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Japanese and European Private International Law in Comparative Perspective

Symposium in Hamburg on 1./2. March 2007

Conflicts lawyers are living in very lively times given the great number of projects which have been launched during the last years that deal with codifying and modernizing private international law, both on the national and the supranational level. This development is particularly reflected by the recent initiatives taken by European and Japanese legislators. On January 1, 2007, the new Japanese "Act on General Rules for Application of Laws"[1] ("New Act") entered into force to replace the old statute dating from 1898 ("*Hôrei*").[2] This reform coincides with the current efforts of the European Union to create a modern and comprehensive private international law regime for its member states. In this respect, the Commission has presented several legislative proposals dealing with the law applicable to contractual obligations ("Rome I"),[3] to non-contractual obligations ("Rome II"),[4] and to maintenance obligations[5] and matrimonial matters (often referred to as "Rome III").[6] Each of these proposals is subject to intense

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1 *Hô no tekiyô ni kan suru tsûsoku-hô*, Act. no. 78 of 21.6.2006; for an English translation see *supra* at 227 ff; a German translation by SAKURADA / NISHITANI / SCHWITTEK is published in ZJapanR 11 (2006) 269 ff.

2 *Hôrei*, Act no. 10 of 21.6.1898; a German translation by MONIKA SCHMIDT is published in Außereuropäische IPR-Gesetze (1999) 308, ed. by KROPHOLLER / KRÜGER / RIERING / SAMTLEBEN / SIEHR.

3 Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM(2005) 650 final of 15.12.2005.

4 Amended proposal for a European Parliament and Council Regulation on the law applicable to non-contractual obligations (Rome II), COM(2006) 83 final of 21.2.2006; revised by the Common Position (EC) No 22/2006 of 25 September 2006 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II), O.J. 2006 C 289E/68.

5 Proposal for a Council Regulation on jurisdiction, applicable law, recognition, and enforcement of decisions and cooperation in matters relating to maintenance obligations, COM(2005) 649 final of 15.12.2005.

6 Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM(2006) 399 final of 17.7.2006.

academic and political debate calling for a thorough scrutiny of the different options. Against this background, it appears to be particularly stimulating to undertake an intercontinental comparison of parallel developments in private international law and to contribute to the ongoing discussion. To this end, the Max Planck Institute for Comparative and International Private Law, in cooperation with the German-Japanese Association of Jurists, organized a symposium on "Japanese and European Private International Law in Comparative Perspective" which took place on March 1 and 2, 2007, in Hamburg.

I. GENERAL INTRODUCTION

1. In his welcome address, *Jürgen Basedow* (Max Planck Institute for Comparative and International Private Law, Hamburg) highlighted the urgent need for truly European legal thinking which overcomes traditional domestic concepts given the growing body of European private international law. *Jan Grotheer* (German-Japanese Association of Jurists / Tax High Court of Hamburg) added that Japanese private international law theory can already draw on longstanding comparative experience that fits perfectly into the aim of the conference.

2. The conference was opened by *Jürgen Basedow* reporting on "Recent Developments of Private International Law in Comparative Perspective." *Basedow* explained that, traditionally, conflict rules were drafted with a view to protecting the national substantive law. The introduction of the legislative competence for the European Community in Arts. 61(c), 65 EC, however, has paved the way for a change of paradigm: For the first time, choice-of-law instruments will be enacted by legislators who are not responsible for the corresponding substantive law. Furthermore, *Basedow* identified three common features of modern conflict laws: a trend toward codification, a trend toward specification, and a trend toward liberalization. The first trend is reflected by the growing number of choice-of-law statutes – some of which have been enacted even in common law jurisdictions. These codifications contain a great number of specialized provisions that account for the various types of obligations and show a trend toward specification. The tend toward liberalization is mirrored by the increasing importance of party autonomy in many areas of law, particularly contracts but also torts and even family law. Finally, *Basedow* hinted at the antinomy of flexibility and certainty in private international law. In his opinion, the two principles are best balanced by a technique of presumption and rebuttal as approved by the new Japanese Act or the Rome Convention. This solution would be superior to the overly flexible approach taken by the American conflicts revolution or the excessively rigid concept evidenced in Art. 4 of the "Rome I" Proposal.

3. *Masato Dogauchi* (Waseda University, Tokyo) illustrated the "Historical Development and Fundamental Principles of Japanese Private International Law." He indicated that, during the second half of the nineteenth century, Japan invited many European

scholars who were supposed to advise the Japanese government on the introduction of a modern legal system. This initiative was meant to serve as a protection against the threatening European colonialism. The *Hôrei*, for instance, was based on intense comparative studies drawing particularly on German, French, Italian, and Belgian law. It was drafted as a fairly comprehensive and universal codification that acknowledged *Savigny*'s conflicts theory. The statute remained virtually unrevised for more than one hundred years, besides a reform of the international family law in 1989 aimed at the elimination of gender discrimination and the incorporation of the Hague Convention on Matrimonial Property Regimes. In 2002, it was finally decided to adjust the *Hôrei* to the modern economic environment. *Dogauchi* pointed out that the revision concentrated on the law applicable to contractual and non-contractual obligations, while the law governing family relations and succession law has been left untouched in substance. In his overall conclusion, *Dogauchi* argued that one cannot identify a clear and coherent policy underlying the New Act. Instead, it constitutes a hybrid model that evidences traces of both modern and conservative conflicts theories.

