Introduction to European Business Law

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Module 8 (procedural/environmental law)

A glossary of key terms and a summary of case notes from week 8

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These notes were prepared by Penny Parker for others who are taking this MOOC course, for personal private use only. Please feel free to comment or submit corrections to pennyparker@me.com.

Analysing an environmental matter in a business context -- From the ungraded quiz for this module, the question was what are the three steps in how an environmental law inquiry is made in a European business law context. The lecture notes had identified these 3 steps as framing, identifying and understanding. But the quiz described it a little more ambiguously as: identifying the relevant laws to the identified problems, identifying and working to understand the nature of the environmental problem, and identifying the relevant environmental laws that apply to the environmental problems identified. Wrong answers included: identifying the relevant market and analyzing company employment contracts.

Ancillary rules – I'm not sure whether these are officially referred to as the ancillary rules but this term came up in the lecture on private international law, to describe two regulations that relate to specific issues of cross-border civil/commercial matters and the taking of evidence. Namely,

- Regulation (1393/2007) on the Service in the Member States of Judicial and Extrajudicial Documents in Civil and Commercial Matters
- Regulation (1206/2001) on Cooperation between the Courts of the Member States in the Taking of Evidence in such matters.

Applicable law – for contractual matters is covered by the so-called Rome I regulation (593/2008); for non-contractual matters, the Rome II regulation (864/2007).

Areas not covered by EU – even as to the main regulations on private international law, there are several other areas not covered by this legislation and these areas are left to the member states own legislation. There still remains several other issues, not regulated by EU Private International Law, and these continue to be governed by the law designated by national conflict rules of the member state of the court. This applies for instance, to the validity of marriages, or the protection measures such as, guardianship for adults who, due to mental problem or age, are unable to take care of their affairs. It must be mentioned that due to special arrangements, Denmark, in spite of being an EU Member State, does not participate in this legislative cooperation. And that the United Kingdom and Ireland, although not obliged to participate, have in most cases, made use of the right to opt in, that is to decide to take part in this cooperation, on a voluntary basis.

Article 34 TFEU – free movement of goods provision, "the prohibition of quantitative restrictions between member states on imports and all measures having equivalent effect." This requirement came up several times in discussing environmental law. National environmental protection measures may amount to such prohibitive trade restrictions and get struck down by the court. See in particular the Commission vs. Austria case involving the ban on heavy transport loads on certain motorways and the

Commission vs. Denmark case involving a deposit-and-return beverage container law – in both cases they were struck down because of infringements on the free movement of goods under Article 34 TFEU. However, Sweden's green certificates trading scheme was upheld after surviving a challenge on Article 34 grounds, although the court's decision does not really explain why (a fact that was also criticized in the EU Law Blog article I quoted in the case summary of the Alads Vindkraft case below).

Article 81 TFEU -- The legal basis of EU's legislative competence regarding private international law, is in Article 81 TFEU, which provides that the Union should develop judicial cooperation in civil matters having cross-border implications, particularly when necessary for the proper functioning of the internal market. This cooperation includes taking measures aimed at ensuring, among other things, the compatibility of the rules applicable in the member states concerning

- conflict of laws,
- jurisdiction of courts,
- and the mutual recognition and enforcement between member states of judgments.

Brussels I regulation -- on the basis of Article 81 and its predecessor, the European Union has issued a substantial number of instruments dealing with private international law. The most important among them, are the regulation on jurisdiction and the enforcement of judgments in civil and commercial matters, the so called, Brussels I regulation. Among other things this regulation sets out the so-called domicile principle in article 2 -- a person, who in the business dispute is usually a company of some sort, domiciled in a Member State, must be sued in the court of that Member State. While persons domiciled outside the European Union, remain subject to the national jurisdictional rules of the member state of the relevant court.

From Wikipedia: The Brussels I Regulation contains a jurisdictional regime: the rules which courts of EU Member States use to determine if they have jurisdiction in cases with links to more than one country in the EU. The basic principle is that the court in the member state of the party that gets sued has jurisdiction, while other grounds exist, which are diverse in content and scope, and are often classified in descending order of exclusivity and specificity.

Brussels II regulation – Regulation 2201/2003, also called Brussels IIA or II bis is the EU regulation on conflict of law issues in family law between member states; in particular those related to divorce, child custody and international child abduction. The regulation does not apply to Denmark.

Carbon markets -- Carbon emissions trading is a form of emissions trading that specifically targets carbon dioxide (calculated in tonnes of carbon dioxide equivalent or tCO_2e) and it currently constitutes the bulk of emissions trading. In the EU this is one of the key projects in the environmental law area that utilize so-called market dynamics to protect the environment. The core idea is that through better and smarter, also environmental regulation, the economy can be or will be stimulated by creating so-called win-win situations allowing companies to behave responsibly and maximize profits at the same time.

Characteristic performance – this is the term used to distinguish the simple act of payment of money under a contract, from the specific performance contracted for – such as building a bridge, or repairing a boat. The latter is called the characteristic performance. This concept is used sometimes in determining where a legal action can be brought when multiple member states are involved. When the contract is silent as to which law should be applied, the law of the state where the characteristic performance was to be performed will be used.

Chattel mortgage -- a term used to describe a loan arrangement in which an item of movable personal property is used as security for the loan. For example, a boat loan.

Climate change – climate change is one of the environmental topics listed in Title 20 (articles 191-193) of the TFEU. It also figured prominently in the emissions trading and green energy cases in our recommended readings. The point was made in the lecture that subjects like climate change require highly skilled technical competence, in additional to legal competence, to solve.

