SYbIL | Spanish Yearbook of International Law

DE MIGUEL ASENSIO, Pedro A. *Conflict of Laws and the Internet*, (Edward Elgar Publishing, Cheltenham, 2nd edition, 2024)

1. A leisurely reading of the 2nd edition of this *magnum opus* of Professor Pedro de Miguel, after having had the opportunity to study the 1st edition in detail four years ago, demonstrates to what extent one of the most relevant characteristics of this new era — the cognitive era — is the exponential acceleration of the changes, something that had not happened before in the entire history of humanity, where the changes were always linear and punctuated sporadically by some exponential changes that always took centuries and millennia to repeat themselves. Instead, in just four years so many changes have occurred in the digital world !!!.

2. it is fair to announce in advance that Professor De Miguel surprises us again. If the 1st edition published in 2020 constituted a herculean effort to synthesize from a comprehensive perspective a still adolescent subject where, based on an academic vision of both private international law and intellectual property, the difficulties of adapting its postulates to the new digital world were highlighted, this 2nd edition goes much further and is even more complete. First, because it enshrines the conviction that European sources clearly engulf domestic ones on the construction of a system designed to provide answers to both intra-European and extra-European situations derived from online activities. Second, because it shows that in just four years the adolescent has become an adult and the number of complex issues has also multiplied exponentially, which may make advisable in the future to continue the effort including *de lege ferenda* considerations. And third, because the result is magnificent and becomes a magisterial treatise on the treatment of the EU private international law of the Internet.

3. The 1st edition has been accurately analized in numerous publications: among others, Moura Vicente, D., *Revista Española de Derecho Internacional,* 2021, Vol. 73-2, pp. 472-473; López-Tarruella Martínez, A., *Revista Electrónica de Estudios Internacionales*, 40, December 2020, DOI: 10.17103/reei.40.21; Palao Moreno, G., *Anuario Español de Derecho internacional privado*, Volume XIX-XX, 2019-2020, pp. 819-822; and Espiniella Menéndez, A, *Cuadernos de Derecho Transnacional* (October 2020), Vol. 12, 2, pp. 1495-1497. This note aims to briefly evaluate the major differences and the added value that the author proposes in this 2nd edition.

4. While Prof. De Miguel preserves the essence of the six chapters in which the 1st edition was structured, most of them have been enormously enriched. Chapter I ("Foundations") reflects both the Internet's growth phase and the fundamental principles of private international law applied to cross-border online activities. Regarding the first, the work highlights how the emergence of edge technologies implies an enormous variety of challenges for the system of private international law. To mention only some, a) the product liability and damage caused with the involvement of AI systems; or b) the development of blockchain technology leading to a more user-centric and decentralized Internet with the creation of new intermediaries — as cryptoexchanges — and the increased centralization due to the requirements for data exchange, data collection, and

concentration of computational power needed for blockchain, crypto-asset mining and machine learning; or c) the development of virtual three-dimensional spaces in which participants can interact, possibly through avatars, or d) the standard setting on essential patents and the development of FRAND commitments or licences by standard-setting organizations. Regarding the second, it is worth to mention the study of numerous rulings of the European Court of Justice (ECJ) issued in recent years referring to matters such as the scope of application of Brussels I (recast) Regulation (ECJ Judgments of 22 December 2022, *Eurelec Trading*, C-98/22, and of 8 September 2022, *IRnova*, C-399/21), the law applicable to divorce (ECJ Judgment of 16 July 2020, *JE (Law applicable to divorce)*, C-249/19) or the conditions for the recognition of judgments (ECJ Judgments of 7 April 2022, *H Limited*, C-568/20, or of 7 September 2023, *Charles Taylor Adjusting*, C-590/21).

