

# General Principles of European Private International Law

*Edited by*

Stefan Leible

95

EUROPEAN MONOGRAPHS



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# General Principles of European Private International Law

## European Monograph Series

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VOLUME 95

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*In memoriam Hannes Unberath*

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# Preface

Ever since the European Union received the competence in the Amsterdam Treaty to develop judicial cooperation in civil matters with cross-border implications – a competence to be exercised *inter alia* to ensure the compatibility of the rules applicable in the Member States concerning conflict of laws, see Article 81(2)(c) TFEU – the number of legal instruments of the European Union on conflict of laws has risen quickly. More and more areas of Private International Law are harmonised across Europe. The regulations concerning the conflict of laws of contractual and non-contractual obligations (the Rome I and Rome II Regulations) broke the first ground. By now, regulations on the law applicable to divorce and legal separation (Rome III) and to maintenance obligations as well as succession have been added to the mix. Furthermore, there are proposals for regulations concerning the law applicable to matrimonial property and to the property consequences of registered partnerships.

This development leads to various academic, but also political questions. From an academic point of view, and in light of the rapid increase in the number of rules, the question of the coherence of European Private International Law arises. Closely connected to this is the issue of whether principles of European Private International Law have emerged over the past years.

If this is the case, and it is the objective of this volume to pursue that question, one needs to consider whether to catalogue these principles, based on the model of the *Acquis Principles* (Principles of the Existing EC Contract Law). These then could form the basis for a General Part of European Private International Law, possibly a ‘Rome 0 Regulation’ (see Leible, *Auf dem Weg zu einer Rom 0-Verordnung? – Plädoyer für einen Allgemeinen Teil des europäischen IPR*, in: FS Martiny, 429 [Witzleb et al. (eds.), Mohr Siebeck 2014]; Leible/Müller, *The Idea of a ‘Rome 0 Regulation’*, 14 *Yearbook of Private International Law* 137 [2012/2013]).

This volume originates from a symposium that I hosted together with my colleague at the University of Bayreuth, Hannes Unberath, who passed away much too young. The German book comprising the contributions to that symposium (Leible/Unberath [eds.], *Brauchen wir eine Rom 0-Verordnung? Überlegungen zu einem Allgemeinen Teil des Europäischen IPR* [JWV 2013]) focuses on the possibility of a

Rome 0 Regulation. The present volume attempts to shift that focus to the aforementioned principles. In comparison to the German volume, some additional topics are addressed and some of the authors have changed. The contributors to this volume had to take account of a growing academic discussion all over Europe and, in particular, the study by Kramer and others for the European Parliament (Kramer/de Rooij/Lasic/Frohn/Blauwhoff, *A European framework for private international law: current gaps and future perspectives* [Brussels 2012]).

I would like to express my gratitude to my research assistant Felix M. Wilke who not only contributes to this volume with the introductory chapter (again) and a translation, but also coordinated the project. He received indispensable support in the editorial process from our student assistants Hannah S. Lüdecke and Jan Wißling, whom I also thank. Mark Deavin attended to issues of the English language; many thanks to him for that. Finally, I would like to thank Kluwer Law International for accepting this book for publication. It is dedicated to my unforgotten colleague and friend Hannes Unberath.

Stefan Leible  
Bayreuth, August 2015

## List of Abbreviations

|                          |                                                                                                                                                                                                           |
|--------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| ABGB                     | Allgemeines Bürgerliches Gesetzbuch (Austrian Civil Code)                                                                                                                                                 |
| AC                       | Appeal cases                                                                                                                                                                                              |
| AcP                      | Archiv für civilistische Praxis                                                                                                                                                                           |
| AG                       | Amtsgericht (German District Court)                                                                                                                                                                       |
| Am. J. Comp. L.          | American Journal of Comparative Law                                                                                                                                                                       |
| AnwBl.                   | Anwaltsblatt                                                                                                                                                                                              |
| Austrian IPRG            | Austrian Private International Law Act                                                                                                                                                                    |
| BerDGesVölkR             | Berichte der Deutschen Gesellschaft für Völkerrecht                                                                                                                                                       |
| BGB                      | Bürgerliches Gesetzbuch (German Civil Code)                                                                                                                                                               |
| BGBL                     | Bundesgesetzblatt (German Federal Law Gazette)                                                                                                                                                            |
| BGH                      | Bundesgerichtshof (German Federal Court of Justice)                                                                                                                                                       |
| BGHZ                     | Entscheidungssammlung des Bundesgerichtshofs in Zivilsachen (Collection of Decisions of the German Federal Supreme Court in Civil Matters)                                                                |
| Brussels Convention      | Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters                                                                                          |
| Brussels Ibis Regulation | Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) |

