Job Vacancy: Researcher in Private International Law and International Civil Procedure

The **Institute for German and International Civil Procedure** at the Rheinische Friedrich Wilhelms University of Bonn, Germany, is looking for a **highly skilled and motivated PhD candidate and fellow (Wissenschaftliche/r Mitarbeiter/in)** to work in the fields of Private International Law and International Civil Procedure on a part-time basis **(50%) as of 1 April 2020.**

The successful candidate must hold the First or Second German State Examination in law with distinction ("*Prädikat*") and is interested in the international dimensions of private law, in particular private international law and international civil procedure.

The fellow will be given the opportunity to conduct his/her PhD project (according to the Faculty's regulations) under the supervision of the Director of the Institute Prof Dr Matthias Weller, Mag.rer.publ. (https://www.jura.uni-bonn.de/professur-prof-dr-weller/professor-dr-weller-magrer publ/). The position is paid according to the German public salary scale E-13 TV-L, 50% (about 1,300 Euro net per month). The initial contract period is one year at least and up to three years, with an option to be extended. Responsibilities include supporting research and teaching on Private International Law and International Civil Procedure as well as a teaching obligation of two hours per week during term time.

If you are interested in this position, please send your application (cover letter in German; CV; and relevant documents and certificates, notably university transcripts and a copy of law degree) to Prof Dr Matthias Weller (weller@jura.uni-bonn.de). The University of Bonn is an equal opportunity employer.

Law Shopping in Relation to Data Processing in the Context of Employment: The Dark Side of the EU System for Criminal Judicial Cooperation?

This post was written by Ms Martina Mantovani, Research Fellow at the Max Planck Institute Luxembourg. The author is grateful to her colleague, Ms Adriani Dori, for pointing out the tweet.

On 26th September 2019, Dutch MEP Sophie in 't Veld announced through her Twitter account the lodging of a question for written answer to the EU Commission, prompting the opening of an investigation (and, eventually, of infringement proceedings) in relation to a commercial use of the European Criminal Record Information System (ECRIS). A cornerstone of judicial cooperation in criminal matters, this network is allegedly being exploited by a commercial company operating on the European market (hereinafter name, for the purposes of this entry, The Company), in order to provide, against payment, a speedy and efficient service to actual or prospective employers, wishing to access the criminal records of current employees or prospect hires.

Commercial activities of this kind raise a number of questions concerning, first and foremost, the lawfulness of the use of the ECRIS network beyond its institutional purpose, as well as the potential liability under EU law of the national authorities which are (more or less knowingly) fostering such practices. Moreover, as specifically concerns the topic of interest of this blog, such commercial practices exemplify how law shopping, stemming from the lack of coordination of Member States' data protection laws, can be turned into a veritable profit-seeking commercial endeavor. As it is, these commercial practices are made possible not only by the specific legislation instituting the ECRIS, but also due to the legal uncertainty and fragmentation fostered by the GDPR. In fact, this Regulation leaves rooms for maneuver for Member States' legislators to specify its provisions in relation to, *inter alia*, the processing of personal data in

the context of employment (art 88), without nonetheless providing for either a guiding criterion or an explicit uniform rule to delimit or coordinate the geographical scope of application of national provisions enacted on this basis. This contributes to creating a situation whereby advantage might be taken of the uncertainty relating to the applicable data protection regime, to the detriment of the fundamental right to data protection of actual or prospective employees.

The ECRIS: institutional mission and open concerns.

The ECRIS is based on two separate but related pieces of legislation, Council Framework Decision 2009/315/JHA and Council Decision 2009/316/JHA, as well as on a separate data protection framework, previously set out by Council Framework Decision 2008/977/JHA, now repealed and replaced by Directive (EU) 2016/680. The intuitional mission of the ECRIS consists in providing competent public authorities from one Member States with access to information from the criminal records of nationals of other Member States. By facilitating the exchange of information from criminal records, this network aims at informing the authorities responsible for the criminal justice system of the background of a person subject to legal proceedings, so that his/her previous convictions can be taken into account to adapt the decision to the individual situation (Recital 15 of Council Framework Decision 2009/315/JHA). The ECRIS additionally aims at ensuring that a person convicted of a sexual offence against children will no longer be able to conceal this conviction or disqualification with a view to performing professional activity related to supervision of children in another Member State (Recital 12 of Council Framework Decision 2009/315/JHA, in conjunction with article 10(3) of Directive 2011/93/EU). In current law, ECRIS applications for accessing extracts from criminal records can be filed by judicial or competent administrative authorities, such as bodies authorized to vet persons for sensitive employment or firearms ownership. In such cases, these applications must be submitted with the central authority of the Member State to which the applicant authority belongs. This central authority may (and not *shall*) submit the request to the central authority of another Member State in accordance with its national law. In addition, access requests can also be filed by the person concerned for information on own criminal records. In this case, the central authority of the Member State in which the request is made may, in accordance with its national law, submit a request to the central authority of another Member State for information and related data to be extracted from its criminal record,

provided the person concerned is or was a resident or a national of either the requesting or the requested Member State. In relation to information extracted via the ECRIS for any purposes other than that of criminal proceedings, a Statewatch Report of 2011 already expressed serious concerns, noting that while the European Data Protection Supervisor recommended that requests of this kind should have only be allowed "under exceptional circumstances", the Council Framework Decision did not finally introduce such a stringent limitation. Moreover, since, under current article 7, the requested central authority shall reply to such requests *in accordance with its national law*, this piece of legislation provides "*an opportunity for the widespread cross-border exchange of information extracted from criminal records for a variety of purposes unrelated to criminal proceedings*". That same Report additionally stresses the huge potential for "information shopping" that may thus arise, insofar as applicants who are not able to obtain information on an individual from that person's home Member State, may access it via another Member State which also holds the information and has less stringent data protection legislation.

