ through to *Rehder v Air Baltic*,⁶⁰ *Color Drack*⁶¹ and *Wood Floor Solutions*,⁶² the Court of Justice has continued to distinguish the applicability of Article 5(1) (now Article 7 (1)) for the sale of goods, the provision of services⁶³ and mixed contracts.

The Court of Justice has also continued to develop its jurisprudence on special jurisdiction in the Brussels I Regulation through a series of particularised rulings on the scope of Article 5(3) (now Article 7(2)) in respect to claims for breach of intellectual property.⁶⁴ Two cases of interest to business to business relations were concerned with multiple perpetrators on the one hand and the liabilities of director/shareholder on the other. The former issue was considered in *Hi Hotel HCF v Uwe Spoering*.⁶⁵ This case follows on from the earlier decision in *Melzer*⁶⁶ where the court confirmed that it would be 'contrary to the general scheme and objectives'⁶⁷ of the Brussels I Regulation for Article 5(3) (now Article 7(2)) to apply where the defendant had not acted within the jurisdiction. In the former case, the defendant was alleged to have acted in France; however, the claimant was seeking to establish jurisdiction for breach of copyright which was alleged to have occurred via a third party publisher in Germany. Whilst the Court of Justice confirmed that Article 5(3) (now Article 7(2)) could not

⁵³ The CJEU also confirmed that a managing director or majority shareholder did not constitute a 'consumer' for the purposes of Article 15, Regulation EC 44/2001.

⁵⁴ *Sporitelna*, para.47; affirmed in Case C-147/12, *ÖFAB, Östergötlands v Frank Koot and Evergreen Investments*, [2013] ECR 00000, 18 July 2013, para.33; see also C-375/13 *Harald Kolassa v Barclays Bank plc* [2015] ECR 00000 28 January 2015, paras 36-41,

⁵⁵ Case C-87/10 *Electrosteel Europe SA v Edil Centro SpA* [2011] ECR 0000, 9 June 2011.

⁵⁶ *Electrosteel*, paras 15, 18.

⁵⁷ Case C-548/12, *Brogstetter v Fabrication des Montres Normandes* [2014] ECR 0000, 13 March 2014.

⁵⁸ *Brogstetter*, paras 24–25, 29. Word modified for syntax.

⁵⁹ Case C-533/07, *Falco Privastifung v Weller-Lindhorst* [2009] ECR I-3327.

⁶⁰ Case C-204/08 *Rehder v Air Baltic Corporation* [2009] ECR I-06073.

⁶¹ Case C-386/05 *Color Drack GmbH v Lexx International Vertriebs GmbH* [2007] ECR I-03699.

⁶² Case C-19/09 *Wood Floor Solutions Andreas Domberger v Silva Trade* [2010] ECR I-02121.

⁶³ Case C-469/12 *Lager & Umschlagbetriebs v Olbrich Transport und Logistik GmbH*, (14 November 2013) C-102, 7 April 2014, where the Court of Justice ordered that a contract for the storage of goods constituted a contract for the provision of services.

⁶⁴ It is submitted that a more particularised series of judgments is emerging on the interpretation of Article 7(2) (ex Article 5(3)) for specialist torts such as, *inter alia*, infringement of intellectual property rights on the Internet; Cases C-523/10, *Wintersteiger AG v products 4U Sondermaschinenbau GmbH*, [2012] ECR 00000, 19 April 2012; C-170/12, *Pinckney v Mediatech* [2013] ECR 00000, 3 October 2013, on which see further L Gillies, 'Jurisdiction, international private law and the internet,' in L Edwards (ed.), *Law, Policy and the Internet*, 4th edn, (Hart Publishing, forthcoming).

⁶⁵ Case C-387/12, *Hi Hotel HCF v Uwe Spoering* [2014] ECR 00000, 3 April 2014.

⁶⁶ Case C-228/11, *Melzer v MF Global UK Ltd* [2013] ECR 00000, 16 May 2013.