|                           |                                                                                                                                                                                                                                              |
|---------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Brussels IIbis Regulation | 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 I Regulation     | Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters                                                                                     |
| BT-Drs.                   | Bundestagsdrucksache (Parliamentary Materials of the German Bundestag)                                                                                                                                                                       |
| Cass. civ.                | Arrêts de la Cour de cassation, chambre civile                                                                                                                                                                                               |
| Cass. req.                | Chambre des requêtes de la Cour de cassation française                                                                                                                                                                                       |
| CC                        | Code Civil (French Civil Code)                                                                                                                                                                                                               |
| cf.                       | <i>confer</i> , i.e., compare                                                                                                                                                                                                                |
| CJEU                      | Court of Justice of the European Union                                                                                                                                                                                                       |
| CMLRev                    | Common Market Law Review                                                                                                                                                                                                                     |
| Colum. L. Rev.            | Columbia Law Review                                                                                                                                                                                                                          |
| Cornell Int. L. J.        | Cornell International Law Journal                                                                                                                                                                                                            |
| Cuad. Der. Trans.         | Cuadernos de Derecho Transnacional                                                                                                                                                                                                           |
| DB                        | Der Betrieb                                                                                                                                                                                                                                  |
| DCFR                      | Draft Common Frame of Reference                                                                                                                                                                                                              |
| DLR                       | Dominion Law Reports                                                                                                                                                                                                                         |
| DNotZ                     | Deutsche Notar-Zeitschrift                                                                                                                                                                                                                   |
| DRiZ                      | Deutsche Richterzeitung                                                                                                                                                                                                                      |
| DtZ                       | Deutsch-deutsche Rechtszeitschrift                                                                                                                                                                                                           |
| DÖV                       | Die Öffentliche Verwaltung                                                                                                                                                                                                                   |
| ECHR                      | European Convention of Human Rights                                                                                                                                                                                                          |
| ECJ                       | European Court of Justice                                                                                                                                                                                                                    |
| Econ J.                   | Economic Journal                                                                                                                                                                                                                             |
| ECR                       | European Court Reports                                                                                                                                                                                                                       |
| EC Treaty                 | Treaty Establishing the European Community                                                                                                                                                                                                   |
| EF-Z                      | Zeitschrift für Familien- und Erbrecht                                                                                                                                                                                                       |
| e.g.                      | <i>exempli gratia</i> (for example)                                                                                                                                                                                                          |
| EGBGB                     | Einführungsgesetz zum Bürgerlichen Gesetzbuch (Introductory Law to the German Civil Code)                                                                                                                                                    |
| ERCL                      | European Review of Contract Law                                                                                                                                                                                                              |

|                                                 |                                                                                                                                                          |
|-------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------|
| ERPL                                            | European Review of Private Law                                                                                                                           |
| EuLF                                            | European Legal Forum                                                                                                                                     |
| Eur. L. J.                                      | European Law Journal                                                                                                                                     |
| EU Fundamental Rights Charter                   | Charter of Fundamental Rights of the European Union                                                                                                      |
| Eur. J. L. & Migr.                              | European Journal of Migration and Law                                                                                                                    |
| European Enforcement Order Regulation           | Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims |
| European Order for Payment Procedure Regulation | Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure          |
| European Small Claims Procedure Regulation      | Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure                |
| EuZW                                            | Europäische Zeitschrift für Wirtschaftsrecht                                                                                                             |
| EWS                                             | Europäisches Währungssystem                                                                                                                              |
| FamFR                                           | Familienrecht und Familienverfahrensrecht                                                                                                                |
| FamRZ                                           | Zeitschrift für das gesamte Familienrecht mit Betreuungsrecht, Erbrecht, Verfahrensrecht, Öffentlichem Recht                                             |
| Foro it.                                        | Il foro italiano                                                                                                                                         |
| FPR                                             | Familie Partnerschaft Recht                                                                                                                              |
| FS                                              | Festschrift (Liber Amicorum)                                                                                                                             |
| FuR                                             | Familie und Recht                                                                                                                                        |
| Gaz. Pal.                                       | La Gazette du Palais                                                                                                                                     |
| GEDIP                                           | Groupe européen de droit international privé                                                                                                             |
| Geo. L. J.                                      | Georgetown Law Journal                                                                                                                                   |
| GPR                                             | Zeitschrift für das Privatrecht der Europäischen Union/ European Union Private Law Review / Revue de droit privé de l'Union européenne                   |
| GS                                              | Gedächtnisschrift                                                                                                                                        |
| Hague Maintenance Protocol                      | Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations                                                                            |
| Hague Testamentary Form Convention              | Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions                                            |
| Harv. L. R.                                     | Harvard Law Review                                                                                                                                       |