4. "The Reform of Japanese Private International Law in 2006" was set out by *Hironori Wanami* (Japanese Embassy, The Hague/formerly Japanese Ministry of Justice). He emphasized that the initiative was particularly induced by the global efforts to modernize private international law and that it was designed to ensure worldwide consistency of conflicts rules. *Wanami* pointed out that, though a few other issues have been revised as well (*e.g.,* guardianship and disappearance, Arts. 5, 6, 35), the core of the reform concerns the law governing contractual and non-contractual obligations. As to contracts, the revision made in Art. 8 was intended to synchronize Japanese law with the solutions embodied in Art. 4 of the Rome Convention, *i.e.,* to introduce the closest connection test (Art. 8 (1)) combined with a rebuttable presumption in favor of the habitual residence of the party carrying out the characteristic performance (Art. 8 (2)). This general rule is supplemented by special provisions dealing with consumer and employment contracts (Arts. 11-12). With regard to non-contractual obligations, a number of specific provisions have been adopted dealing with general torts, product liability, defamation (Arts. 17-19), negotiorum gestio, and unjust enrichment (Art. 14). Each of these rules are subject to the possibility of subsequent choice of law (Arts. 16 and 21) as well as to an escape clause giving effect to a manifestly closer connected law (Arts. 15 and 20).

5. The discussion following the first session centered around the application of choice-of-law rules in practice. As there are many difficulties resulting from the application of foreign law in domestic courts, judges often tend to favor the *lex fori* even though both Japanese and German judges are obliged to apply foreign law ex officio. Apparently, Japanese judges have no means to ask neutral institutions to deliver expert opinions on foreign law. The debate turned to the question of why the Japanese reform omitted international family law and whether there is a discussion as to a possible shift from

nationality to habitual residence as the primary connecting factor. It was pointed out that the reluctance was mainly due to time constraints and may further be explained by the fact that very few foreigners live in Japan so that nationality as connecting factor works relatively well in practice. The topic then shifted to the issue of to what extent lobbying had an impact on the New Act. It was indicated that opinions of various different interests groups were taken into consideration during the drafting process and that the legislators tried to balance the conflicting interests reasonably. Finally, the philosophical foundations of party autonomy in the cross-border setting were debated with explicit reference to Jean-Jacques Rousseau's concept of the contract social.

II. CONTRACTUAL OBLIGATIONS

1. *Yuko Nishitani* (Tohoku University, Sendai) gave an account of "Party Autonomy and Its Restrictions by Mandatory Rules in Japanese Private International Law." She explained that the *Hôrei* was an extraordinary progressive codification because it had already enshrined party autonomy in its Art. 7 (1) as early as 1898. Though the objective connecting factor in Art. 7 (2) of the *Hôrei* exclusively pointed to the *lex loci actus*, courts often approved an implicit or even hypothetical choice of law under Art. 7 (1) which sometimes led to unpredictable results. Moreover, the old act did not include a special regime for consumer or labor contracts. *Nishitani* indicated that Japanese legal theory sought to protect weaker parties by a fairly broad interpretation of internationally mandatory rules. Even though the New Act still adheres to party autonomy as the prevailing connecting factor (Art. 7), neither internationally recognized principles nor the *lex mercatoria* are eligible as the law governing the contract. This concept was welcomed by *Nishitani*. Art. 11(1) allows for party autonomy in consumer matters as well. However, the consumer can claim that the mandatory provisions of the law of his habitual residence shall apply provided that (1) the contract is not concluded in the consumer's professional capacity, (2) the professional was aware of this fact, (3) the professional induced the consumer to conclude a cross-border contract, and (4) the professional was aware of the consumer's habitual residence. Art. 12 stipulates a similar regime for employment contracts, giving effect to the mandatory provisions of the law of the place where the labor is to be carried out. Finally, *Nishitani* pointed out that the application and interpretation of internationally mandatory rules was intentionally left to the practice for further development. Hence, there is no corresponding provision within the New Act.

2. The following presentation by *Catherine Kessedjian* (University Panthéon-Assas, Paris II) dealt with "Party Autonomy and Characteristic Performance in the Rome Convention and the Rome I Proposal." Her talk focused on three different issues. First, she addressed Art. 3(1) 3rd sentence of the Proposal which presumes that a choice of a particular forum encompasses the choice of that forum's law. *Kessedjian* assumed that

this provision originated from English law where it is to be construed as a rebuttable presumption, while the Proposal appears to be absolute in this respect. She questioned the appropriateness of such a rule, since it undermines the fact that the parties actually did not agree on the applicable law. Second, *Kessedjian* examined Art. 3(2) of the Proposal which enables the parties to choose non-state law such as the Principles of European Contract Law. Basically, she endorsed this possibility but voiced concern that it might be difficult to draw a clear line between sufficiently recognized principles and non-eligible rules. *Kessedjian* clarified that this provision will probably be deleted anyway because some member states have cast doubts on the democratic legitimacy of non-state law. Finally, *Kessedjian* dealt with the new legal concept laid down in Art. 4 of the Proposal which objectively determines the applicable law for contractual obligations in want of a parties' choice of law. She argued that this provision would constitute a striking shift from the reasonable and balanced approach adopted in the Rome Convention toward a concept of excessively rigid rules with no means to account for special cases. *Kessedjian* therefore pleaded for the reintroduction of presumptions for the closest connection flanked by an escape clause.