Conflict rules – this is the term generally used to refer to conflict of law rules, or how to determine which courts have jurisdiction over certain types of disputes. An example of a typical conflict rule is found in Article 4 of the EU regulation from 2008 (also called Rome I, 593/2008), on the law applicable to contractual obligations. This article stipulates that to the extent the law applicable to the contract has not been agreed by the parties themselves, a contract for the provision of services should be governed by the law of the country where the service provider has his habitual residence. This is also known as the domicile rule -- the idea that a person or company sued on a contractual matter must be sued in that person's state of domicile, if they reside in the EU. If they reside outside the EU, the jurisdiction will be dictated by the local conflict rules, not EU rules.

Consumer contracts – consumer contracts are consider weaker party contracts and are governed by different choice of law rules. The Rome I regulation (593/2008) provides that the typical consumer contract is normally governed by the law of the country where the consumer has his habitual residence. The choice of another law, while not invalid in itself, must not deprive the consumer of the mandatory protection, that is, the protection the parties cannot derogate from by agreement, as provided by the law of his country.

Contracts for provision of services – these are one of the types of contracts where the court jurisdiction is in the state where the provider of the services resides. This is the Rome I regulation of 2008 (593/2008). However the principle of party autonomy also applies which means if the parties choose a different state's laws to apply, that choice will normally be honored. The rules in the Rome I regulation only usually apply in the case where no choice of law clause appears in the contract.

Contracts for sale of goods -- The Rome I regulation (593/2008) contains a number of seemingly fixed conflict rules for some of the most common types of contract. For example, to the extent that the applicable law has not been chosen by the parties, a contract for the sale of goods is governed by the law of the country where the seller has his habitual residence.

Contractual obligations (Rome I) – the choice of law for contractual obligations is covered by the Rome I regulation. The main principle is party autonomy – in other words, if the parties have selected the law to apply in their contract that choice will normally be upheld. The Rome I regulation (593/2008) contains a number of seemingly fixed conflict rules for some of the most common types of contract. For example, to the extent that the applicable law has not been chosen by the parties, a contract for the sale of goods is governed by the law of the country where the seller has his habitual residence. And the contract for the provision of services is governed by the law of the country of habitual residence of the service provider. However, many important and frequent contracts, ranging from money loans to trademark licenses and equipment rentals, are not on the list.

Cyberspace – the activities of the Internet have changed the rules on civil and commercial matters. For example, today it is possible to conclude a sale of digital goods, such as, music, computer games, or movies, pay for them, and even have them delivered, on the Internet. Harmful acts such as defamation or copyright infringement can also be committed in cyberspace. All this constitutes a challenge to private international law, which has to be adapted, and to some extent has already been adapted, to our new digital world. See also the eDate case in our case notes this week, dealing with defamation allegations of stories posted on the Internet.

Delict or quasi-delict – a wrongful act, such as a tort or criminal offense. These types of claims are covered by the Brussels II regulation (44/2001). From a case summary on the EU Law Blog: The

Brussels Regulation (44/2001) provides that persons domiciled in a Member State are, in principle, to be sued before the courts of that State. However, in matters relating to tort, delict or quasi-delict, a person may also be sued in another Member State before the courts for the place where the harmful event occurred or may occur. Thus, in the case of defamation by means of a written newspaper article distributed in several Member States, the victim has two options for bringing an action for compensation against the publisher. On the one hand, he may bring an action before the courts of the State in which that publisher is established, which have jurisdiction to award damages for all of the harm caused by the defamation. On the other hand, he may bring an action before the courts of each Member State in which the publication was distributed and where he claims to have suffered injury to his reputation (place in which the damage occurred). In the latter case, however, the national courts have jurisdiction only in respect of damage caused in the State in which they are located.

Denmark exception – Denmark has opted out of the jurisdictional and enforcement rules of the Brussels I and Brussels II regulations. This means the rules for determining which courts have jurisdiction over special private international law matters do not apply to Denmark. Denmark's own national rules on jurisdiction and enforcement will instead apply to such situations.

Divorce – in the realm of private international law, there is a Regulation Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation. Regulation 1259/2010. According to Wikipedia it is sometimes also called the European Union Divorce Law Pact or the Rome III Regulation. Note that it specifies which law applies, not which court can hear or enforce the matter – for which court has jurisdiction, one must refer instead to the Brussels II Regulation on non-contractual jurisdiction and enforcement matters. It specifies which applicable law is used in cross border divorces. The applicable law is determined based on a number of criteria. If a higher ranked criterion is not applicable, the evaluation moves to one lower. The main criteria in order of priority are: 1. The choice of the couple, 2. The place of their residence, 3. Their last place of residence, 4. Their nationality, or 5. The law of the court seized of the matter.

Domicile principle – this is the idea that a person or company sued on a contractual matter must be sued in that person's state of domicile, if they reside in the EU. If they reside outside the EU, the jurisdiction will be dictated by the local conflict rules, not EU rules.

Environmental damage -- Regarding certain types of torts, the Rome II regulation contains special conflict rules which prevail over the general conflict rules that have just been described. One such special conflict rule, for instance, deals with the compensation to be paid for environmental damage, and gives the person seeking compensation the right to choose to base his claim on the law of the country in which the event giving rise to the damage occurred, meaning the law of the country where the harm to the environment originates, rather than to rely on the main rule referring to the law of the country of the resulting damage.

EU competence – the EU has competence pursuant to Article 81 of the TFEU on matters dealing with conflict of laws, jurisdiction of courts and the mutual recogniation and enforcement between member states of judgements. But there still remains several other issues, not regulated by EU Private International Law, and these continue to be governed by the law designated by national conflict rules of the member state of the court. This applies for instance, to the validity of marriages, or the protection measures such as, guardianship for adults who, due to mental problem or age, are unable to take care of their affairs.

EU emissions trading scheme -- the EU Emissions Trading Scheme, the EU carbon market, makes an interesting study of framing and identifying an environmental subject. The emissions trading scheme was introduced in the EU legal order following the Kyoto Protocol and subsequently international environmental laws and agreements. In the EU it was enacted as a directive in line with the EU legal order and competences. It was implemented in the national legal systems through national laws.