⁶⁷ *Melzer*, para.36.

be a basis of jurisdiction against a defendant who did not act there, jurisdiction was established in Germany as the place of damage with damages limited to that place. With regard to the latter issue of directors'/shareholders' liability, in *ÖFAB, Östergötlands v Koot*⁶⁸ the Court of Justice offered responses to two important sub-questions; first, that the place of a harmful event which is alleged to have resulted from the actions of directors or shareholders is 'the place to which the activities [...] and the financial situation related to those activities are connected'⁶⁹ and second that the determination of jurisdiction under Article 5(3) (now Article 7(2)) is unaffected when a creditor 'transfers'⁷⁰ a claim to another creditor. A final species of special jurisdiction which also continues to be significant is jurisdiction over multiple defendants, 'in the court for the place where any one of them is domiciled'.⁷¹ In the decision *Land Berlin v Sapir and Others*,⁷² the Court of Justice was required to determine whether the recovery of unpaid monies from a compensation scheme paid by a public body fell within the scope of a civil and commercial matter in accordance with the Brussels I Regulation and if so whether Article 6(1) (now Article 8(1)) applied and extended to claims where other defendants were not domiciled in an EU Member State. The Court confirmed that given the nature of the scheme and the basis upon which monies could be claimed under it, the dispute was a civil and commercial matter for the purposes of Article 1; second, the Court confirmed its earlier reasoning in *Freeport* to the extent that Article 6 (now Article 8) is justified if the connections between proceedings render it 'expedient to determine those actions together in order to avoid the risk of irreconcilable judgments'.⁷³ As regards the third matter, the Court confirmed that the 'special'⁷⁴ nature of Article 6 (now Article 8), in combination with the operation of residual jurisdiction in Article 4 (now Article 6) and exclusive jurisdiction (which operates regardless of the defendant's domicile) could not mean that Article 6 (now Article 8) applied when one of the defendants was domiciled in a non-EU Member State.

Business to Consumer Jurisdiction

As far as cross-border consumer disputes are concerned, the way in which the EU has sought to improve the 'just distribution of regulatory authority'⁷⁵ is through the introduction, application and interpretation of *approximated*, EU private international laws. A special or *particularised* strand of social justice has emerged in EU private international law, in particular for cross-border consumer contracts. Under Article 15 of Regulation EC 44/2001 the Brussels I Regulation,⁷⁶ a private consumer was able to bring proceedings in the jurisdiction where he is domiciled subject to the business pursued or having directed its commercial activities there. Articles 3, 4 and 6 of the Regulation EC 593/2008, the Rome I Regulation, determine the applicable law of the contract and the mandatory rules of the consumer's habitual residence. In order to 'access justice',⁷⁷ throughout the EU Member States, private international law rules are an example of an 'access to justice'⁷⁸ technique. The EU's overarching objective is to contribute towards the completion of the internal market

⁶⁸ Case C-147/12, *ÖFAB, Östergötlands v Frank Koot and Evergreen Investments* [2011] ECR 0000, 18 July 2013.

⁶⁹ *ÖFAB, Östergötlands*, para.55.

⁷⁰ *ÖFAB, Östergötlands*, para.59.

⁷¹ Article 8 (ex Article 6, Brussels I Regulation). Again, particularised judgments have emerged on the infringement of intellectual rights, for example, Cases C-145/10, *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] ECR 00000, 1 December 2011, and C-616/10, *Solvay SA v Honeywell Fluorine and others* [2012] ECR 0000, 12 July 2012 ; see further Gillies, in Edwards (ed) (n.64) above.

⁷² Case C-645/11, *Land Berlin v Ellen Mirjam Sapir and Others* [2013] ECR 00000, 11 April 2013.

⁷³ *Land Berlin*, para.42; Case C-98/06, *Freeport v Arnoldsson* [2007] ECR 1-08319.

⁷⁴ *Land Berlin*, para.54.