3. Finally, *Fausto Pocar* (University of Milan) informed the audience on the "Protection of Weaker Parties in the Rome Convention and the Rome I Proposal." He started by summarizing the basic features and deficiencies of Art. 5 of the Rome Convention, whose technique was to shift the objective connecting factor from the supplier's business establishment to the consumer's habitual residence, and to limit the effects of an unfavorable choice of law. The latter was achieved by requiring the judge to compare the standard of protection of the chosen law with that of the law of the consumer's habitual residence. *Pocar* explained that the provision was criticized for being too narrow in scope and for being unsuited to modern business practices. Additionally, it has been difficult to operate the mandatory comparative analysis in court practice. Against this background, *Pocar* described Art. 5 of the "Rome I" Proposal. He criticized that this provision protects only member state residents, an exclusiveness which appears to be contrary to the principle of universalism earmarked by the Commission as one of its main policies. He further disapproved of the total ban of party autonomy in the proposed Art. 5. In his opinion, the aim of avoiding problems resulting from the *favor protectionis* concept could have been achieved more appropriately by different means as evidenced by the New Japanese Act.

4. The ensuing discussion started with an account of the latest developments concerning the "Rome I" Proposal. It was reported that both the presumption which equates choice of forum with choice of law and the possibility to choose internationally recognized principles will probably be deleted. By contrast, the concept of presumption and rebuttal is very likely to be reintroduced into Art. 4. The audience then turned to the question of whether non-state law should be eligible. While some participants doubted the practical need of such a possibility, the majority took the view that contract law

should be an area of liberalism in which the parties' contractual freedom should only be limited for compelling reasons and that the latter has not been demonstrated yet. Moreover, modern private international law should be open to future developments and to private efforts of harmonization which would militate for the eligibility of private codifications. Finally, it was debated whether a professional supplier should be given the possibility to standardize his terms and conditions by way of choice of law in accordance with one single law granting a high standard of protection to the consumer. In this context, it has been clarified that under Art. 11 of the Japanese Act, the consumer can express his or her intent to apply the law of the place of his or her habitual residence at any point in time, *i.e.,* not only at the time of the conclusion of the contract, but also at any later stage, *e.g.*, during subsequent court proceedings.

III. ASSIGNMENT OF RECEIVABLES

1. In the following session, *Aki Kitazawa* (Keio University, Tokyo) illustrated the "Law Applicable to the Assignment of Receivables in Japan." She explained that three different issues have to be distinguished in this respect: (1) the law governing the validity and effects of the assignment as between the contracting parties, *i.e.,* the assignor and the assignee; (2) the law governing the effects of the assignment on the debtor of the assigned claim; and (3) the law governing the effects of the assignment vis-à-vis third parties, *i.e.,* the general creditors of the assignor or subsequent assignees in cases of multiple assignments. With regard to the first issue, neither Art. 12 of the *Hôrei* nor Art. 23 of the New Act provides a clear answer. Hence, the solution is under debate just as it is in the context of Art. 12 of the Rome Convention. *Kitazawa* supports the view that both the contractual and the proprietary effects of the assignment as between assignor and assignee should be governed by one single law, *i.e.,* the law governing the assignment contract. As to the effects of the assignment on the debtor as well as on third parties, the *Hôrei* opted for the law of the debtor's domicile. By contrast, Art. 23 of the New Act designates the law governing the assigned receivable itself. According to *Kitazawa*, this basically constitutes a sound solution accounting for the competing interest involved in the triangular setting of assignment. She admitted that this rule might cause problems regarding bulk assignments which, however, appear to be less common in Japanese business practice for the time being.