New commercial practices.

It is within this framework that the new commercial practices lying at the heart of Ms Sophie in 't Veld's question must be understood. The commercial services in question are provided by The Company, expressly identified in the MEP's interrogation. On its website, The Company takes great care to specify that, while it may have a name which closely echoes the EU system, it remains a private company offering commercial services and that "*the purpose of this similarity is to highlight [it uses] the EU structures to access information on criminal records*". According to the same source, the services provided aim at addressing a widespread need of employers from Europe and rest of the world, who wish to ensure that their employees have no criminal background. Having remarked that said employers often struggle to perform background checks in a compliant manner, with legislation varying across the European Union rendering such a check "*complicated, time consuming or impossible*", The Company proposes an innovative solution. According to its website, it "discovered" that by resorting to a EU program called European Criminal Records Information System, it is "*able to address all of those concerns and offer easy and compliant access to state-issued EU criminal records certificates*". The FAQs further specify how this procedure works in practice. They confirm that all certificates are obtained from central

criminal registers of EU Member States. What makes the service provided "unique" is that The Company is declaredly streamlining all access requests through the ECRIS central authority of just one Member State, who requests criminal information from its European counterparts on The Company's behalf. According to both The Company's website and MEP Sophie in 't Veld's interrogation, the National Criminal Register of this Country "*play[s] a role of a middleman in the flow of documentation and requests the information from the central register of the destined country*". While The Company claims that "*the application is made with the applicant's full awareness and explicit consent*", the MEP stresses "*it is not clear whether the person whose records are obtained has given explicit consent*". In fact, it must be acknowledged that the website's wording is rather ambiguous, being unclear whether the expression "*the applicant*" refers to the employer seeking the company's services, or to the persons whose criminal records are being accessed. The way in which The Company (which, incidentally, has UK phone number and which, according its website's FAQ's, seems to direct its services primarily to employers operating in the UK and Ireland) is effectively resorting to a foreign National Criminal Register for accessing the ECRIS remains a mystery. In fact, The Company cannot certainly be counted among either the administrative or the judicial authorities admitted to filing a request under Council Framework Decision 2009/315/JHA. Two highly speculative guesses might be made. A first possibility might be that the National Criminal Register allegedly playing the role of middleman might be misapplying the Framework Decision by submitting requests filed by non-legitimate applicants (as MEP in 't Veld seems to imply, by appealing to the principle of mutual trust and by envisioning the possibility of opening infringement proceedings). As it is, the form for access requests used by said National Criminal Register does not strictly require, according to its letter, that person filing the request shall be the same person whose criminal records need to be obtained, although it contains the explicit warning that "obtaining unauthorized information about a person from the National Criminal Register is punishable by a fine, restriction of liberty or imprisonment up to 2 years". A second possibility is that the company might be exploiting individual access requests, which – it must be stressed – could concern only "residents or nationals *of the requesting or requested Member State*" (article 6§2 of Council Framework Decision 2009/315/JHA). In such cases, one might imagine that, after being approached by the employer, The Company would transmit the aforementioned form to the employee/prospect hire, who would personally sign the form, thus

explicitly consenting to the procedure. From the standpoint of data protection law, however, such an approach would not be less problematic. As repeatedly confirmed by the Article 29 Working Party, an employer which processes personal data (even within the framework of a recruitment process) qualifies as a controller of the employee/prospect hire personal data, having moreover very limited possibilities to rely on the employee's express consent as a lawful basis for their processing. Furthermore, such approach remains even more controversial if account is taken of the fact that it may be purposefully used to circumvent the more restrictive data protection provisions in matters of employment enacted by another Member State.

The Member State's law applicable to the processing of personal data in the context of employment.

Albeit having been promoted by the EU Commission as "a single, pan-European law for data protection", the new GDPR fails to level out all legislative differences in the Member States' data protection laws. As mentioned above, it provides in fact a margin of maneuver for Member States to specify its rules, including for the processing of special categories of personal data. To that extent, it does not exclude Member State law that sets out the circumstances for specific processing situations, including determining more precisely the conditions under which the processing of personal data is lawful (recital 10). In this vein, its article 88 provides that "Member States *may*, by law or by collective agreements, provide for more specific rules to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data in the employment context, in particular for the purposes of recruitment […]". Commercial practices such as those signaled by Ms in 't Veld seem to thrive on this situation of persisting legal uncertainty and fragmentation. In fact, some Member States' data protection legislation expressly prohibits the use of individual access requests to criminal record in connection with the recruitment of an employee, except for very exceptional circumstances. Nonetheless, such legislative measures are often rendered toothless at the international level, either because the legislator limited – more or less willingly – their reach to the domestic domain, or because their geographical scope of application, left undefined by the relevant GDPR-complementing law, remains highly ambiguous. This is precisely what happens in relation to the British and the Irish Data Protection Acts, expressly mentioned by The Company's website.