⁷⁵ Mills (n.13), 18; Muir-Watt (n.31) and Gillies (n.14).

⁷⁶ Regulation EC 1215/2012, Article 17.

⁷⁷ Micklitz (n.2), 5.

⁷⁸ Stockholm Programme (n.28) at para.3.1.2.

through improving the ‘effectiveness [of] consumer policy’,⁷⁹ the implementation of Articles 38 and 47 of the Charter of Fundamental Rights and the approximation of laws in civil and judicial matters. However, if their value as a legitimate technique of facilitating consumers’ access to social justice is to be sustained, the role, scope and substance of private international laws as *second order* rules requires *continued coordination* between national and supranational levels.

Consumers are provided with particular protection in accordance with Treaty and ECHR objectives. Readers will be aware that in order to establish jurisdiction in civil and commercial matters over a ‘protected’⁸⁰ consumer contract, Regulation EC 44/2001 required a business to have its commercial operations or to have directed its activities in the courts of the Member State in which the consumer is domiciled. Whilst Briggs regards Article 15(1)(c)(now Article 17(1)(c)) as the ‘most significant’⁸¹ aspect to establishing jurisdiction over such contracts, he recently acknowledged that it is ‘too narrow in scope’.⁸² Three simple examples may be instructive at this point. If an English consumer wanted to sue a seller based in Spain for breach of contract, subject to any jurisdiction agreement, he could have raised proceedings in England relying on Articles 15(1)(a)–(c) of the Brussels I Regulation. Alternatively, if the English consumer wanted to sue a Scottish seller for breach of contract, he could do so in the English courts using analogous rules contained in Schedule 4 to the Civil Jurisdiction and Judgments Act 1982 (as amended). Prior to the introduction of the Brussels I Recast considered below, if the English consumer had previously wanted to sue a business based in Brazil, he would have⁸³ been required (in the absence of the defendant’s presence, agreement or submission to the English courts) to apply the relevant Member States’ jurisdiction rules applicable to a defendant not domiciled in an EU Member State.⁸⁴ In such a case, unless the Brazilian business was present or submitted to the jurisdiction of the English courts, the English courts would have to grant service of proceedings out of the jurisdiction, if the consumer could demonstrate that the English court is *forum conveniens*. Whilst the prospect of an individual consumer being able to take such action against a foreign business (whether EU or non-EU based) is slim, the protectionist objectives of both jurisdiction and choice of law rules for consumer contracts should ensure that the mandatory rules of the consumer’s domicile – English law in these three examples – still applies.

Nevertheless, the effective horizontal application of Article 15(1)(c) continues to rest upon the interpretation by the Court of Justice. Crucially, there have been a number of recent decisions from the Court of Justice which have sought to clarify discrete aspects of Article 15, . Whilst these cases have been generally instructive, they demonstrate the limitations of the terminology used and the strict interpretation of the special jurisdiction. In *Pammer and Hotel Alpenhof*,⁸⁵ as this author has previously stated,⁸⁶ the prevalent issue was whether the activities of a business’ or agent’s website demonstrated a ‘sufficient connection’ (‘alignment’⁸⁷) with the Member State of the consumers’ domicile in order to establish jurisdiction there. Whilst the Court of Justice has sought a harmonious interpretation of (now) Article 17(1)(c), Member States’ courts are still required to assess whether a business

⁷⁹ European Commission, Commission Staff Working Document, ‘Consumer Conditions Scoreboard – Consumers at home in the single market. Monitoring the integration of the retail single market and consumer conditions in the Member States’, 7th edn, May 2012, draft at pp.4 and 32.

⁸⁰ Stone (n.20), 125.

⁸¹ Briggs (n.19), 74.

⁸² Briggs, *ibid*.

⁸³ See below regarding the effect of Article 17, Regulation EC1215/2012.

⁸⁴ Using English Civil Procedure Rule 6.36.

⁸⁵ Joined cases C-585/08 and C-144/09 *Pammer and Hotel Alpenhof* OJ 2011 C55/4.