2. *Eva-Maria Kieninger* (University of Würzburg) outlined the "General Principles on the Law Applicable to the Assignment of Receivables in Europe." First of all, she briefly illustrated the rules embodied in Art. 13(1) and (2) of the "Rome I" Proposal dealing with the relationship of the parties of the assignment vis-à-vis each other and as regards the debtor. *Kieninger* focused on the priority issue in relation to third parties. In this respect, four different solutions have been suggested: (1) the law applicable to the assignment contract (Art. 12(1) Rome Convention), (2) the law applicable to the as-

signed claim (Art. 12(2) Rome Convention), (3) the location of the assignor (Art. 13(3) "Rome I" Proposal), and (4) the location of the debtor (Art. 12 *Hôrei*). *Kieninger* stressed the utmost importance of *ex ante* legal certainty because there is no ideal solution to the complex problem of cross-border assignment. Against this background, she demonstrated that solution (1), *i.e.,* granting party autonomy to the assigning parties, is detrimental to the legitimate interests of third parties. As to solution (2), *Kieninger* argued that it is impractical with regard to bulk assignments playing a major role in European market practice. Consequently, *Kieninger* advocated the third approach since the assignor's location is a readily ascertainable connecting factor safeguarding ex ante legal certainty without causing problems regarding securitizations and bulk assignments. According to *Kieninger*, this law should equally determine the proprietary effects as between assignor and assignee rather than vis-à-vis third parties only. She finished her talk by suggesting three minor improvements of the current draft, inter alia, the suspension of Art. 18(1) 2nd sentence in the context of assignments.

3. After this session, it was first debated whether there is any problem as to the reconcilability of the law applicable to assignment with the law governing set-off (Art. 16 "Rome I" Proposal). Second, it was discussed whether or not the definition of habitual residence provided for in Art. 18(1) 2nd sentence should be given effect in cases of assignment as well. Third, it was pointed to the fact that Art. 13(3) "Rome I" Proposal effectuates a useful synchronization of the law applicable to priority conflicts with the *lex concursus*, and is furthermore in line with the UNCITRAL Assignment Convention. Finally, it was emphasized that some kinds of transactions, *e.g.,* dealings in intermediated securities, might have to be excluded from the scope of Art. 13 "Rome I" and should be left to a special instrument.

IV. International Company Law

1. *Dai Yokomizo* (Hokkaido University, Sapporo) gave an overview of the current state of the "International Company Law in Japan." He pointed out that neither the former *Hôrei* nor the New Act contains provisions identifying the law applicable to companies. However, Art. 36 of the *Civil Code*[7] provides that the juridical personality of foreign companies is generally recognized. In addition, Art. 482 of the pre-revised *Commercial Code*[8] and Art. 821 of the new *Company Code*[9] deal with the issue of pseudo-foreign companies. Reviewing the past developments, *Yokomizo* pointed out that the drafters of the *Hôrei*, who were strongly influenced by François Laurent, regarded the issue not as a problem relating to the applicable law, but rather as a question

7 *Minpô,* Law No. 89/1896, last amended by Law No. 50/2006, which changed Artt. 35 and 36.
8 *Kaisha-hô,* Law No. 86/2005.
9 *Shôhô,* Law No. 48/1899, last amended by Law No. 87/2005.

of recognition of the legal personality of foreign companies (dealt with in Art. 36 *Civil Code*) and thus considered an unnecessary provision. Since World War II, the majority of scholars have supported the place of incorporation rather than the company's seat as a connecting factor. They do not, however, accept the drafters' approach toward the recognition of foreign companies, but rather regard the problem as one identifying the law applicable to companies. Thus, they distinguish between conflict-of-law rules and alien law rules (such as Art. 821 *Company Code* and Art. 36 *Civil Code*). Due to its unclear wording, a Supreme Court's decision dating from 1975 is open to interpretation as supporting either the seat doctrine or the incorporation doctrine. Nevertheless, the incorporation doctrine is almost unanimously accepted in Japan. Still, no provision regarding the law applicable to companies was introduced into the New Act, as legislators found the discussion on this matter was still insufficient to justify introducing a rule. Art. 821 of the new *Company Code* has been criticized strongly for having an unclear scope, so further examination is highly desirable to enhance predictability. Further issues recently discussed include the law applicable to an international merger, the law applicable on piercing the corporate veil, and the existence of international mandatory rules within the *Company Act*.

2. Next, *Sylvaine Poillot-Peruzzetto* (University of Toulouse I) spoke on the "International Company Law in the ECJ Decisions." There are no uniform private international law rules in relation to companies in Europe, but the right of establishment provides an alternative method for an indirect coordination of the national laws. European member states are divided between those that apply the law of the real seat to companies (which inhibits transferring the seat without a reincorporation that induces tax and other legal issues) and those that apply the law of the place of incorporation. *Poillot-Peruzzetto* distinguished between two effects of ECJ case law. The first is the indirect effect on the conflict-of-law rules. There is an indirect effect on the connecting factor selected by the member state, as the ECJ case law (*Daily Mail*, *Überseering*) clearly condemned the use of the real seat as a connecting factor in some circumstances, thus enhancing party autonomy and the competition between the various company law models. There may also be an effect on the structure of the national rule. When the conflict-of-laws rule of a state is unilateral and uses the criteria of location of the seat or of nationality, it may lead to discrimination and thus to an infringement of the right of establishment (SEVIC, Segers). Second, ECJ case law may have an indirect effect on the private international law instruments, namely on the exception of evasion of the law (*Centros*) and the super mandatory rules (*Inspire Art*). Exemplifying those effects, *Poillot-Peruzzetto* found that as the ECJ case law controls the result of the application of the governing law, the recognition principle becomes very important in Europe. She put forward that coordination, in addition to mobility, becomes a European value through European conflict of law rules on the basis of the incorporation theory, stressing that the ECJ case law should be qualified as an open invitation to a European

harmonization, and that it becomes increasingly important to act positively in that respect. *Poillot-Peruzzetto* emphasized that this debate is totally connected to the issue of the identity of Europe, either merely as a space for mobility and competition between various systems or as the possibility to build a model of society. This being a European situation, in her opinion, the ECJ case law sketches the European private international law rules in relation to international situations on the basis of the real seat theory.