Understanding how these different legal frameworks fit or even clash is crucial in following environmental inquiries through.

Exceptions to jurisdiction rules– there are several exceptions to the main rule of the exclusive jurisdiction of the court of the member state of the defendant's domicile. For example, in matters relating to tort, a person, even a domicile in a member state, may, at the option of the plaintiff, also be sued in another member state, where the harmful event occurred, or may occur. Some kinds of disputes must always, irrespective of the domicile of the defendant, be dealt with by a court designated on another ground. For example, proceedings have, have their own objective rights in, in movable property, fall within the exclusive jurisdiction of the member state in which the property is situated. The parties are also permitted, under certain conditions, to agree that the courts of a certain member state, are to have jurisdiction to settle disputes between them.

Exceptions to recognition and enforcement rules -- when it comes to recognition and enforcement, a judgment given in a member state is, in principle, recognized in the other member states, and it is also enforceable there. Even here there are exceptions, though, such as where the recognition would be manifestly contrary to the public policy in the member state, in which recognition is sought. Or if the foreign judgment is irreconcilable with the judgment given in a dispute between the same parties there.

Framing – this describes how we see a particular problem and it sets up the context for how we tackle it, for example in environmental matters. From the lecture notes: This first line of inquiry is important as that it frames how we see the environmental problem and how we then, later, tackle it. In studying carbon markets, I discovered that these are seen to remedy distinct environmental problems. One was the need to stimulate the market. Another was substituting state control of the commons, or a third was a simple revision of traditional environmental law. These different framings of the environmental problem leads to different legal constructions of carbon markets being proposed and furthered. From the ungraded quiz, the question was what are the three steps in how an environmental law inquiry is made in a European business law context. The lecture notes had identified these 3 steps as framing, identifying and understanding. But the quiz described it a little more ambiguously as: identifying the relevant laws to the identified problems, identifying and working to understand the nature of the environmental problem, and identifying the relevant environmental laws that apply to the environmental problems identified. Wrong answers included: identifying the relevant market and analyzing company employment contracts.

GEDIP -- The creation and ongoing growth of European Private International Law, attracts the attention of many legal academics, and has given rise to significant legal research. An association of leading specialists in the field is the European Group for Private International Law, GEDIP, which meets annually to discuss and adopt recommendations concerning current developments and projects.

Habitual residence – a person's ordinary or permanent place of residence. The Rome I regulation (593/2008) contains a number of seemingly fixed conflict rules for some of the most common types of contract. For example, to the extent that the applicable law has not been chosen by the parties, a contract for the sale of goods is governed by the law of the country where the seller has his habitual residence. And the contract for the provision of services is governed by the law of the country of habitual residence of the service provider.

Individual employment contract – under the Rome I regulation (593/2008), as part of the so-called weaker party exceptions to the main rules, even though an individual employment contract is in the first place governed by the law chosen by the parties, that choice must not deprive the employee of the mandatory protection he enjoys pursuant to the law that would govern the contract if the parties had not chosen another law.

Insolvency – the regulation of the jurisdiction and enforcement of insolvency matters is covered in the so-called Insolvency Regulation, not in the Brussels I or II regulations. Regulation 1346/2000. Cross-border insolvency occurs whenever a debtor's assets or liabilities are located in more than one state, or if the debtor is subject to the jurisdiction of courts from two or more states. The EU Insolvency Regulation, adopted in 2000, neither unifies nor harmonises insolvency law but regulates conflicts of law and jurisdiction within the Member States (except Denmark).

Jurisdiction of courts – mostly addressed in the Brussels I (civil/commercial matters) and Brussels II (non-commercial matters such as matrimonial matters) Regulations.

Manifest close connection – in the case of a mixed contract where several different rules on applicable law might apply, usually the laws of the state where the "characteristic performance" is, will apply. However, a court examining such a dispute is also permitted to deviate from these conflict rules, where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country.

Market mechanisms – in environmental law, carbon markets, market and fishery quotas, water markets are examples of regulating a field using market mechanisms in controlling the use and access to common resources that are employed.

Marriage, matrimonial matters – court jurisdiction of matrimonial matters is addressed in the Brussels II regulation. Applicable law is addressed in the Rome II regulation. There are also a series of more specific regulations covering matrimonial matters including: 1. The Regulation of Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions, and Cooperation in Matters relating to Maintenance Obligations. And 2. The Regulation Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation. There is also preparation underway to issue a regulation on the enforcement of decisions regarding matrimonial property regimes. But there still remains several other issues, not regulated by EU Private International Law, and these continue to be governed by the law designated by national conflict rules of the member state of the court. This applies for instance, to the validity of marriages, or the protection measures such as, guardianship for adults who, due to mental problem or age, are unable to take care of their affairs.

Mixed contracts – in determining where a legal action may be brought, different rules may apply to mixed contracts. It is not uncommon that the contents of the same single contract constitute a mixture of several types of contract. Such as when a contract for the sale of equipment includes the training of the buyer's staff and the license to put the seller's trademark on the final product. Such so-called mixed contracts are governed by the law of the country of habitual residence of the party required to carry out what the regulation calls the characteristic performance, meaning the specific performance, as opposed to the performance consisting of payment of money.

Movable property exception -- Some kinds of disputes must always, irrespective of the domicile of the defendant, be dealt with by a court designated on another ground. For example, proceedings have their own objective rights in movable property, fall within the exclusive jurisdiction of the member state in which the property is situated.