⁸⁶ L Gillies, ‘Clarifying the “philosophy of Article 15” in the Brussels I Regulation: *Pammer v Reederei Karl Schulte GmbH & Co KG* (C-585/08) and *Hotel Alpenhof* (C-144/09),’ (2011) 60 *International and Comparative Law Quarterly* 557.

⁸⁷ *Ibid*, 558.

'uses as website to align, direct or target its activities to consumers'.⁸⁸ This assessment requires the national court to take account the geographical scope of the business' location, the provision of commercial services and the construction of the website in question.

A Preliminary Reference has yet to be put to the Court as to the extent to which a business' web-based software application ('app') constitutes directed activity towards the consumer's domicile by analogy with an active website. However, in *Daniela Mühlleitner v Ahmad Yusufi and Wadat Yusufi*,⁸⁹ the Court of Justice confirmed its earlier approach in *Ilsinger v Dreschers*⁹⁰ that a contract between the business and the consumer did not have to be concluded *in the consumer's domicile* for Article 15(1)(c) (now Article 17(1)(c)) to operate. In *Mühlleitner*, the claimant raised proceedings in Austria concerned with the sale of defective goods. The defendants argued that they should be sued in Germany since they said they did not direct their activities to Austria and that the parties' contract was concluded in Germany. Having failed to establish jurisdiction at first instance, the Austrian Appeal court referred to the Commission and Council's earlier 'Statement on Article 15'⁹¹ which required the contract to be concluded at a distance. The claimant appealed to the highest Austrian court which, based on *Pammer*, regarded the defendants as having directed their activities to Austria. In the end, the Court of Justice only answered the particular question whether the consumer contract had to be concluded *at a distance* for Article 15(1)(c) (now Article 17(1)(c)) to operate. The Court of Justice said that it did not require to be concluded at a distance to ensure that the jurisdiction rule operated as a derogation to Article 2 (now Article 4) as the general rule. Furthermore, the interpretation of Article 15(1)(c) (now Article 17(1)(c)) was to ensure it took account of changes in technology to the extent that the previous requirement under Article 13 of the Brussels Convention 1968 that the advertisement was made in the consumer's Member State consumer concluded the contract in his domicile was removed. It is to be expected therefore that this reasoning would apply to a business app which provides the equivalent or greater functionality for interaction between the parties, irrespective of where the consumer is situated at the time the contract is concluded.

In a similar case, *Lokman Emrek v Vlado Sabranovic*,⁹² the claimant argued that the German court had jurisdiction for breach of warranty of a second hand car and that the defendant's business activities on the internet were directed to Germany. The German court did not uphold jurisdiction since Mr Sabranovic's website was not deemed to have been directed to Germany. So Mr Emrek appealed arguing that no causal link required to be shown between the website, the commercial activity and the conclusion of the contract. The Regional German court agreed with Mr Emrek that a causal link was not required but that 'at the very least, the trader's Internet site should form the basis of the actual conclusion of the contract with the consumer ...'⁹³ so as to avoid fortuitously contracting with a trader. The Court of Justice followed its previous decision in *Shearson Lehman Hutton v TVB*⁹⁴ and held that whilst a causal link is not a requirement of Article 15 (now Article 17), in terms of proof, it may constitute *strong* evidence of the link between the contract and the seller.

⁸⁸ Judgment of the Court (Grand Chamber) C-585/08 and C-144/09, 7 December 2010, para.73 and Gillies (n.86), 559; C-89/91 *Shearson Lehman Hutton v TVB* [1993] ECR I-139 at 154.

⁸⁹ Case C-190/11, *Daniela Mühlleitner v Ahmad Yusufi and Wadat Yusufi*, Judgment of the Court (Fourth Chamber), OJ 2012 C355/6, 6 September 2012.

⁹⁰ Case C-180/06, *Renate Ilsinger v Martin Dreschers (administrator in the insolvency of Schlank & Schick GmbH)* OJ 2009 C153/5.