3. Rounding out the picture, *Daniel Zimmer* (University of Bonn) analyzed "The Proposal of the *Deutscher Rat für Internationales Privatrecht*" (German Council for Private International Law), which was brought forward in reaction to the ECJ decisions in *Centros*, *Überseering*, and *Inspire Art*. Two mostly identical proposals have been drawn up,[10] one that is aimed at the Community level and one that provides for a set of rules to complement the existing German private international law in case the proposed Community legislation should not succeed for the time being. *Zimmer*, concentrating on the first, reported that in principle, the proposal follows the incorporation theory. Art. 2, using a ladder of consecutive rungs of connecting factors, states that companies shall be subject to the law of the state in whose public register they are entered. If they are not or have not yet been registered in a public register, they shall be subject to the law of the state under whose law they are organized. European and third-country companies are treated alike in order to keep the rules as simple as possible. The scope of application is determined in Art. 3 by a non-exhaustive enumeration. Art. 4 sets out the rule that formal requirements for legal acts relating to a company's constitution are governed by the substantive law applicable to the company, while for other acts it is sufficient to comply with the formal requirements of the applicable company law or those under the law of the country where the act was performed. The following three articles relate to important structural changes in companies, such as cross-border mergers, international company division, and asset transfer. Evaluating the basic features of the proposal, *Zimmer* came to the conclusion that it is in line with the trends identified by *Basedow* in his introductory speech on recent developments in the conflict of laws: it is an attempt to codify this important branch of private international law in a more specific and detailed way, giving private parties more freedom than previously offered by private international law and thus confirming a trend toward liberalization.

4. A lively discussion arose about the topics brought up in the speeches of the session. The first issue addressed was the interpretation and impact of the ECJ decisions, especially regarding the reading and effects of the *Überseering* decision. Other issues of interest were the pros and cons of a codification of the private international law concerning companies in general, and of the proposal of the German Council for Private International Law in particular. Concerns as to whether the codification process for an

10 The German text of the proposal is published by H.J. SONNENBERGER / F. BAUER in: Recht der Internationalen Wirtschaft 2006, Beilage 1, 1-24.

EC-regulation might lead to an undesirable compromise were brought forward, suggesting that the decision was better left to the ECJ. Majority opinion was, however, that there is a necessity to act in this field. Drawing a comparison with the codification process of non-contractual liability, it was predicted that in future the necessity for codification will be recognized by the EU. As for the draft of the German Council for Private International Law, the request was made that it should be better publicized and explained to the public. It was pointed out that as harmonization will be realized using the incorporation theory, Japan's approach with a substantive provision on pseudo-foreign companies might be interesting with regard to third-state countries to deal with problems such as creditor protection. It was also brought forward that the harmonization of substantive corporate law is necessary to deal with some of the problems at stake, and that some contents of material law should be reconsidered. For example, rather than prescribing a minimum capital, other measures of creditor protection such as enhanced management liability might be more effective. Japan's recent company law reform could set a good example in this respect.

V. NON-CONTRACTUAL OBLIGATIONS

1. Aiming at finding a common basis of discussion between Japan and Europe, *Toshiyuki Kono* (Kyushu University, Fukuoka) spoke on the "Lex Loci Delicti and Its Exceptions in Japanese Private International Law." Analyzing and exemplifying the various options legislators have, *Kono* found that the conflict of law rules on tort should serve the purpose of reducing the number of torts by leading all possible parties to behave appropriately within appropriate costs and should be designed and selected thereafter. Comparing them to the "Rome II" provisions, *Kono* gave an overview of the provisions on tort in the New Act. Under Art. 17, 1st sentence, the law of the place of tortuous results is applicable, unless, according to Art. 17, 2nd sentence, the occurrence of the results there would usually be unforeseeable, in which case the law of the place of tortuous acts is applied. As for product liability, Art. 18 regulates that the law of the place of the product delivery is applied (Art. 18, 1st sentence); if that place could not usually be foreseen, the law of the principal place of business of the producer is relevant (Art. 18, 2nd sentence). Art. 19 determines that in case of defamation, the law of the injured person's habitual residence is applied. Art. 20 provides an exception for cases with a manifestly closer connection to another place, Art. 21 admits party autonomy *ex post* without prejudicing third parties' rights, and Art. 22 gives room for public policy in tort. *Kono* went into the problem of party autonomy *ex post* or *ex ante*, suggesting that party autonomy *ex post* might affect people's behavior *ex ante* insofar as with the confidence that the applicable law set forth by the legislators could be changed at a later stage, people might be less concerned about acting contrary to the law, and thus the number of torts might increase.