Negative declaration – a negative declaration is a court declaration that something does not apply. The tactic is sometimes used by a defendant to a claim, to file suit first before the claimant sues, securing a court judgment that the claim is not valid if brought against the defendant. This also allows the defendant to choose the court where the action is heard, if permitted by the applicable rules. This issue came up in the case of jurisdiction over torts in the **Folien Fischer** case in the recommended materials this week. An Italian company wrote a letter to a Swiss company claiming they were guilty of anti-competitive behavior by refusing to enter into a distribution agreement and license its patents. The Swiss company sued for a negative declaration in a German court, claiming it was not guilty of anti-

competitive behavior. The German court dismissed the matter claiming it had no jurisdiction over such a matter. The ECJ eventually agreed.

Non-contractual obligations (Rome II) – applicable law issues for non-contractual obligations are covered in the so-called Rome II regulation. 864/2007.

Party autonomy -- the main principle of the Rome I (593/2008) regulation on the law applicable to contractual obligations is the principle of party autonomy. A contract is governed by the law chosen by the parties. The choice may take place at the time of contracting or later, and it can be explicit or otherwise clearly demonstrated by the terms of the contract, or by the circumstances of the case. With some exceptions, the freedom of choice of the parties is not limited to legal systems having some natural connection with the situation. So that, for example, a Swedish and a Greek company may agree on subjecting their contract to English law, simply because they both are familiar with it.

Private international law – generally thought of as the legal relationships between individuals in an international context, or in other words where cross border elements are present. As discussed in this course, it covers the issues of court jurisdiction, applicable law, and recognition and enforcement of judgments when more than one state is involved. The four principle regulations are Brussels I and Brussels II on court jurisdiction and recognition/enforcement of judgments and Rome I and Rome II on applicable law. In the ungraded quiz, it is emphasized that these regulations are not comprehensive. They do not regulate all relevant areas of private international law. There are still significant gaps that are left to the member states' laws.

Proportionality – proportionality played role in several of the environmental cases we reviewed in this module. State efforts to reduce pollution often fell victim to court decisions ruling that they had gone too far. For example, in Commission vs. Austria, an effort to combat air pollution by prohibiting heavy transport lorries on certain motorways in Austria was not the least restrictive means and failed the proportionality test. Likewise Denmark in the case of Commission vs. Denmark failed to satisfy the principle of proportionality in its deposit-and-return beverage container law and was therefore in breach of the free movement of goods guaranteed by article 30 TFEU. Both cases are summarized below in these notes.

Public policy exception – enforcement of judgments will not be accepted where the recognition would be manifestly contrary to public policy in the member state where the judgment is being pursued. For example, a judgment to collect a bribe would fall under this type of exception. In the ungraded quiz for this module this exception is formally called "Ordre Public" exception.

Recognition and enforcement of judgments – addressed in the Brussels I (civil/commercial matters) and Brussels II (non-commercial matters) regulations.

Rome I regulation -- (593/2008) covers the applicable law in contractual obligations. The main principle of the Rome I regulation on the law applicable to contractual obligations is the principle of party autonomy. A contract is governed by the law chosen by the parties. The choice may take place at the time of contracting or later, and it can be explicit or otherwise clearly demonstrated by the terms of the contract, or by the circumstances of the case. With some exceptions, the freedom of choice of the parties is not limited to legal systems having some natural connection with the situation. So that, for example, a Swedish and a Greek company may agree on subjecting their contract to English law, simply because they both are familiar with it. The Rome I regulation contains a number of seemingly fixed conflict rules for some of the most common types of contract. For example, to the extent that the applicable law has not been chosen by the parties, a contract for the sale of goods is governed by the law of the country where the seller has his habitual residence. And the contract for the provision of services is governed by the law of the country of habitual residence of the service provider.

Rome II regulation – (864/2007) covers the applicable law in non-contractual obligations, such as torts or criminal offenses (delict and quasi-delict). With regard to non-contractual obligations, the Rome II regulation gives the parties some rather limited space to agree on the applicable law. But in most cases, this is not a realistic option. The main conflict rule of the regulation stipulates that the law applicable to an obligation arising out of a tort is the law of the country in which the damage occurs (Article 4 – damage residence), irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur. In the ungraded quiz for this module the correct answer was "where the damage occurs"; the wrong answer was "where the harmful act was committed." However, if both the person claim to be liable and the person sustaining damage have their habitual residence in the same country at, at the time when the damage occurs, the law of that country applies. Another exception to the main rule concerns those cases where it is clear from all the circumstances of the case that the tort is manifestly more closely connected with another country, in particular, due to some preexisting relationship such as a contract between the parties.

Service of documents – covered by Regulation (1393/2007) on the Service in the Member States of Judicial and Extrajudicial Documents in Civil and Commercial Matters

Service of process – covered by the Brussels I regulation. However, there can be exceptions where non-EU nationals are involved. For example, the United Kingdom has a rule that grants their courts jurisdiction against a foreign person, if the documents instituting the proceedings have been served on him during his temporary visit in the United Kingdom. This rather excessive ground of jurisdiction continues to apply in the UK if the defendant is domiciled in, for example, the United States, Russia, or South Africa. But it cannot be used if the defendant is domiciled in, for example, Sweden, because Sweden is a member state of the European Union. Some persons, in particular in the United States, have criticized this approach as unfair and discriminatory.

Succession – cross border inheritance law, covered by the Regulation 650/2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions in Matters of Succession. From the EU press release on this regulation: The new rules will make life easier for heirs, legatees and other interested parties. They will speed up succession procedures in cross-border situations and will make it easier and less costly for heirs and legatees as well as for persons entitled to reserved shares to take possession of their respective parts of the estate. Once they start applying, the rules will ensure that: – the succession to the estate of a deceased person will be dealt with as a whole irrespective of the nature or the location of the assets, – one single authority will be in charge of the succession, and – one single law will apply to the succession.

Taking of evidence – covered by Regulation (1206/2001) on Cooperation between the Courts of the Member States in the Taking of Evidence in such matters.