|                        |                                                                                                                                                                                                 |
|------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| HCCH                   | Hague conference on private international law                                                                                                                                                   |
| Hofstra L. R.          | Hofstra Law Review                                                                                                                                                                              |
| ICLQ                   | International & Comparative Law Quarterly                                                                                                                                                       |
| IDI                    | Institut de Droit International                                                                                                                                                                 |
| IHR                    | Internationales Handelsrecht                                                                                                                                                                    |
| Int'l Lis              | Rivista di diritto processuale internazionale e arbitrato internazionale                                                                                                                        |
| IPRax                  | Praxis des Internationalen Privat- und Verfahrensrechts                                                                                                                                         |
| IPRspr.                | Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts                                                                                                                    |
| IZPR                   | Internationales Zivilprozessrecht                                                                                                                                                               |
| JCP G                  | Juris-Classeur périodique, édition Générale                                                                                                                                                     |
| JDI                    | Journal du droit international                                                                                                                                                                  |
| JhJb                   | Jherings Jahrbücher für Dogmatik des bürgerlichen Rechts                                                                                                                                        |
| J. L. Econ.            | Journal of Law, Economics and Policy                                                                                                                                                            |
| J. Priv. Int'l L       | Journal of Private International Law                                                                                                                                                            |
| J. trib.               | Journal des tribunaux                                                                                                                                                                           |
| Jura                   | Juristische Ausbildung                                                                                                                                                                          |
| JuS                    | Juristische Schulung                                                                                                                                                                            |
| JVW                    | Jenaer Wissenschaftliche Verlagsgesellschaft                                                                                                                                                    |
| JZ                     | JuristenZeitung                                                                                                                                                                                 |
| KG                     | Kammergericht (Higher Regional Court of Berlin, Germany)                                                                                                                                        |
| LG                     | Landgericht (German Regional Court)                                                                                                                                                             |
| LGDJ                   | Librairie juridique de référence en ligne                                                                                                                                                       |
| LMCLQ                  | Lloyd's Maritime and Commercial Law Quarterly                                                                                                                                                   |
| LMK                    | Kommentierte BGH-Rechtsprechung                                                                                                                                                                 |
| Maintenance Regulation | Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations |
| Mich. L. Rev.          | Michigan Law Review                                                                                                                                                                             |
| MittBayNot             | Mitteilungen des Bayrischen Notarvereins, der Notarkasse und der Landesnotarkammer Bayern.                                                                                                      |
| Ned. Jur.              | Nederlandse Jurisprudentie                                                                                                                                                                      |