2. *Thomas Kadner Graziano* (University of Geneva) then laid out the "General Principles in International Tort Law in Europe." He explained that as conflict of law rules of the EU are still extremely rare in this area and are largely left to the national legislators for the time being, and as they differ very much from one country to another, in any specific case the outcome may mainly depend on the Europe forum state where the claim has been filed. Therefore, initiatives to unify tort conflicts rules have been taken in order to enhance foreseeability of the applicable law and legal certainty, first by the Hague Conference on private international law, then by the EC/EU. *Kadner Graziano*, after giving a summary of the previous undertakings, dealt with some relatively uncontroversial issues such as the general principle of application of the *lex loci delicti* that is in force in almost all European countries and was provided for in all proposals for "Rome II", and the exceptions to this principle. He then focused on more disputed issues, the first and most fundamental of which is the question of if and to what extent the parties should have the freedom to choose the law applicable to their extra-contractual relationships. *Kadner Graziano* stated that the resolution on "Rome II" of the European Parliament dating from 2005 as well as the last proposal of the Commission in February 2006 and the "Common Position" of September 2006 show that, should "Rome II" be realized, the freedom of choice, *ex post* and *ex ante*, will certainly count among the cardinal principles of European private international tort law. He then analyzed the delicate issues of public policy of the forum, observing that the very cautious application of *ordre public* clauses may be a strong characteristic, if not a general principle, of PIL on tort in Europe. Speaking about the topic of complex torts, *Kadner Graziano* expressed the opinion that the introduction of specific rules for specific multilocal torts is at least another common feature in Europe. For the future, he pointed out two major problems that need to be solved: the question of which law to apply to transnational violations of privacy, personality rights, and defamation, especially by mass media and the issue of a limitation period in road accidents and, more generally, personal-injury cases.

3. *Marc Fallon* (Catholic University of Louvain, Louvain-la-Neuve) closed the session with a thorough analysis of the "Law Applicable to Specific Torts in Europe." Generally, he found that specific rules tend to solve a problem due to the difficulty of localizing the place of a wrong or the place of a damage in diversity cases. Statutory provisions are rare, and most solutions result from a case law interpretation of a global rule referring to the place of the wrong or to the place of the damage, or to both factors. As for "Rome II", the European Parliament is rather reluctant to enact some of the specific rules introduced there, while the Commission and the Council favor specific rules for products liability, environmental damage, unfair competition, and infringement of intellectual property rights. The Council, in contrast to the Commission and the European Parliament, seems to prefer to exclude protection of privacy from the scope of the Community act, concerning in particular the risk of a violation of the fundamental

freedom of expression. The specific rules of "Rome II" identify more precisely the place of the damage, which has the first place in the scale of the general rule. The place of the habitual residence is used only to protect a party, in product liability cases or in privacy cases to protect the defendant. This does not prejudice the extension of the freedom of choice, except for unfair competition and for the infringement of intellectual property rights, while the application of the escape clause is extended to products liability only. Apart from international treaties, in particular the Hague Conventions on traffic accidents and on products liability, provisions outside the Regulation itself consist of Community law provisions of a diverse nature such as a general "mutual recognition" concept and overriding mandatory provisions, and thus are sometimes difficult to identify. In *Fallon*'s opinion, it is not sure that the same rules on conflicts of laws should prevail in a universal way, for intra-Community as well as external situations. The consequence thereof would be that Europe should accept and think about the possibility of two parallel sets of conflicts of law rules.

4. In the discussion following the speeches, the question of what law should be applicable to antitrust violations arose. As for the purpose of private international law rules on tort, it was stated that deterrence was not a sufficient factor, as compensation was just as important in dealing with international torts. From a standpoint with a focus on general deterrence, doubts were cast on the common habitual residence as the connecting factor because it might countervail deterrence. It was also discussed whether an *ex-ante* choice of law was reasonable and necessary. Fears were expressed as to the danger of the emergence of a "minimum Rome II," *e.g.*, a regulation excepting defamation and traffic accidents, if a European consensus cannot be found. As for defamation, it was pointed out that the application of the law of the injured person might bear a great risk for media.

VI. INTERNATIONAL FAMILY LAW

1. *Yasuhiro Okuda* (Chûô University, Tokyo) opened the session about International Family Law with his survey on "Divorce, the Protection of Minors, and Child Abduction in Japanese Private International Law." Pursuant to the 1989 revisions, Art. 27 of the new Act stipulates that the law applicable to the effect of marriage also applies to divorce. Where one of the spouses is a Japanese national with habitual residence in Japan, however, the divorce is always governed by Japanese law. Art. 32 provides that parental authority is governed by the child's national law where that is the same as the national law of either the mother or the father, or where that is not the case, by the law of the child's habitual residence. There is no express statutory provision as to the conflict of jurisdiction. A general rule was set up by the Supreme Court in 1964, but a 1996 Supreme Court judgment has caused some confusion among inferior courts as it slightly altered the rule of 1964. In *Okuda*'s opinion, the Japanese courts should return