⁹¹ European Commission, 'Statement on Article 15 and 73,' available 6 April 2016 at http://ec.europa.eu/civiljustice/homepage/homepage_ec_en_declaration.pdf.

⁹² Case C-218/12, *Lokman Emrek v Vlado Sabranovic* OJ 2013 C367/14, 17 October 2013.

⁹³ *Emrek*, para.17; the requirement for the "conclusion of a contract with the professional concerned" was reiterated by the Court in C-375/13 *Harald Kolassa*, (n.54), at paras 25, 29 and 30.

⁹⁴ Case C-89/91, *Shearson Lehman Hutton v TVB* [1993] ECR I-139.

Since 10 January 2015, Regulation EC 44/2001 has been replaced by Regulation EC 1215/2012, known as the Brussels I Recast. Whilst there is no substantive change to the content of the special jurisdiction rule for consumer contracts in Article 17, a change of emphasis has sought to enhance the ability of consumers to raise proceedings in their home jurisdiction under Article 18 (ex Article 16). Under Article 16 of the Brussels I Regulation, consumers were able to bring proceedings against businesses in other EU Member States in the courts of their domicile or the court of the Member State in which the other party is domiciled. This dualist approach required reference to Member States' residual jurisdiction rules in the event that the business seller was domiciled in a non-EU Member State. As a consequence of the Amendment to the Brussels I Regulation proposed by the European Council and the European Parliament, the Brussels I Recast has introduced 'partial reflexive effect'.⁹⁵ In essence, the operation of the current basis for proceedings in the Member State where the consumer has his habitual residence will be extended beyond the scope of businesses situated in another Member State. The consequence of this Amendment is now contained in Article 18 of the Recast. In essence, whether or not the business is domiciled in a Member State, consumers may bring proceedings against a defendant business in the courts of a Member State where the consumer is domiciled. The justification for this Amendment is to enable further access to justice. This Amendment is a particularly significant approximation of special jurisdiction rules for the EU consumer and for businesses domiciled outside the EU. Whilst they may not have a branch, agency or other establishment in an EU Member State, such businesses may target EU consumers via websites. Whilst the approximation of such rules may be intended to increase the scope for consumer's to raise proceedings where they are domiciled, the practical net effect of this change is to ensure greater access to the substantive law of the consumer's habitual residence, including its mandatory rules where applicable.

PART III: THE INSTITUTIONAL RESPONSE TO MUTUAL RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN EU1215/2012, THE BRUSSELS I RECAST

EU Private international laws are also concerned with ensuring judgments are capable of automatic recognition and enforcement between Member States. From the consumer's perspective, being able to sue a business, regardless of its domicile, in his own jurisdiction is pivotal. As mentioned above, the consumer can be assured of the knowledge of his own courts as well as the substantive law. Once the consumer or his representative obtains a judgment, the dual issues of recognition and enforcement arise. In accordance with Article 36 of the Recast (ex Article 33(1)), a judgment obtained from a Member State was capable of recognition in another Member State without any special form or procedure. Furthermore, judgments from Member States were entitled enforcement in another Member State once declared enforceable. In order to streamline the enforcement procedure and support the mutual recognition of decisions between the Member States, the requirements for *exequatur* – intermediate measures⁹⁶ to declare the enforceability of a judgment from one Member State in another – have been abolished by Article 39 of the Recast.

PART IV: COORDINATING EU PRIVATE INTERNATIONAL LAWS WITH INITIATIVES IN COLLECTIVE REDRESS AND THE COMMON EUROPEAN SALES LAW

More recently, the EU Commission has put forward two new, inter-related proposals. The first is the Commission's 'Initiative on Collective Redress'.⁹⁷ The second proposal is a

⁹⁵ European Parliament, 'Amendment 121 to the Proposed Recast of the Brussels I Regulation', 2010/0383 (COD), 25 September 2012 at p.5.

⁹⁶ Regulation EC 1215/2012, Recital (2).