- *The UK Data Protection Act 2018*

This law, meant to adapt the UK data protection regime to the GDPR, provides, under its *Section 184,* that:

"it is an offence for a person ("P1") to require another person to provide P1 with, or give P1 access to, a relevant record in connection with— (a)the recruitment of an employee by P1; (b)the continued employment of a person by P1; or (c)a contract for the provision of services to P1." According to *Schedule 18* of the same law, *"relevant record" means—* […] *(b)a relevant record relating to a conviction or caution …*[which] *(a)has been or is to be obtained by a data subject in the exercise of a data subject access right from a person listed in sub-paragraph (2), and (b)contains information relating to a conviction or caution.* The Company is well aware of these restrictions, which are expressly reported on its website (reference is made to Section 56 of the Data Protection Act (DPA) 2015, corresponding to Section 184 of the new DPA 2018). Nonetheless, it is further clarified that "[*The Company] do[es] not make any requests under section [184] of the DPA, therefore [being] not limited by [it]*" and that, consequently, it might even be "*safer*", as a UK-based employer, to resort to its services. And this might admittedly be true, since the prohibition set out by Section 184 solely concerns records obtained by a data subject in the exercise his/her access right from one of the UK-based authorities listed in §3(2) of Schedule 18, and not by a foreign Criminal Register. Nonetheless, despite the apparent lawfulness of the whole process, the fact remains that the use (or abuse?) of an EU system, established to address specific needs of the judicial cooperation in criminal matters, becomes, in practice, the tool for enabling a UK-established employer to access employees' personal data which he could not lawfully access domestically. This goes explicitly against the declared ratio and aim of Section 184 of the UK Data Protection Act. As clarified by the Explanatory Notes, this provision aims at thwarting conducts which may give the employer access to records which they would not otherwise have been entitled. There are, in fact, established legal routes for employers and public service providers to carry out background checks, which do not rely on them obtaining information via subject access requests. Disclosure and Barring Service (DBS) checks can in fact be performed *locally* only by one responsible organizations registered with DBS and according to the procedure and guarantees set out by British law.

- *The Irish Data Protection Act 2018*

The other relevant national GDPR-complementing provision is Section 4 of this law, entitled "obligation not to require data subject to exercise right of access under Data Protection Regulation and Directive in certain circumstances". This provision prohibits a person from requiring, in connection with the recruitment of an individual as an employee or his continued employment, that individual to exercise his rights of access to own criminal records, or to supply the employer with data obtained as a result of such a request. Again, The Company's website specifies that the services provided are not based on requests under Section 4 of the Irish law, and that this provision does not consequently constitute a limitation, thus making the use of their services "safer" for employers. It must be noted, however, that as opposed to the British provision, Section 4 does not limit the scope of the prohibition to records obtained by requesting access to Irish authorities. Therefore, the extent to which the processing of employees' personal data, including their criminal records, will be covered by Section 4 of the Irish Data Protection Act will finally depend on the identification of the scope of application of this Act *as a whole*. The problem with the Irish Data Protection Act (and with many other national GDPR-complementing laws, such as, *inter alia,* the Italian and the Spanish legislations) is that it does not explicitly define its geographical reach, thus fostering uncertainty as to the range of factual situations effectively covered and governed by its complementing provisions. This omission has been maintained in the final text of the Irish Data Protection Act despite the contrary advice given, during the drafting process, by the Irish Law Society. This pointed to such a lacuna as a potential source of ambiguity, for both individuals and controllers/processors, with regard to the remit and applicability of that piece of legislation. In particular, clarity as to what entities the Data Protection Act 2018 applies would have been especially desirous "given the number of corporations processing personal data on a large scale in Ireland and the likely queries that might otherwise arise and require judicial clarification".

The need for better coordination of national data protection laws in the context of employment.

Following Ms in 't Veld's question, the EU Commission will eventually investigate whether such a use of the ECRIS system is compliant with EU law, and whether the National Criminal Register in question is lawfully taking action on the basis of applications filed by/or with the help of The Company. In any event, the objective difficulties that may be encountered, in current law, in deciding over the

lawfulness of commercial practices this kind, which might be merely taking advantage of pre-existing legislative loopholes and gaps, are a clear cry for better coordination of the Member States' data protection laws enacted on the basis of the opening clauses enshrined in the GDPR. In a related paper, which is forthcoming in the *Rivista italiana di diritto internazionale privato e processuale,* this author tries and demonstrate that this problem is of an overarching nature, not being limited to the rather specific issues of, on the one side, the parochial approach adopted by the UK Parliament in defining the reach of its provision on forced access to criminal records for employment purposes and, on the other side, the silence kept by many national legislators concerning the geographical reach of their domestic data protection law. As it is, the entire European regime on data protection is deeply and adversely affected by a generalized lack of coordination of the spatial reach of domestic GDPR-complementing provisions. Lacking any uniform solution at EU level (set out either by the GDPR itself or by other existing instruments) the delimitation of the scope of application of national GDPR-complementing provisions is in fact left to unilateral and uncoordinated initiatives of domestic legislators. The review of existing national legislation evidences the variety of techniques and connecting factors employed for these purposes by the several Member States, which is liable to generate endemic risks of over- and under-regulations, and, above all, gaps of legal protection which are perfectly exemplified by, but not limited to, the commercial practices arisen in relation to the use of the ECRIS.

Updated European Small Claims Guides

The new Practice Guide and User Guide for the European Small Claims Procedure, prepared by Xandra Kramer (ESL, Erasmus University Rotterdam, Utrecht University) in collaboration with the European Commission and the European Judicial Network, have been published. These updates were

necessitated by the amendments to the European Small Claims Regulation, resulting from Regulation No 2015/2421 as applicable since 14 July 2017. The European Small Claims Regulation provides a uniform, low threshold procedure for consumers to claim their rights in cross-border cases in the EU.