to the general rule of the 1964 decision to keep determinations of jurisdiction consistent in the future. There being no Supreme Court decision as to the international jurisdiction for parental authority, the inferior courts have held in many cases that the court with jurisdiction over divorce also has jurisdiction over parental authority because parental authority is a matter derived from the divorce. *Okuda* indicated that the conditions for recognition should be different between divorce and parental authority. Contrary to divorce and parental authority, the provision on guardianship was not amended in 1989 but was altered slightly in 2006 by Article 35 of the New Act. *Okuda* regretted that the 1980 Convention on the Civil Aspects of International Child Abduction has not been ratified by Japan. He inferred that though Japanese courts have made reasonable efforts to establish rules applicable to legal proceedings in international family law, in the absence of statutory provisions, the rules remain unclear.

2. *Maarti Jänterä-Jareborg*'s (Uppsala University) outlook on "Jurisdiction and Applicable Law in Cross-Border Divorce Cases in Europe" treated the Regulation concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and Matters of Parental Responsibility ("Brussels II *bis*"), in force in the member states of the EU (with the exception of Denmark) since March 1, 2005, and the Commission's proposal on the law applicable to divorce (and legal separation) which also includes amendments to the rules on jurisdiction in the "Brussels II *bis"* by proposing a right for the spouse to agree on jurisdiction of a member state's court ("Rome III").[11] Stressing that there are many non-EU citizens who reside in the Union, *Jänterä-Jareborg* remarked that third-state citizens are also affected in various ways by the common EU rules. She reported that the "Brussels II *bis"* is a so-called double instrument consisting of rules on jurisdiction and on the recognition/enforcement of other member states' judgments. A major innovation is the Regulation's direct rules on jurisdiction which must be respected by the courts of the member states. Third-state citizens are also covered, provided that the situation is linked to a member state in a manner corresponding with at least one of the jurisdictional grounds of the Regulation. Once proceedings are initiated in more than one member state, the court second seized shall decline jurisdiction in favor of the first seized competent court, which in *Jänterä-Jareborg*'s opinion is a great improvement. Also, divorce judgments given in a member state are recognized automatically in the other member states. *Jänterä-Jareborg* did not approve of the criticism that the Regulation might encourage forum shopping and rush to court. The starting point of the "Rome III" Proposal, which will also cover the laws of any third state, is that the spouses have the right to choose (within limitations) the law applicable to their divorce. *Jänterä-Jareborg* expressed serious doubts regarding this provision, *e.g.*, regarding the lack of solutions for procedural problems related to the application of foreign law.

11 See *supra* note. 6.

3. At the end of the session, *Alegría Borrás* (Barcelona University) gave a survey of the "Protection of Minors and Child Abduction under the Hague Conventions and the Brussels II *bis* Regulation," resuming the topics dealt with by the previous speaker. *Borrás* outlined the history of the Hague Conventions and compared them with the European instrument highlighting the common features of the Conventions and the Regulation as well as their discrepancies before she finally analyzed the "Rome III" Proposal. *Borrás* defined the basic terms and concepts such as "parental responsibility" and "wrongful" removal, and laid out the main rules, *e.g.*, the child-centered approach, for both the Conventions and the Regulation. She came to the conclusion that although there is a need for regulation, there have been too many amendments in the past which have led to legal uncertainty. She criticized the fact that the material scope of the application for marriage and parental responsibility have remained together. In her opinion, this causes even more amendments, as the one cannot be changed without the other, and thus separating the two issues would enhance legal certainty. As for the future, she suggested that it would be reasonable if all the member states of the European Union ratified the Hague Conventions.

4. Evoked by the lectures, the question was raised whether same-sex divorces fall into the scope of "Brussels II *bis*." The danger was pointed out that if the regulation aims at covering jurisdiction entirely, maybe in some cases there would be no access to justice. As an agreement for prorogation is now possible, the practicability of such an agreement was discussed. The refusal of one or both parties to approve of the agreement was considered likely, which might make a prenuptial agreement advisable. The exclusive jurisdiction for Japan if a child is domiciled in Japan was said to be a matter of interpretation and non-exclusive, as there are some exceptions to the rule. In conclusion, the reason for Japan's refusal to ratify the Hague convention was discussed.

VII. INTERNATIONAL CIVIL PROCEDURE LAW

1. The next session started with *Yoshihisa Hayakawa*'s (Rikkyô University, Tokyo) overview on "Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Japan." Scrutinizing Art. 118 *Civil Procedure Code* as the statutory rule for the recognition of foreign judgment in Japan, *Hayakawa* came to talk on highly controversial issues of the recognition of foreign judgments such as service abroad directly by postal channels or the awarding of punitive damages. He then went into depth on another issue frequently discussed in many cases on foreign judgments: international adjudicative jurisdiction. There are conflicting opinions among Japanese scholars as to whether Japanese rules concerning this issue are similar to those of Europe or to those of the U.S. In former times, the number of cross-border cases was very small, so there have been no clear statutory provisions in Japan until today, and Japanese lawyers rely on case law. Today, however, the number of cross-border cases is drastically increasing,