TFEU direct applicability – the TFEU which is itself directly applicable in the court of the member states, contains some provisions with direct impact on private international law issues. For example, the articles prohibiting all discrimination on grounds of nationality. Or protecting the freedom of movement of persons, goods, services, and capital. One may, for example, raise the question, of whether a non-recognition of a same-sex marriage celebrated in another member state would not be incompatible with the free movement of persons, as it would indirectly hinder the persons involved from moving. Or whether a non-recognition of a chattel mortgage created in another member state would not indirectly create an unlawful obstacle to the free movement of goods.

Title 20 – this refers to Title XX of the TFEU – more specifically articles 191-193 on environmental protection.

Torts – as a general rule torts such as assault or negligence or liability for property damage must be litigated in the state where the tort took place. This is governed by the Brussels II regulation on court jurisdiction. Regulation 44/2001. The applicable law must also be the law where the damage occurred, with some exceptions. Regarding certain types of torts, the Rome II regulation contains special conflict rules which prevail over the general conflict rules that have just been described. One such special conflict rule, for instance, deals with the compensation to be paid for environmental damage, and gives the person seeking compensation the right to choose to base his claim on the law of the country in which the event giving rise to the damage occurred, meaning the law of the country where the harm to the environment originates, rather than to rely on the main rule referring to the law of the country of the resulting damage. Online defamation and other types of torts committed online are normally litigable in the state where the injured person resides, but as discussed in the eDate case, these cases can also be prosecuted in the state of the defendant.

Treaty basis for EU environmental law -- we discussed the following treaty provisions relating to environmental law:

- **Article 11 TFEU** (Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development)
- **Article 114(3) TFEU** (The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective)
- **Articles 191-193 TFEU** (policy of preserving, protecting and improving the quality of the environment; natural resources; climate change; aim at a high level; safeguard clause allowing measures for non-economic environmental reasons; take account of available scientific data; cooperate internationally; derogations; does not prevent states from more stringent measures, provided they remain compatible with the Treaties and are notified to the Commission)
- **Article 3(3) TEU** (The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance)
- **Article 37 of the Charter of Fundamental Rights** (A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development)
- **Article 21(2)(f) TEU** (help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development)

United Kingdom rule on jurisdiction – this is the so-called "ambush" rule (my term, not the term used by the lecturer) of catching a person transiting through the EU and serving them with legal papers. It does not apply to EU nationals, but may apply to foreigners. The United Kingdom has a rule that grants their courts jurisdiction against a foreign person, if the documents instituting the proceedings have been served on him during his temporary visit in the United Kingdom. This rather excessive ground of jurisdiction continues to apply in the UK if the defendant is domiciled in, for example, the United States, Russia, or South Africa. But it cannot be used if the defendant is domiciled in, for example, Sweden, because Sweden is a member state of the European Union. Some persons, in particular in the United States, have criticized this approach as unfair and discriminatory.

Weaker party rules – these are the jurisdiction rules in the Rome I regulation for weaker parties like consumers or individual employees. The regulation contains special conflict rules for certain so-called weak party contracts, such as contracts between a businessman and a consumer or between an

employee and his employer, where an unlimited party autonomy could be abused by the stronger party to the disadvantage of the weaker party, normally the consumer or the employee. Therefore the regulation provides that the typical consumer contract is normally governed by the law of the country where the consumer has his habitual residence. And that the choice of another law, while not invalid in itself, must not deprive the consumer of the mandatory protection, that is, the protection the parties cannot derogate from by agreement, as provided by the law of his country.

Case summaries for this Module:

Recommended case law – introduction to private international law

• C-133/11 – **Folien Fischer vs. Ritrama** (2012). 5 pages. The application of article 5.3 Brussels I, Regulation 44/2001/EC, of 22 December 2000 on jurisdiction over torts in cases of a non-contractual obligation. The case was brought in a German court by Folien Fischer, a Swiss company, which also did business in Germany, and Fofitec, a subsidiary and also a Swiss company, seeking to obtain a court declaration that no competition law infringement had been committed in their distribution relationship. Ritrama a company established in Italy, had claimed by letter in March 2007 that Folien Fisher's distribution policy and refusal to grant patent licenses were violations of competition law. Once the suit was brought, Ritrama countersued, claiming that the conduct of Folien Fischer and Fofitec was anti-competitive and seeking an award of damages as well as an order requiring Fofitec to grant licenses for the patents in question. The three companies distribute, manufacture and/or sell laminated paper goods and adhesive film. Article 5(3) of Regulation 44/2001 states that a person domiciled in a member state may be sued in a different member state in matters relating to tort, delict or quasi-delict, if such other state is the place where the harmful event occurred or may occur.

The German court dismissed the claim for a negative declaration that no tort had been committed, on the basis of not having jurisdiction. The judgment was appealed and affirmed. The matter was appealed to a higher court where the question was, can an EU regulation stipulating that torts must be litigated in the state where the tort was committed be used to block jurisdiction in another state's court where the purpose is to obtain a court declaration that no tort has been committed?

While acknowledging the unique context of an action for a negative declaration, the Court of Justice nonetheless concludes that it must satisfy the requirements of Article 5(3) for jurisdiction. Since there was no connection between the alleged competition infringement against Ritrama in Germany, a German court could not hear the matter. Instead Italy was the logical place where the harm is alleged to have taken place.

Recommended case law – contractual and non-contractual obligations

- C-509/09 – **eDate Advertising GmbH v. X** (2011). 8 pages. The application of jurisdictional and conflict rules on torts committed online.