'The most significant amendment is the raising of the monetary limit of the procedure from €2,000 to €5,000 (Article 2). Most other amendments aim at strengthening the use of distance communication technology, including to conduct oral hearings (Article 8), and the taking of evidence (Article 9) and enabling the e-service of documents (Article 13) and distant payment of court fees (Article 15a). Other amendments are that the primacy of the written procedure is underlined (Article 5), the practical assistance of parties is strengthened (Article 11) and the rule on minimum standard for review is clarified (Article 18). New provisions are inserted regarding the requirement that court fees should be proportionate (Article 15a), the language of the enforcement certificate (Article 21a) and the enforcement of court settlements (Article 23a). In addition, Regulation No 2015/2421 amended one provision of the Order for Payment Procedure (15). Article 17 of that Regulation now envisages a transfer to the European Small Claims Procedure in cases where a statement of opposition is lodged against the payment order, where the European Small Claims Procedure is applicable.' (p. 12 Practice Guide).

One of the novelties in the User Guide and the Practice Guide is the link to available ADR mechanisms and the reference to the ODR platform, which informs consumers and practitioners about the existing alternatives and secure a more integrated approach to consumer dispute resolution. The publication of the new guides are part of a European consumer campaign launched in July. The Guides as well as other tools on and information about the Small Claims Procedure – including an infographic for consumers, a leaflet for legal professionals, a leaflet for businesses and a web toolkit – are available in the Small Claims Section of the e-Justice Portal.

CJEU confirms that an actio pauliana is a matter relating to a contract: Case C-722/17 Reitbauer et al v Casamassima

Written by Michiel Poesen

Less than a year after its decision in Case C-337/17 Feniks (discussed here), the Court of Justice had another opportunity to consider the extent to which the Brussels Ia Regulation provides a head of special jurisdiction for an actio pauliana*. In Case C-722/17 Reitbauer (decided last Wednesday but still not available in English), the Court confirmed its decision in* Feniks*, according to which such an action falls under Art 7(1) Brussels Ia if it is based on a contractual right.* ***Michiel Poesen****, PhD candidate at KU Leuven, has been so kind as to share his thoughts on the decision with us in the following post.*

Earlier this week, the Court of Justice of the European Union found that an *actio pauliana* is subject to jurisdiction in matters relating to a contract, contained in Article 7(1) Brussels Ia (Case C-722/17 *Reitbauer*).

In general terms, the *actio pauliana* is a remedy that allows a creditor to have an act declared ineffective, because said act was carried out by a debtor with the purpose of diminishing its assets by passing them on to a third party (see Opinion of AG Bobek, C-337/17 *Feniks*, [35]). This blogpost will briefly summarise the Court's ruling and its wider impact.

Facts

The facts leading to the ruling are quite complex. Mr Casamassima and Ms Isabel C., both resident in Rome, lived together at least until the spring of 2014. In 2010, they purchased a house in Villach, Austria. While Mr Casamassima apparently funded the transaction, Isabel C. was registered in the land register as the sole owner.

Ms Isabel C. – with the 'participation' of Mr Casamassima – entered into contracts

for extensive renovation works of the house with Reitbauer and others (the applicants in the preliminary reference proceedings, hereinafter referred to as 'Reitbauer'). Because the costs of the renovation far exceeded the original budget, payments to Reitbauer were suspended. From 2013 onwards, Reitbauer were therefore involved in judicial proceedings in Austria against Ms Isabel C. Early 2014, the first of a series of judgments was entered in favour of Reitbauer. Ms Isabel C. appealed against those judgments.

On 7 May 2014 before a court in Rome, Ms Isabel C. acknowledged Mr Casamassima's claim against her with respect to a loan agreement which was granted by the latter in order to finance the acquisition of the house in Villach. Ms Isabel C. undertook to pay this amount to the latter under a court settlement. In addition, she agreed to have a mortgage registered on the house in Villach in order to secure Mr Casamassima's claim.

On 13 June 2014 a (further) certificate of indebtedness and pledge certificate was drawn up in Vienna by a notary to guarantee the above settlement ('the pledge'). With this certificate, the pledge on the house in Villach was created on 18 June 2014.

The judgments in favour of Reitbauer did not become enforceable until after this date. The pledges on the house of Ms Isabel C. held by Reitbauer, obtained by way of legal enforcement proceedings, therefore ranked behind the pledge in favour of Ms Casamassima.

In order to realise the pledge, Mr Casamassima applied in February 2016 to the referring court (the District Court in Villach, Austria) for an order against Ms Isabel C., requiring a compulsory auction of the house in Villach. The house was auctioned off in the autumn of 2016. The order of entries in the land register shows that the proceeds would go more or less entirely to Mr Casamassima because of the pledge.

With a view to preventing this, Reitbauer brought an action for avoidance *('Anfechtungsklage'*) in June 2016 before the Regional Court in Klagenfurt, Austria, against Mr Casamassima and Ms Isabel C. The action was dismissed by that court due to a lack of international jurisdiction, given Casamassima's and Isabel C's domicile outside of Austria.

At the same time, Reitbauer filed an opposition before the district court of Villach,

Austria, in the course of the proceedings regarding distribution of the proceeds from the compulsory auction, and subsequently brought opposition proceedings against Mr Casamassima. In these opposition proceedings, Reitbauer sought a declaration **1)** that the decision regarding the distribution to Mr Casamassima of the proceeds of the action was not legally valid for reasons of compensation between Ms Isabel C.'s claims and those of Mr Casamassima, and **2)** that the pledge certificate was drawn up to frustrate Reitbauer's enforcement proceedings with regard to the house in Villach. Essentially, the second part of Reitbauer's action was based on the allegation that Ms Isabel C. had acted with fraudulent intent, therefore being a form of *actio pauliana*.