5. Chapter II changes its title (from "Information Society services, internal market and illegal content" to "Digital services, internal market and content liability"), has been severely reviewed and expands on issues as relevant as a) how the e-commerce directive has been supplemented by the Digital Services Act 2022 (DSA) and its rules on specific due diligence obligations tailored to certain categories of providers of intermediary services, and b) how new EU instruments have brought to a much mature understanding of the impact of edge technologies in the internal market, such as the Directive (EU) 2018/1808 amending the Audiovisual Media Services Directive, the Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services, the Regulation (EU) 2021/784 on addressing the dissemination of terrorist content online, the Regulation (EU) 2023/988 laying down essential rules on the safety of consumer products, and, above all, the AI Act and the Proposal Directive on AI Liability for defective products. All in all, the e-commerce directive has been gifted with very relevant decisions of the ECJ such as the judgments of 19 December 2019 (*Airbnb Ireland,* C-390/18), 3 December 2020 (*Star Taxi App*, C-62/19), and 27 April 2023 (*Viagogo*, C-70/22).

As to the developments specifically related to private international law, this second edition expands on the relevance of ECJ judgments related a) to jurisdiction (9 July 2020, *Verein für Konsumenteninformation*, C-343/19: the place of the event giving rise to the damage is in the Member State within the territory of which the products at issue were equipped with that software; and 22 February 2024, *FCA Italy y FPT Industrial*, C-81/23: where the contract was concluded in a Member State but the defective product was delivered in another Member State the place where the damage occurs is in that latter Member State) and b) to the applicable law (10 March 2022, *BMA Nederland*, C-498/20: the place where the damage occurred within the meaning of Article 4(1) Rome II is the place where the initial damage to the persons directly affected occurs) for the law applicable).

On the other hand, the AI Liability Directive Proposal lays down rules to enable claimants to substantiate non-contractual fault-based civil law claims for damages caused by an AI system on two areas: (a) the disclosure of evidence concerning high-risk AI systems; and (b) the burden of proof.

As to the law applicable to intermediary liability, the author concludes rightly that "the choice of law rules of the Rome II Regulation will normally lead to application of the liability rules of the DSA, insofar as the intermediary service provider targets its activity to an EU Member State" and that "the DSA decisively undermines the practical

significance of 'requirements concerning the liability of the service provider' as an issue falling within the 'coordinated field' of the E-Commerce Directive".

Finally, Chapter II has been enriched with a thorough reflection on the territorial scope of orders against illegal content as result of the application of art. 9.2 DSA, a topic where the author has shown in the past authoritative expertise.

6. Chapter III (Data Protection and Personality Rights, including Defamation) develops the consequences of the 2023 Data Act on the free flow of data within the EU and the 2022 Digital Markets Act (DMA) in relation to the application of the General Data Protection Regulation (GDPR), offering at the same time a complete UpToDate of the consequences for the GDPR of multiple ECJ judgments like those of 1 October 2019, (*Planet 49*, C-673/17), 11 November 2020, (*Orange Romania*, C-61/19), 8 December 2022 (*Google*, C-460/20), 12 January 2023 (*Budapesti Elektromos Művek*, C-132/21 — *Déréférencement d'un contenu prétendument inexact)*, 4 May 2023, Österreichische *Post — Préjudice moral lié au traitement de données personnelle*, C-300/21), 4 July 2023 (*Meta Platforms and Others — Conditions générales d'utilisation d'un réseau social*, C-252/21), 14 December 2023, (*Natsionalna agentsia za prihodite*, C-340/21), 14 December 2023 (*Gemeinde Ummendorf*, C-456/22), and 25 January 2024 (*MediaMarktSaturn*, C-687/21).

Four specific issues highlight the special added value of this Chapter III: first, the transfer of personal data to third countries, where the author develops the standard data protection clauses adopted by the Commission in 2021 and the ECJ Judgment of 16 July 2020, (*Facebook Ireland and Schrems*, C-311/18); second, the understanding that Directive 2020/1828 on representative actions for the protection of the collective interests of consumers is a very significant development to foster collective redress within the EU and has an impact on the application of arts 79 and 80 GDPR: third, the introduction of the strategic lawsuits against public participation (SLAPPs), that are usually brought in the form of defamation lawsuits and pose particular challenges to defendants in cross border situations; finally, the depth analysis of two ECJ judgments: 17 June 2021 (*Mittelbayerischer Verlag*, C-800/19), on the scope of the term 'personality right' and the consequences of the application of this judgment for the interpretation of art 7.2 Brussels I (Recast), and 21 December 2021 (*Gtflix Tv*, C-251/20) of particular significance in relation to the mosaic criterion, and to the determination of the place where the damage occurs.