  From the Court of Justice Press Release on the case:

  Victims of infringements of personality rights by means of the internet may bring actions before the courts of the Member State in which they reside in respect of all of the damage caused. *However, the operator of an internet website covered by the e-commerce directive cannot be made subject, in that State, to stricter requirements than those provided for by the law of the Member State in which it is established*

The Brussels Regulation (44/2001) provides that persons domiciled in a Member State are, in principle, to be sued before the courts of that State. However, in matters relating to tort, delict or quasi-delict, a person may also be sued in another Member State before the courts for the place where the harmful event occurred or may occur. Thus, in the case of defamation by means of a written newspaper article distributed in several Member States, the victim has two options for bringing an action for compensation against the publisher. On the one hand, he may bring an action before the courts of the State in which that publisher is established, which have jurisdiction to award damages for all of the harm caused by the defamation. On the other hand, he may bring an action before the courts of each Member State in which the publication was distributed and where he claims to have suffered injury to his reputation (place in which the damage occurred). In the latter case, however, the national courts have jurisdiction only in respect of damage caused in the State in which they are located.

The Bundesgerichtshof (Federal Court of Justice, Germany) and the Tribunal de grande instance de Paris (Paris Regional Court, France) have asked the Court to clarify the extent to which those principles also apply in the case of infringements of personality rights committed by means of content placed online on an internet website.
Facts of Case C-509/09
In 1993, X, who is domiciled in Germany, was sentenced, together with his brother, by a German court to life imprisonment for the murder of a well-known actor. He was released on parole in January 2008.

The company eDate Advertising, which is established in Austria, operates an internet portal under the address 'www.rainbow.at', on which it published information about the appeals which X and his brother had lodged against their convictions. Although eDate Advertising removed the disputed information from its website, X requested the German courts to order the Austrian company to stop using his full name when reporting about him in connection with the crime committed. eDate Advertising, for its part, challenges the international jurisdiction of the German courts to dispose of the case as it argues that proceedings may be brought against it only before the Austrian courts.

Facts of Case C-161/10
On 3 February 2008 a text written in English and entitled 'Kylie Minogue is back with Olivier Martinez' appeared on the website of the British newspaper the *Sunday Mirror*, with details of the meeting between the Australian singer and the French actor. The latter and his father, Robert Martinez, alleged interference with their private lives and infringement of the right of Olivier Martinez to his image and brought an action, in France, against the British company MGN, which publishes the *Sunday Mirror*. MGN, like eDate Advertising, challenges the international jurisdiction of the court before which the action has been brought, arguing that there is no sufficiently close connecting factor between the placing online of the information in the United Kingdom and the alleged damage in French territory. Such a link alone, it argues, could establish the jurisdiction of the French courts to rule on the facts giving rise to damage and attributable to the placing of the material at issue online.

Judgment of the Court
In its judgment delivered today, the Court holds that the placing online of content on an internet website is to be distinguished from the regional distribution of printed matter by reason of the fact that it can be consulted instantly by an indefinite number of internet users world-wide. Thus, universal distribution, firstly, is liable to increase the seriousness of the infringements of personality rights and, secondly, makes it extremely difficult to locate the places in which the damage resulting from those infringements has occurred. In those circumstances, - given that the impact which material placed online is liable to have on an individual's personality rights might best be assessed by **the court of the place where the**

victim has his centre of interests -, the Court of Justice designates that court as having jurisdiction in respect of all damage caused within the territory of the European Union. In that context, the Court states that the place where a person has the centre of his interests corresponds in general to his **habitual residence.**

The Court points out, however, that, in place of an action for liability in respect of all of the damage, **the victim may always bring an action before the courts of each Member State in the territory of which the online content is or has been accessible.** In that case, in the same way as damage caused by printed matter, those courts have jurisdiction to deal with cases only in relation to damage which occurred within the territory of the State in which they are situated. Similarly, the person whose rights have been infringed may also bring an action, in respect of all of the damage caused, before **the courts of the Member State in which the publisher of the online content is established.**

Finally, in interpreting the e-commerce directive (2000/31/EC), the Court rules that the principle of the freedom to provide services **precludes,** in principle, **the provider of an electronic commerce service from being made subject, in the host Member State, to stricter requirements than those provided for by the law of the Member State in which that service provider is established.**

Recommended case law – environmental law in an EU business law context

- C-320/03 P – **Commission vs. Austria** (2005). 9 pages. Austria's air pollution regulation is struck down by the court as a violation of the free movement of goods. Conflict between the free movement of goods and Austria's sectoral prohibition on the movement of lorries of more than 7.5 tonnes carrying certain goods; air quality; protection of health and environment; proportionality principle. The Commission brought an action against the government of Austria, claiming that Austria's prohibition of lorries of more than 7.5 tonnes on a section of A12 motorway in the valley of Inn, Austria was a violation of the free movement of goods required by the Treaty. Regulations 881/92 and 3118/93 govern the transport of goods by road in Community territory. Community legislation on the protection of ambient air quality consists in particular of Council Directive 96/62/EC of 27 Sep 1996 on ambient air quality assessment and management and Council Directive 1999/30/EC of 22 Apr 1999 relating to limit values of sulphur dioxide, nitrogen dioxide, nitrogen dioxide and oxide of nitrogen, particulate matter and lead in ambient air.

  De facto, the prohibition imposed by the contested Austrian regulation mainly affects the international transit of goods. Transit traffic, affected by such a measure, is carried out as to more than 80% by non-Austrian undertakings, whereas over 80% of the transport not affected by that measure is carried out by Austrian undertakings. The regulation is therefore, at least indirectly, discriminatory, contrary to Regulations Nos. 881/92 and 3118/93 and Articles 28 EC to 30 EC.