⁹⁷ Following on from COM(2008) 794 Final.

Directive on 'Damages under National Law for Competition Law Infringements'.⁹⁸ This proposal is designed with the 'protect(ion) [of] subjective rights under Union law'⁹⁹ including Articles 47 and 6 as principles of the Charter,¹⁰⁰ to equip anyone¹⁰¹ with the 'right'¹⁰² to claim 'full compensation [for a] harm caused by an infringement of competition law'.¹⁰³ For this purpose, consumers may be either 'direct purchasers' who have suffered direct infringement such as an overcharge¹⁰⁴ by the infringing business, or they may be 'indirect purchasers'¹⁰⁵ who have suffered damage as a result of the passing-on of the particular infringing activity to them as end-user. It remains to be seen how the effectiveness, fairness and the logistics of proceedings under this proposal operate and whether a social justice or deterrence function is the likely outcome.

Both the Rome I and Rome II Regulations contain special choice of law rules for consumer contracts. Both sets of rules have been introduced to determine what law applies to a cross-border consumer contract or where individual or collective consumers claim for damages as a result of a breach of a non-contractual obligation. Like Regulation EC 44/2001, the changes to the special choice of law rule for consumer contracts in the Rome Convention 1980 in Regulation EC 593/2008 (the Rome I Regulation) were undertaken to reflect initial technological advances of cross-border selling. Article 6 of Regulation EC 864/2007, the Rome II Regulation, contains a distinct choice of law rule for claims against businesses for anti-competitive behaviour or acts restricting competition. This is a novel choice of law rule designed to protect 'horizontal [and] vertical'¹⁰⁶ relations between market participants. Article 6(1) of the Rome II Regulation confirms that the applicable law is the 'law of the country where competitive relations or the collective interests of consumers have been affected'. Three aspects will underpin the utility of this choice of law rule. First, in order to maintain legal certainty and predictability of result, the parties to a dispute of this nature are not permitted to select the applicable law (Article 6(4)). Second, this choice of law rule imputes the potential for consumers, or their representatives, to take collective action over such disputes and for the law of the place where the non-contractual obligation occurred to apply or the *lex fori* if that place is one of the affected markets. However, this is dependent upon the accessibility of collective redress actions in Member States and the future EU proposals for both collective redress and damages for anti-competitive behaviour. One issue amongst many that remains to be determined is the meaning of the term 'affected market' which underpins Article 6 of the Rome II Regulation.

Article 6 of the Regulation EC 593/2008, the Rome I Regulation, contains a special choice of law rule for particular consumer contracts. This rule, legitimately regarded by Briggs as 'untidy and problematic',¹⁰⁷ highlights in the narrow sense the challenge of reconciling support for the market and protection for consumers through social policy. Article 6 of Rome I seeks to sustain two competing objectives; the preservation of party autonomy

⁹⁸ Amendments by the European Parliament to the Commission Proposal, 'Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union', A7-0089/2014, 9 April 2014, available 6 April 2016 at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+AMD+A7-2014-0089+002-002+DOC+PDF+V0//EN>.

⁹⁹ Amendment, *ibid* at p.4.

¹⁰⁰ Amendment, *ibid* at p.32.

¹⁰¹ Amendment, Article 1 at p.34.

¹⁰² Amendment, Article 2(2), *ibid* at p.35.

¹⁰³ Amendment, Article 2(1), *ibid* at p.35.

¹⁰⁴ Amendment, Article 14(2), *ibid* at pp.55–6.

¹⁰⁵ Amendment, Article 4(23) and (24), *ibid* at p.41.

¹⁰⁶ G Howells and S Weatherill, *Consumer Protection Law*, 2nd edn (Ashgate, 2005), 533; A Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (Oxford University Press, 2008), 403.