Decision

The Court of Justice had to consider first whether jurisdiction in proceedings that have as their object rights *in rem* in immovable property or tenancies of immovable property, provided in Article 24(1) Brussels Ia, was applicable. To trigger this ground of jurisdiction, Reitbauer and others alleged that their action was closely related to the house in Villach.

In reaching its conclusion, the Court reiterated that Article 24(1) Brussels Ia does not encompass all actions concerning rights *in rem* in immovable property, but only those which both come within the scope of th Regulation and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights in rem therein and to provide the holders of those rights with protection for the powers which attach to their interest (Case C-722 *Reitbauer*, [44]; see also Case C?417/15 *Schmidt*, [30])

This definition implies that an action was based on rights *in rem*, not on rights *in personam*. The part of the action alleging compensation between Casamassima's and Isabel C.'s claims does not satisfy this requirement, as it aims at contesting the existence of the Mr Casamassima's right *in personam* that was the cause of the enforcement proceedings.

The second part of the action, the *actio pauliana*, does not fit within *in rem* jurisdiction either. The Court found that such an action does not involve the assessment of facts or the application of rules and practices of the *locus rei sitae* in such a way as to justify conferring jurisdiction on a court of the State in which the property is situated (Case C-722 *Reitbauer*, [48]; see also C-115/88 *Reichert I*,

[12]).

Having come to this conclusion, the Court decided that jurisdiction over the actions brought by Reitbauer and others was not subject to Article 24(5) Brussels Ia either – which contains a special ground of jurisdiction "in proceedings concerned with the enforcement of judgments". According to the Court, this bespoke ground of jurisdiction is to be understood as englobing proceedings that may arise from "recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments and authentic instruments" (Case C-722 *Reitbauer*, [52]; see also Case C?261/90 *Reichert II*, [28]) .

Reitbauer and others' actions were clearly not related to the enforcement of the judgment but to the substantive rights underlying the pledge which was being enforced. For that reason, enforcement jurisdiction was to remain inapplicable.

Having reached the conclusion that no exclusive ground of jurisdiction could apply, the Court went on to consider Art 7(1) Brussels Ia – jurisdiction in matters relating to a contract. Following a short motivation (Case C-722 *Reitbauer*, [56]–[62]) the Court confirmed that the part of Reitbauer and others' action amounting to an *actio pauliana* was a matter relating to a contract. As in the *Feniks* ruling, the reason cited is that the action aims at preserving Reitbauer and others' contractual rights by setting aside the creditor's allegedly fraudulent acts (Case C-722 *Reitbauer*, [58]–[59]; Case C-337/17 *Feniks*, [43]–[44]).

As a consequence, Art 7(1)(b) Brussels Ia allocates jurisdiction to the place of performance of the allegedly defrauded contract, being Villach since Reitbauer and others delivered their renovation services in that location (see Case C-337/17 *Feniks*, [46]).

The Purpose and Role of Art 7(1) Brussels Ia

As far as the exclusive grounds of jurisdiction in Art 24(1) and 24(5) Brussels Ia are concerned, the decision can hardly be considered surprising. Reitbauer and others tried to plead their actions as relating to a matter covered by exclusive jurisdiction, with the aim of suing the Italian domiciled defendants in Austria instead of Italy (which would be the outcome of the default rule of jurisdiction of Art 4(1) Brussels Ia). This attempt was bound to fail.

More interestingly, the Court confirmed that an *action pauliana* can be a matter relating to a contract. This emerging line of case law is met with criticism. One of the points raised was that a defendant may be ignorant of the contract it allegedly helped to defraud. In such a situation, applying contract jurisdiction would trigger a forum that is unforeseeable for the defendant (an outcome that the Court rightly attempted to avoid in Case C-26/91 *Handte*, [19]). A response to this criticism would be not to apply contract jurisdiction to an *actio pauliana* altogether, as suggested earlier by AG Bobek (Opinion of AG Bobek, C-337/17 *Feniks*, [62]–[72]). There, the AG opined that an *actio pauliana* is too tenuously and too remotely linked to a contract to be a matter relating to a contract for the purpose of Art 7(1) Brussels Ia. Alternatively, AG Tanchev opined that the defendant's knowledge should be taken into account (Opinion in Case C-722/17):

> *[84] … knowledge of a third party should act as a limiting factor: … the third party needs to know that the legal act binds the defendant to the debtor and that that causes harm to the contractual rights of another creditor of the debtor (the applicants).*
>
> *[92] … the defendant's knowledge of the existence of the contract(s) at issue is important.*

Instead of realigning the *Feniks* ruling with the principle of foreseeability, the decision in *Reitbauer* confirmed that an *actio pauliana* fits squarely within jurisdiction in matters relating to a contract, the driving factor seemingly being the hope to offer the claimant an additional forum that presumably has a close connection to the dispute (Case C-722 *Reitbauer*, [60]: Case C-337/17 *Feniks*, [44]–[45]).