  The Court first notes that, clearly by prohibiting heavy vehicles of more than 7.5 tonnes carrying certain categories of goods traveling along a road section of paramount importance, constituting one of the main routes of land communication between southern Germany and northern Italy, the contested regulation obstructs the free movement of goods and, in particular, their free transit. The fact, as the Republic of Austria argues, that there are alternative routes or other means of transport capable of allowing the goods in question to be transported does not negate the existence of an obstacle. EU law must be understood as being intended to eliminate all barriers, whether direct or indirect, actual or potential, to trade flows in intra-Community trade. Traffic is forced at very short notice to seek viable alternative routes. The contested regulation must therefore be regarded as constituting a measure having

equivalent effect to quantitative restrictions, which in principle are incompatible with the Community law obligations under Articles 28 EC and 29 EC, unless that measure scan be objectively justified.

It is well settled case-law that national measures capable of obstructing intra-Community trade may be justified by overriding requirements relating to protection of the environment provided that the measures in question are proportionate to the aim pursued. However the court finds the Austria regulation technically deficient in that it lacks some of the planning elements required in the EU Directive for permissible air quality legislation. However, the regulation might still be justified under relevant case law as a measure that is an "imperative requirement in the public interest" if it is a proportionate response to the air pollution problem it seeks to address. As the Advocate General has pointed out, it has not been conclusively established in this case that the Austrian authorities, in preparing the contested regulation, sufficiently studied the question whether the aim of reducing pollutant emissions could be achieved by other means less restrictive of the freedom of movement and whether there actually was a realistic alternative for the transportation of the affected goods by other means of transport or via other road routes.

Moreover, a transition period of only two months between the date on which the contested regulation was adopted and the date fixed for implementation was clearly insufficient reasonably to allow the operators concerned to adapt to the new circumstances.

Therefore Austria's regulation is not objectively justified and fails to comply with articles 28 and 29 EC on the free movement of goods.

- C-302/86 – **Commission v Denmark** (1988). 7 pages. Denmark's deposit-and-return beverage container law is struck down as a violation of TEU's free movement of goods. The Commission sued Denmark because of a law requiring that all containers for beer and soft drinks must be returnable. Manufacturers must market beer and soft drinks only in re-usable containers. The containers must be approved by the National Agency for the Protection of the Environment, which may refuse to approve new kinds of containers if it considers them not technically suitable for a system for returning containers. The court starts by noting that obstacles to free movement may be accepted if responding to a mandatory requirement of EU law and as long as not discriminatory between local and foreign products and provided the measure is proportionate to the aim in view. If a Member State has a choice between various measures for achieving the same aim, it should choose the means which least restricts the free movement of goods.

  Denmark claims its mandatory collection system for beer and soft drink containers is justified by a mandatory requirement related to the protection of the environment. The court acknowledges that protection of the environment is a mandatory requirement of Article 30 of the Treaty. The Commission claims Denmark's response is disproportionate and that less restrictive means should instead be imposed. It is therefore necessary to examine whether all the restrictions of the contested rules are necessary to achieve the objectives pursued by those rules.

  The Court first of all concludes that a deposit-and-return system for empty containers is an indispensable element of a system intended to ensure the re-use of containers and therefore appears to be necessary to achieve the aims pursued by the contested rules. Therefore it is not disproportionate.

  Next, is the requirement discriminatory between domestic and imported trade? The court noted that since the container approval system introduced a considerable time lag for a foreign

producer, it would be necessary for a foreign producer who still wished to sell his products in Denmark to manufacture or purchase containers of a type already approved, which would involved substantial additional costs and make the importation of products into Denmark very difficult. Denmark had responded by introducing a grace period into its regulation, permitting producers to market up to 3000 hectoliters of beer and soft drinks a year in non-approved containers, provided that a deposit-and-return system is established. However, this still requires non-approved containers to be returned only to the location where the beverage was purchased. The Court concludes that Denmark has failed to satisfy the principle or proportionality and is therefore in breach of the obligations of article 30 TEU on the free movement of goods.

- C-473/98 – **Kemikalieinspektionen v Toolex** (2000). 6 pages. Sweden's dangerous goods law is upheld, satisfying the proportionality test. Trichloroethylene is classified under EU Directive 67/548/EEC (the classification directive) as a category 3 carcinogen, which is the least dangerous of the 3 possible classifications. But according to Directive 76/769/EEC (the marketing directive) it is not listed as one of the dangerous substances which states must restrict under that program. A third legislative source, the risk evaluation regulation, Regulation 793/93 requires states to regularly evaluate and draw up lists of the priority dangerous substances. On this basis trichloroethylene was risk evaluated and it was decided that it was appropriate to limit the risks to workers and consumers, and to the general public as a whole. There was a finding that there was also a possibility of contamination to plant-life. A strategy for reducing those risks is currently being prepared.

  Toolex is a manufacturer of machine parts which are used in the production of compact discs. It uses trichloroethylene to remove residues of grease produced during the manufacturing process. Per the new regulations, directives and applicable Swedish legislation, Toolex sought approval to continue to use trichloroethylene for these purposes. The Swedish Inspectorate denied approval. The Commission argued that Sweden was not permitted to legislate in this field since the EU laws were sufficiently comprehensive to make member state laws superfluous. The court did not agree. Given that the marketing directive in itself does no more than state certain minimum requirements, it clearly presents no obstacle to the regulation by a member state as well. This is particularly true for substances that do not fall within the scope of the EU marketing directive, such as trichloroethylene. Nor does the risk regulation preclude state activity. It provides a system for prioritizing the most dangerous substances, but does not occupy the field as to others.

  Given that secondary Community law does not therefore prevent Sweden from legislating in this field, it is necessary next to consider whether the free movement of goods requirements of the EU Treaty prevents Sweden from doing so.

  The Swedish Government submits that trichloroethylene affects the central nervous system, the liver and kidneys. The fact that it is highly volatile increases the chances of exposure in circumstances that might result in damage to health. Inhaling the substance can cause fatigue, headaches, and difficulties with memory and concentration. In addition, there is hard evidence that the carcinogenic effect of trichloroethylene upon the kidneys of a rat also occurs in humans. The toxic metabolic waste matter and mutagens found in laboratory animals have also been identified in humans, again reinforcing suspicions that trichloroethylene can cause cancer in humans.