|                            |                                                                                                                                                      |
|----------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------|
| New York Convention        | Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958                                                                        |
| NILR                       | Netherlands International Law Review                                                                                                                 |
| NIPR                       | Nederlands Internationaal Privaatrecht                                                                                                               |
| NJB                        | Nederlands Juristenblad                                                                                                                              |
| NJW                        | Neue Juristische Wochenschrift                                                                                                                       |
| NJW-RR                     | NJW Rechtsprechungsreport                                                                                                                            |
| NVwZ                       | Neue Zeitschrift für Verwaltungsrecht                                                                                                                |
| N.Y.U. L. Rev.             | New York University Law Review                                                                                                                       |
| ÖJZ                        | Österreichische Juristenzeitung                                                                                                                      |
| OJ EU                      | Official Journal of the European Union                                                                                                               |
| OLG                        | Oberlandesgericht (German Higher Regional Court)                                                                                                     |
| PIL                        | Private International Law                                                                                                                            |
| RabelsZ                    | Rabels Zeitschrift für ausländisches und internationales Privatrecht (The Rabel Journal of Comparative and International Private Law)                |
| Rec. des Cours             | Recueil des Cours                                                                                                                                    |
| REDI                       | Revista Española de Derecho Internacional                                                                                                            |
| Rev. crit. dr. int. pr.    | Revue critique de droit international privé                                                                                                          |
| Rev. Der. Com. Eur.        | Revista de Derecho Comunitario Europeo                                                                                                               |
| Rev. dr. int. pr.          | Revue de droit international privé                                                                                                                   |
| Rev. gén. dr. civ. belge   | Revue général de droit civil belge                                                                                                                   |
| Rev. Marché Commun UE      | Revue Marché Commun et de l'Union européenne                                                                                                         |
| Rev. trim. dr. eur.        | Revue trimestrielle de droit européen                                                                                                                |
| Rev. trim. dr. fam.        | Revue trimestrielle de droit familial                                                                                                                |
| RGBL                       | Reichsgesetzblatt (Imperial Law Gazette)                                                                                                             |
| RGZ                        | Reichsgericht in Zivilsachen                                                                                                                         |
| Riv. dir. int. priv. proc. | Rivista di diritto internazionale privato e processuale                                                                                              |
| Riv. dir. int.             | Rivista di diritto internazionale                                                                                                                    |
| RIW                        | Recht der Internationalen Wirtschaft                                                                                                                 |
| RNotZ                      | Rheinische Notar-Zeitschrift                                                                                                                         |
| Rome Convention            | Convention on the Law Applicable to Contractual Obligations 1980                                                                                     |
| Rome I Regulation          | Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) |

|                       |                                                                                                                                                                                                                                                                                                                  |
|-----------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Rome II Regulation    | Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)                                                                                                                                                        |
| Rome III Regulation   | Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation                                                                                                                                                    |
| S. Cal. L. Rev.       | Southern California Law Review                                                                                                                                                                                                                                                                                   |
| SEW                   | Tijdschrift voor Europees en economisch recht                                                                                                                                                                                                                                                                    |
| StaZ                  | Das Standesamt                                                                                                                                                                                                                                                                                                   |
| Succession Regulation | Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession |
| Swiss IPRG            | Swiss Private International Law Act                                                                                                                                                                                                                                                                              |
| SZIER                 | Schweizerische Zeitschrift für internationales und europäisches Recht                                                                                                                                                                                                                                            |
| TEU                   | Treaty on the European Union                                                                                                                                                                                                                                                                                     |
| Texas. Int. L. J.     | The Texas International Law Journal                                                                                                                                                                                                                                                                              |
| TFEU                  | Treaty on the Functioning of the European Union                                                                                                                                                                                                                                                                  |
| Trib. Civ.            | Tribunal civil                                                                                                                                                                                                                                                                                                   |
| VersR                 | Versicherungsrecht                                                                                                                                                                                                                                                                                               |
| Virg L R              | Virginia Law Review                                                                                                                                                                                                                                                                                              |
| W.L.R.                | Wisconsin Law Review                                                                                                                                                                                                                                                                                             |
| WM                    | Wertpapier-Mitteilungen                                                                                                                                                                                                                                                                                          |
| ZAIPR                 | Zeitschrift für ausländisches und internationales Privatrecht [later: <i>RabelsZ</i> ]                                                                                                                                                                                                                           |
| ZEuP                  | Zeitschrift für europäisches Privatrecht                                                                                                                                                                                                                                                                         |
| ZEV                   | Zeitschrift für Erbrecht und Vermögensnachfolge                                                                                                                                                                                                                                                                  |
| ZfRV                  | Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht                                                                                                                                                                                                                                  |
| ZHR                   | Zeitschrift für das gesamte Handels- und Wirtschaftsrecht                                                                                                                                                                                                                                                        |
| ZIP                   | Zeitschrift für Wirtschaftsrecht                                                                                                                                                                                                                                                                                 |



|           |                                                      |
|-----------|------------------------------------------------------|
| ZPO       | Zivilprozessordnung (German Code of Civil Procedure) |
| ZSR       | Zeitschrift für schweizerisches Recht                |
| ZVglRWiss | Zeitschrift für vergleichende Rechtswissenschaften   |