Looking beyond the *actio pauliana*, the case law begs the question what other types of remedies – however remotely linked to a contract – could be subject to Art 7(1) Brussels Ia. An action for wrongful interference with contract, for example, regarded to be tortious in nature (e.g. *Tesam Distribution Ltd v Schuh Mode Team GmbH and Commerzbank AG* [1990] I.L.Pr. 149), would be a matter relating to a contract by the standard applied in *Feniks* and *Reitbauer*. It is doubtful whether such a broad construction of jurisdiction in matters relating to a contract complies with the limited role of Art 7(1) Brussels Ia within the Regulation (Recital (15) Brussels Ia).

Job Vacancy: Researcher in Foreign and/or Private International Law

Professor Matthias Lehmann, Director of the Institute for Private International and Comparative Law, University of Bonn, University of Bonn, Germany, is looking for one highly skilled and motivated PhD candidate and fellow (Wissenschaftliche/r Mitarbeiter/in) on a part-time basis (50%). The earliest starting date is 1 October 2019.

The successful candidate holds a first law degree, preferably from a jurisdiction outside of Germany. She or he is acquainted in the comparative and international dimensions of private law, and ideally also interested in questions of financial law, in particular the new problems raised by cryptocurrencies. An excellent command of English and a basic knowledge of German are required. Knowledge of another language as well as good IT skills are additional factors that may be taken into consideration.

The fellow will be given the opportunity to conduct his/her PhD project or post-doc project according to the Faculty's regulations. The position is paid according to the German public salary scale E-13 TV-L, 50% (about 1300 Euro net per month). There will be an opportunity to increase the position and salary to 75% as of April 1, 2020 should the candidate wish to do so. The initial contract period is up to three years, with the option to have a shorter period or to renew it, according to the wishes of the candidate. Responsibilities include independent teaching obligations (2 hours per week during the semester in a subject of choice of the candidate) as supporting Professor Lehmann in his research and teaching.

If you are interested in this position, please send your application (cover letter in English; CV; and relevant documents and certificates, notably university transcripts and a copy of law degree) to lehrstuhl.lehmann@jura.uni-bonn.de by July 22, 2019. The University of Bonn is an equal opportunity employer.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2019: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)“ features the following articles:

S.A. Kruisinga: **Commercial Courts in the Netherlands, Belgium, France and Germany – Salient Features and Challenges**

A new trend is emerging in continental Europe: several states have taken the initiative to establish a new commercial court which will use English as the language of the proceedings. Other states have provided that the English language may be used in civil proceedings before the existing national courts. Several questions arise in this context. Will such a new international (chamber of the) court only be competent to hear international disputes, or only a specific type of dispute? Will there be a possibility for appeal? Will extra costs be involved compared to regular civil proceedings? Which provisions of the law of procedure will the court be required to follow? These questions will be answered in relation to developments in the Netherlands, Belgium, France and Germany. For example, in Belgium, a draft bill, which is now being discussed in Parliament, provides for the establishment of a new court that is still to be established: the Brussels International Business Court. In the Netherlands, as of 1 January 2019, the Netherlands Commercial Court has been established, which will allow to conduct civil proceedings in the English language.

K. de la Durantaye: **Same same but different? Conflict rules for same sex-marriages in Germany and the EU**

Conflict rules for same-sex marriages are as hotly disputed as the legal treatment of such marriages in general. The German rules on the topic contain multiple inconsistencies. This is true even after the latest amendments to the relevant statute (EGBGB) entered into force in January 2019. Things become even more

problematic when the German rules are seen in conjunction with Rome III as well as the two EU Regulations on matrimonial property regimes and on property consequences of registered partnerships, both of which are applicable since January 29, 2019. Some instruments do treat same-sex marriages as marriages, others – notably the EGBGB – do not. Curiously, this leads to a preferential treatment vis-à-vis opposite-sex marriages. The EU Regulation on matrimonial property regimes does not define the term marriage and provides for participating member states to do so. At the same time, the ECJ extends its jurisdiction on recognition of personal statuses to marriages. Given all these developments, one might want to scrutinize the existing conflict rules for marriages as provided for in the EGBGB.

T. Lutzi: **Little Ado About Nothing: The Bank Account as the Place of the Damage?**

The Court of Justice has rendered yet another decision on the place of the damage in the context of prospectus liability. In addition to the question of international jurisdiction, it also concerned the question of local competence under Art. 5 No. 3 Brussels I (now Art. 7 No. 2 Brussels Ia) in a case where the claimant held multiple bank accounts in the same member state. The Court confirms that under certain circumstances, the courts of the member state in which these banks have their seat may have international jurisdiction, but avoids specifying which bank account designates the precise place of the damage. Accordingly, the decision adds rather little to the emerging framework regarding the localization of financial loss.

P.-A. Brand: **International jurisdiction for set-offs – Procedural prohibition of set-off and rights of retention in domestic litigation where the jurisdiction of a foreign court has been agreed for the claims of the Defendant**

The question whether or not a contractual jurisdiction clause entails an agreement of the parties to restrict the ability to declare a set-off in court proceedings to the forum prorogatum has been repeatedly dealt with by German courts. In a recent judgement – commented on below – the Oberlandesgericht München in a case between a German plaintiff and an Austrian defendant has held that the German courts may well have international jurisdiction under Article 26 of the Brussels Ia-Regulation also for the set-off declared by the defendant,

even if the underlying contract from which the claim to be set-off derived contained a jurisdiction clause for the benefit of the Austrian courts. However, the Oberlandesgericht München has taken the view that the jurisdiction clause for the benefit of the Austrian courts would have to be interpreted to the effect that it also contains an agreement of the parties not to declare such set-off in proceedings pending before the courts of another jurisdiction. That agreement would, hence, render the set-off declared in the German proceedings as impermissible. The judgment seems to ignore the effects of entering into appearance according to Article 26 of the Brussels Ia-Regulation. That provision must be interpreted to the effect that by not contesting jurisdiction despite a contractual jurisdiction clause for the claim to be set-off, any effects of the jurisdiction clause have been repealed.