  Therefore the Court holds that the Swedish legislation is permitted, especially in light of the system of exemptions that are possible, it appears to be proportionate to the aims of the measure -- "national legislation which lays down a general prohibition on the use of trichloroethylene for industrial purposes and establishes a system of individual exemptions,

granted subject to conditions, is justified under Article 36 of the Treaty on grounds of the protection of health of humans."

- C-142/05 – **Aklagaren v. Mickelsson and Roos** (2009). 5 pages. Sweden's law forbidding the use of jet skis on non-designated waters is upheld, sort of, subject to granting a reasonable period of time for the authorities to designate available waters for such use. Prohibition of the use of personal watercraft on waters other than general navigable waterways; measures having equivalent effect; access to the market; impediment; protection of the environment; proportionality. Criminal proceedings had been brought by Aklagaren (the Public Prosecutors Office) against Mr. Mickelsson and Mr. Roos for failure to comply with a prohibition on the use of personal watercraft (jet skis) by local regulations.

  It is apparent from the file sent to the Court that, at the material time, no waters had been designated as open to navigation by personal watercraft, and thus the use of personal watercraft was permitted on only general navigable waterways. However, the accused in the main proceedings and the Commission of the European Communities maintain that those waterways are intended for heavy traffic of a commercial nature making the use of personal watercraft dangerous and that, in any event, the majority of navigable Swedish waters lie outside those waterways. The actual possibilities for the use of personal watercraft in Sweden are, therefore, merely marginal.

  It is not open to dispute that a restriction or a prohibition on the use of personal watercraft are appropriate means for the purpose of ensuring that the environment is protected. However, for the national regulations to be capable of being regarded as justified, it is also incumbent on the national authorities to show that their restrictive effects on the free movement of goods do not go beyond what is necessary to achieve that aim.

  While leaving the final decision up to the national court, this Court concludes that a blanket prohibition such as that imposed in the Swedish legislation, while not designating any alternative waterways where personal watercraft can be used, is overbroad, not proportionate. However, the Swedish law had been in effect only a few weeks before this litigation was brought. If the national court were to consider the circumstances since and conclude the lack of available waterways designated for personal watercraft had been rectified, the national court could find that the Swedish law was permitted.

  "Articles 28 EC and 30 EC do not preclude such national regulations provided that:
    - the competent national authorities are required to adopt the implementing measures provided for in order to designate waters other than general navigable waterways on which personal watercraft may be used;
    - those authorities have actually made use of the power conferred on them in that regard and designated the waters which satisfy the conditions laid down in the national regulations, and
    - such measures have been adopted within a reasonable period after the entry into force of those regulations."

  Summary of the case from EUlawblog: If the national court were to find that implementing measures were adopted within a reasonable time but after the material time of the events in the main proceedings and that those measures designate as navigable waters the waters in which the accused in the main proceedings used personal watercraft and consequently had proceedings brought against them, then, for the national regulations to remain proportionate and therefore justified in the light of the aim of protection of the environment, the accused would have to be allowed to rely on that designation; that is also dictated by the general principle of Community

law of the retroactive application of the most favourable criminal law and the most lenient penalty.

- C-573/12 **Ålands Vindkraft AB v Energimyndigheten** (2014). 13 pages. Sweden's green certificates legislation is upheld, even though it appears to discriminate against foreign producers of renewable energy. National support scheme providing for the award of tradable green certificates for installations producing electricity from renewable energy sources. Refusal to award green certificates for electricity production installations located outside the Member State in question. Directive 2009/28/EC. Free movement of goods, Article 34 TFEU. Alands Vindkraft was refused an award for electricity certificates for a wind farm it operated in Finland. The Swedish law awards an electricity certificate for each megawatt hour of green electricity produced. Although there is no express mention of any restriction as to location, it is apparent from the preparatory work for that law that the Swedish law was intended to apply only to installations located in Sweden. The approval of installations located outside Sweden is, by contrast, impossible. Alands Vindkraft brought an action claiming infringement of Article 34 TFEU, arguing that the effect of the electricity certificate scheme is that approximately 18% of Swedish electricity consumption is reserved to green electricity producers located in Sweden, to the detriment of electricity imports from other member states. This was a barrier to trade that can not be justified on environmental grounds given, in particular, that the consumption of green electricity in Sweden would be promoted just as effectively through the award of certificates for green electricity consumed in Sweden but produced in other member states.

  The court concluded that the Swedish law was permitted and did not contravene article 34 TFEU. But it is up to the national court to determine, taking into account all relevant factors – which may include the EU legislative context in which the legislation at issue in the main proceedings arises – whether, in terms of its territorial scope, that legislation meets the requirements of the principle of legal certainty.

  From a case summary at the EU Law Blog: While the outcome of this judgment is perfectly convincing, it is a bit disappointing the Court did not actually explain why the territorial limitation of the support scheme was in line with the proportionality principle. The Court merely observed the legislative context, the fact that it was difficult to determine the green origin of electricity and that the measures were necessary to strengthen investor confidence, but only implicitly connected the dots without making any explicit normative statements. The Court could have stated, for instance, that to guarantee the proper functioning of the support system for domestic production it was indispensable that there was a territorial limitation and that the choice of only supporting domestic production was justified because it was mandated by the EU legislature. As such the measure was both suitable to achieve the goal of promoting domestic green electricity production, and that it did not go any further than necessary to achieve this goal of domestic production support. Nonetheless, the message conveyed by this judgment is clear: the Court was, is and probably will remain deferential towards the protection of public interests which are important for the EU itself as well, in particular as regards combatting climate change.