creating the need for clear rules. Until 1981, lower court cases in most jurisdictional areas showed no reliable rule, leading to unpredictability. In 1981, the Supreme Court came up with the idea of using the rules for domestic cases as substitute rules for international jurisdiction. The problem was that venues for the authorization of jurisdiction are widely listed up in the statutory jurisdiction rules, so that a plaintiff can easily bring a suit against a foreign defendant to a Japanese court, which may be serious for the foreign defendant in a cross-border situation. Accordingly, lower courts have gradually modified the 1981 rule to the effect that the domestic jurisdiction rules are used as a substitute for international jurisdiction rules unless there are exceptional circumstances from the viewpoint of equal treatment of parties and a proper and prompt course of justice. This ruling was acknowledged by the Supreme Court in 1996. The Ministry of Justice has started a project to establish statutory rules for international jurisdiction, so in the future these questions will remain a burning issue.

2. *Dieter Martiny* (European University Viadrina, Frankfurt/Oder) then analyzed the "Recognition and Enforcement of Foreign Judgments in Germany and Europe." The rules on the recognition of judgments still are divided into one body of intra-Community rules enacted by the European Community and another body of rules for third-state relations adopted by the member states. Up until now there has been no uniform European approach as to the recognition of judgments originating from third countries. Mutual recognition being the only way to overcome difficulties created by the still-existing differences between national judicial systems – particularly the "Brussels I" Regulation concerning jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and its counterpart in matrimonial law, "Brussels II *bis*" Regulation – have basically ensured the free movement of judgments within the internal market. After outlining those developments, *Martiny* came to speak about the numerous other regulations that have entered into force since 2000, particularly regulations relating to service, the taking of evidence and insolvency proceedings, as well as about the European Judicial Network in civil and commercial matters. Relatively new is the Regulation creating a European Enforcement Order (EEO) for uncontested claims that enforces judgments obtained in uncontested claims in the EU. Other projects are the creation of a European Order for Payment for uncontested claims and the proposal for a Small Claims procedure. *Martiny* proceeded with analyzing the German national law (§ 328 and §§ 722 and 723 of the German Code of Civil Procedure), which has basically remained unchanged. In conclusion, he stated that in regard to the demands of European integration and the development of the internal market, there is a need to enhance free movement of judgments even more through new tools with which one can, on the one hand, abolish the traditional exequatur requirement and facilitate enforcement, but give, on the other hand, sufficient procedural guarantees already in the state of origin. *Martiny* regretted that third countries as such cannot take part in the facilitation of recognition and enforcement by the European integration. For them, only

the international level with its main instrument of international conventions is open. *Martiny* stressed the importance of European efforts to make international cooperation more effective.

3. Finally, *Trevor Hartley*'s (London School of Economics) reported on "The Brussels Regulation and Non-Community States." He explained that the basic feature of the Brussels instruments consists of an almost automatic recognition of Community judgments, prohibiting any second-guessing of the jurisdiction of the court of origin. This is made possible through a comprehensive regulation of the so-called direct jurisdiction of the first court. *Hartley* indicated that this system was originally designed with intra-Community cases in mind without considering third-state defendants. As a consequence, it discriminates against non-Community residents: In relation to third states, member state courts can take jurisdiction on their autonomous (exorbitant) grounds. Such a judgment must be recognized in other member states even though it is not rendered according to the defendant-protective provisions of the Brussels Regulation. Further discrimination results from the fact that the provisions concerning exclusive jurisdiction (Art. 22), choice-of-court agreements (Art. 23), and *lis pendens* (Art. 27) only give priority to member state courts; they do not apply explicitly to similar situations involving third states. *Hartley* showed that the Brussels Regulation does not provide clear answers regarding these types of cases, *i.e.,* whether a member state court would have to take jurisdiction, may take jurisdiction, or would even have to stay its proceedings. In his conclusion, *Hartley* criticized the discriminatory European approach and hinted at the American practice of treating domestic and foreign citizens equally.

4. As regards the treatment of non-Community residents, there was a common understanding among the participants that the discriminatory effect of the Brussels instruments is inappropriate. Consequently, the provisions on direct jurisdiction of member state courts should be extended to third states as well, either by analogy or by an explicit provision. A corresponding solution has been approved in Italian law already. As for the exceptions of public policy, it was agreed upon that in the EU, the member states' powers are more and more limited, and public policy of the single state shrinks accordingly. The questions of how this national public policy is to be replaced – *e.g.*, by regulations in these areas – and whether or how a European *ordre public* is developing were discussed vividly.

The conference was attended by almost one hundred participants from various countries and professions, indicating the growing interest in and importance of comparative private international law. The collection of papers will soon be published in English by Mohr Siebeck (Tübingen) under the editorship of *Jürgen Basedow*, *Harald Baum,* and *Yuko Nishitani* in the Max Planck Institute's series "Materialien zum ausländischen und internationalen Privatrecht."

Simon Schwarz / Eva Schwittek