P. Ostendorf: **(Conflict of laws-related) stumbling blocks to damage claims against German companies based on human rights violations of their foreign suppliers**

In an eagerly awaited verdict, the Regional Court Dortmund has recently dismissed damage claims for pain and suffering against the German textile discounter KiK Textilien und Non-Food GmbH („KiK“) arising out of a devastating fire in the textile factory of one of KiK’s suppliers in Pakistan causing 259 fatalities. Given that the claims in dispute were in the opinion of the court already time-barred, the decision deals only briefly with substantial legal questions of liability though the latter were upfront hotly debated both in the media as well as amongst legal scholars. In contrast, many conflict-of-laws problems arising in this setting were explicitly addressed by the court. In summary, the judgment further stresses the fact that liability of domestic companies for human rights violations committed by their foreign subsidiaries or independent suppliers is – on the basis of the existing framework of both Private International as well as substantive law – rather difficult to establish.

M. Thon: **Overriding Mandatory Provisions in Private International Law – The Israel Boycott Legislation of Arab States and its Application by German Courts**

The application of foreign overriding mandatory provisions is one of the most discussed topics in private international law. Article 9 (3) Rome I- Regulation allows the application of such provisions under very restrictive conditions and

confers a discretionary power to the court. The Oberlandesgericht Frankfurt a.M. had to decide on a case where an Israeli passenger sought to be transported from Frankfurt a.M. to Bangkok by Kuwait Airways, with a stop over in Kuwait City. The Court had to address the question whether to apply such an overriding mandatory provision in the form of Kuwait's Israel-Boycott Act or not. It denied that because it considered the provision to be "unacceptable". However, the Court was not precluded from giving effect to the foreign provision as a matter of fact, while applying German law to the contract. Since the air transport contract had to be performed partly in Kuwait, the Court considered the performance to be impossible pursuant to § 275 BGB. The judgement of the Court received enormous media coverage and was widely criticized for promoting discrimination against Jews.

C.F. Nordmeier: **The inclusion of immoveable property in the European Certificate of Succession: acquisition resulting from the death and the scope of Art. 68 lit. l) and m) Regulation (EU) 650/2012**

The European Certificate of Succession (ECS) has arrived in legal practice. The present article discusses three decisions of the Higher Regional Court of Nuremberg dealing with the identification of individual estate objects in the Certificate. If a transfer of title is not effected by succession, the purpose of the ECS, which is to simplify the winding up of the estate, cannot be immediately applied. Therefore, the acquisition of such a legal title in accordance with the opinion of the OLG Nuremberg is not to be included in the Certificate. In the list foreseen by Art. 68 lit. l and m Regulation 650/2012, contrary to the opinion of the Higher Regional Court of Nuremberg, it is not only possible to include items that are assigned to the claimant „directly" by means of a dividing order, legal usufruct or legacy that creates a direct right in the succession. Above all, the purpose of the ECS to simplify the processing of the estate of the deceased is a central argument against such a restriction. Moreover, it is not intended in the wording of the provision and cannot constructively be justified in the case of a sole inheritance under German succession law.

J. Landbrecht: **Will the Hague Choice of Court Convention Pose a Threat to Commercial Arbitration?**

Ermgassen & Co Ltd v Sixcap Financials Pte Ltd [2018] SGHCR 8 is the first judicial decision worldwide regarding the Hague Choice of Court Convention. The

court demonstrates a pro-enforcement and pro-Convention stance. If other Contracting States adopt a similar approach, it is likely that the Convention regime will establish itself as a serious competitor to commercial arbitration.

F. Berner: **Inducing the breach of choice of court agreements and "the place where the damage occurred"**

Where does the relevant damage occur under Article 7 (2) of the Brussels I recast Regulation (Article 5 (3) of the Brussels I Regulation), when a third party induces a contracting party to ignore a choice of law agreement and to sue in a place different from the forum prorogatum? The UK Supreme Court held that under Article 5 (3) of the Brussels I Regulation, the place where the damage occurs is not the forum prorogatum, but is where the other contracting party had to defend the claim. This case note agrees, but argues that the situation is now different under the Brussels I recast Regulation because of changes made to strengthen choice of court agreements. Thus, under the recast Regulation, the place where the damage occurs is now the place of the forum prorogatum. Besides the main question, the decision deals implicitly with the admissibility for claims of damages for breach of choice of law agreements and injunctions that are not antisuit injunctions. The decision also raises questions about the impact of settlement agreements on international jurisdiction.

D. Otto: **No enforcement of specific performance award against foreign state**

Sovereign immunity is often raised as a defence either in enforcement proceedings or in suits against foreign states. The decision of the U.S. District Court for the District of Columbia deals with a rarely discussed issue, whether an arbitration award ordering a foreign state to perform sovereign acts can be enforced under the New York Convention. The U.S. court held that in general a foreign state cannot claim immunity against enforcement of a Convention award, however that a U.S. court cannot order specific performance (in this case the granting of a public permit) against a foreign state as this would compel a foreign state to perform a sovereign act. Likewise, enforcement of an interest or penalty payment award has to be denied for sovereign immunity reasons if the payment does not constitute a remedy for damages suffered but is of a nature so as to compel a foreign state to perform a sovereign act. Whilst some countries consider sovereign immunity to be even wider, the decision is in line with the view in many

other countries.