¹⁰⁷ Briggs (n.19), 244.

by enabling the parties to select the applicable law whilst ensuring the application of the mandatory provisions – social policy priorities – of the consumer’s habitual residence. The dualist approach to EU choice of law rules seeks to reflect equitable interests and market objectives:¹⁰⁸ it respects the premise that choice of law is founded on party autonomy whilst integrating Member States’ mandatory rules through continued shared competence in consumer protection between the EU and its Member States on the other. However, in the light of the previous proposal for a Common European Sales Law (CESL), the role of both approximated EU choice of law rules and the reference to the mandatory rules of the consumer’s habitual residence will become increasingly significant for any future initiative with similar objectives.

Having selected the applicable law to the cross-border consumer contract, the essence of the European Commission’s original proposal for a CESL was to enable consumers and business contracting (electronically) across borders to elect to apply a set of optional contract laws to the parties’ contract. Despite suggestions that Article 6 of the Rome I Regulation would have been made redundant by the CESL, given the above application, the operation of the CESL would have necessitated both selection of the applicable law supported by an applicable law rule. Furthermore, the optional nature of the proposed CESL reinforced its limited impact upon the necessity for Article 6 of the Rome I Regulation. Once a choice of law has been made in accordance with Article 6, if the optional CESL had come into force as proposed, it would at that stage have had potentially significant consequences for the operation of the *protective component* to Article 6, namely the operation of the mandatory rules of the consumer’s habitual residence. The parties’ ability to opt in to the CESL would have extended party autonomy beyond the context originally envisaged by Article 3 and 6 of the Rome I Regulation. A future revision of the Rome I Regulation will therefore require a careful assessment of the extent to which existing Member States’ mandatory rules will be impacted by any future CESL or Regulation for cross-border online consumer contracts and the hierarchy to be set between such secondary regulations, the scope of such instruments and the mandatory rules of the consumer’s habitual residence given effect by Article 6, Rome I. However, before current attempts to introduce EU contract laws for cross-border sales¹⁰⁹ move forward, what must be reviewed and reconciled is the value of the current national, mandatory rules of the consumers’ habitual residence, the overarching need to promote an optional set of maximised, EU contract laws which may or may not be equivalent to the current mandatory rules and the ability of the parties to opt-in to such laws. In sum, at least the same or a greater level of consumer protection law that a consumer would ordinarily be entitled to via the mandatory rules of his habitual residence must be sustained by a future sales instrument/CESL v.2 for it to be a viable, effective and equivalent option for consumers. What remains to be determined is whether parties and their legal representatives would apply an optional sales law to their cross-border contracts.¹¹⁰

CONCLUSIONS: FUTURE QUESTIONS

It has been the purpose of this chapter to consider how, as a technique of ‘access to justice’, the third wave of approximated, EU private international laws may operate as an ‘EU norm’¹¹¹ by enabling businesses and consumers to cross-border contracts to exercise a

¹⁰⁸ Weatherill (n.6), 283.

¹⁰⁹ European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe’, SWD (2015) 100 final, 6 May 2015.

¹¹⁰ Evidence as to the extent to which businesses remain concerned about the legal and financial costs of Member States’ differing contract laws is not definitive: SWD (2015) 100 final at p.12.

¹¹¹ Benöhr and Micklitz (n.3), 31.

fundamental right to 'access [social] justice'¹¹² irrespective of the means of contracting, the location of the business seller, the technological means and place of contracting, the applicable law or further optional sales law selected. In the absence of a constitutional basis for either consumer protection or fundamental social rights, EU private international law seeks to support the former and promote the latter by sustaining party autonomy in the free movement of goods and services whilst coordinating and complementing the *diversity of values* between Member States' substantive laws. Until such time that constitutional, substantive and procedural rules relative to cross-border obligations are devised, agreed, implemented and operated in a consistent manner between all EU Member States, approximated EU private international laws must continue to act as a 'methodological, institutional and procedural'¹¹³ gatekeeper in advancing fundamental social rights in the resolution of cross-border disputes.

¹¹² Micklitz (n.2), word added for syntax.

¹¹³ Semmelmann (n.1), 532.