7. Chapter IV (Copyright) introduces in this 2nd edition a reflection on a) the consequences of the specific liability mechanism applicable to online content-sharing service providers that give access to copyright-protected content uploaded by their users in cases in which no authorization has been obtained from the relevant rightholders (Article 17 of Directive 2019/790) and b) the adoption of the DSA, with its provisions on specific due diligence obligations tailored to certain categories of intermediary services providers. Our author discusses also in this Chapter the balancing between the freedom of expression and information on the one hand, and the protection of intellectual property on the other, something that it is determinant for the application of the liability exemption concerning online content-sharing service providers, and the obligations, such as prior automatic filtering of content uploaded by users, that can be imposed on them by copyright legislation, as reflected in ECJ judgments like 22 June 2021 (*YouTube and Cyando*, C-682/18 and C-683/18); and 26 April 2022, (*Poland / Parliament and Council*, C-401/19).

8. In Chapter V (Industrial Property and Competition Law), Prof. De Miguel includes in this 2nd edition a discussion on the consequences of the adoption of three new texts, mainly a) Regulation (EU) 2019/517, which confers implementing powers to the Commission and repeals Regulation (EC) No 733/2002 on the implementation of the '.eu' Top Level Domain, b) Regulation (EC) No 874/2004 laying down public policy rules concerning the '.eu' Top Level Domain, with effect from 13 October 2022, and c) Commission implementing Regulation (EU) 2020/857.

On top of that, he reviews the relevant case law of the ECJ related to jurisdiction (Judgments of 7 September 2023 (*Beverage City Polska*, C-832/21): under Article 8(1) Brussels I (recast) a single court may have jurisdiction to rule on the claims brought against all of the actors who committed those acts; and of 27 April 2023 (*Lännen MCE*, C-104/22): interpretation of Article 125(5) of the EU Trade Mark Regulation (EUTMR) to situations where the alleged infringer's online advertising or sales offers do not expressly and unambiguously mention the Member State concerned among the territories to which the goods in question may be supplied) and to applicable law (Judgments of 8 September 2022 (*IRnova*, C-399/21): the distributive application of a plurality of laws becomes relevant; and of 3 March 2022, (*Acacia*, C-421/20): Article 8(2) of the Rome II Regulation in *Nintendo* cannot be transposed to a situation where the holder of a Community design brings one or more targeted actions, relating to each of the acts of infringement within a single Member State, pursuant to Article 85(5).

Especially relevant in this Chapter is the in-depth study of the scope of application, content and enforcement of the DMA and its consequences for competition law. The DMA supplements EU competition rules by providing new tools to address unfairness in dependency relationships between very large platforms and their business users.

9. Finally, Chapter VI (Contracts and transactions) introduces two new items related respectively to the "Platform economy and digital markets", and to the "Access to and use of data due to the application of the EU Data Act", develops further the smart contracts, crypto-assets and crypto-markets (Regulation (EU) 2023/1114), and analyzes the new case law of the ECJ relevant to the matter: Judgments of 24 November 2022 (*Tilman*, C-358/21), 16 September 2021 (*The Software Incubator*, C-410/19), 14 September 2023 (*Diamond Resorts Europe and others*, C-632/21) and 14 September 2023 (*Club La Costa and others*, C-821/21 P).

10. As a conclusion, this thoroughly and ambitious revised 2nd edition of *Conflict of Laws and the Internet* is not only an updated analysis but offers a much more comprehensive approach than the 1st edition, masterfully explores all the relevant EU instruments and the ECJ case law and clearly reflects the complexities of private international law in the digital age. No doubt, a must-read.

Manuel Desantes Real
Catedrático de Derecho internacional privado
en la Universidad de Alicante