A. Anthimos: **No application of Brussels I Regulation for a Notice of the National Association of Statutory Health Insurance Physicians**

The Greek court refused to declare a Notice of the National Association of Statutory Health Insurance Physicians in Rhineland-Palatinate enforceable. The Greek judge considered that the above order is of an administrative nature; therefore, it falls out of the scope of application of the Brussels I Regulation.

C. Jessel-Holst: **Private international law reform in Croatia**

This contribution provides an overview over the Private International Law Act of the Republic of Croatia of 2017, which applies from January 29, 2019. The Act contains conflict-of-law rules as well as rules on procedure. In comparison to the previous Act on Resolution of Conflicts of Laws with Provisions of Other States in Certain Matters which had been taken over after independence from former Yugoslavia in 1991, nearly everything is new. Full EU-harmonization was a key purpose of the reform. The 2019 Act also refers to a number of Hague Conventions. Habitual residence has been introduced as a main connecting factor. Renvoi is as a rule excluded. Many issues are addressed for the first time. For the recognition of foreign judgments, the reciprocity requirement has been abandoned.

G. Ring/L. Olsen-Ring: **New Danish rules of Private International Law applying to Matrimonial Property Matters**

The old Danish Law on the Legal Effects of Marriage, dating back to the year 1925, has been replaced by a new Law on Economic Relations Between Spouses, which was passed on May 30, 2017. The Law on Economic Relations Between Spouses entered into force on January 1, 2018. There is no general statutory codification of private international law in Denmark. The Law on Economic Relations Between Spouses, however, introduces statutory rules on private international law relating to the matrimonial property regime. The Danish legislature was inspired by the EU Matrimonial Property Regulation, but also developed its own approach. The EU Matrimonial Property Regulation is not applied in Denmark, as Denmark does not take part in the supranational cooperation (specifically the enhanced cooperation) in the field of justice and home affairs, and no parallel agreement has been concluded in international law

between the European Union and Denmark. The rules set out in the Danish Law on Economic Relations Between Spouses are based on the principle of closest connection. The main connecting factor is the habitual residence of both spouses at the time when their marriage was concluded or the first country in which they both simultaneously had their habitual residence after conclusion of the marriage. The couple is granted a number of choice-of-law options. In case both spouses have had their habitual residence in Denmark within the last five years, Danish law automatically applies.

The thing that should not be: European Enforcement Order bypassing acta jure imperii

In a dispute between two Cypriot citizens and the Republic of Turkey concerning the enforcement of a European Enforcement Order issued by a Cypriot court, the Thessaloniki CoA was confronted with the question, whether the refusal of the Thessaloniki Land Registry to register a writ of control against property of the Turkish State located in Thessaloniki was in line with the EEO Regulation.

I. THE FACTS

The dispute began in 2013, when two Cypriot citizens filed a claim for damages against the Republic of Turkey before the Nicosia Disctrict Court. The request concerned compensation for deprivation of enjoyment of their property since July 1974 in Kyrenia, a city occupied by the Turkish military forces during the 1974 invasion on the island. The Kyrenia District Court **(***Eparchiakó Dikastírio Kerýneias*), which operates since July 1974 in Nicosia, issued in May 2014 its

ruling, granting damages to the claimants in the altitude of 9 million €. Almost a year later, the latter requested the same court to issue a certificate of European Enforcement Order. The application was granted. Within the same year, the claimants filed an application before the Athens Court of first Instance for the recognition and enforcement of the Cypriot judgment. Prima facie it seems to be a useless step, however there was a rationale behind it; I will come back to the matter later on. The Athens court granted exequatur (Athens CFI 2407/2015, unreported).

Following almost a year of inactivity, the claimants decided to proceed to the execution of their title by attaching property of the Turkish State in Thessaloniki. Pursuant to domestic rules, the enforcement agent serves the distraint order to the debtor; afterwards, (s)he requests the order to be registered at the territorially competent land registry. Both actions are imperative by law. At this point, the chief officer of the land registry refused to proceed to registration, invoking Article 923 Greek Code of Civil Procedure (CCP) which reads as follows: *Compulsory enforcement against a foreign State may not take place without a prior leave of the Minister of Justice*. The claimants challenged the registrar's refusal by filing an application pursuant to Article 791 CCP, which aims at the obligation of the registrar to proceed to registration by virtue of a court order. The Thessaloniki 1. Instance court dismissed the application (Thessaloniki CFI 8363/2017, unreported). The claimants appealed.

II. THE RULING

The Thessaloniki CoA dismissed the appeal, confirming the first instance ruling in its entirety. It began from the right of the land registrar to a review of legality, thus the right to examine the request beyond possible formality gaps. It then referred to Articles 6.1 ECHR, 1 of the 1. Additional Protocol to the ECHR, and Articles 2.3 (c) and 14 of the 1966 International Covenant on Civil and Political Rights, in order to support the right to enforcement against a foreign State. The appellate court continued by analyzing Article 923 CCP and its importance in the domestic legal order. It emphasized the objective of the provision, i.e. to estimate potential repercussions and to avoid possible tensions with the foreign State in case of execution. The court founded its analysis on two ECHR rulings, i.e. the judgments in the *Kalogeropoulou and* Others *v*. *Greece and* Germany (59021/00),

and *Vlastos v. Greece* (28803/07) cases, adding two rulings of the Full Bench of the Greek Supreme Court from 2002. Finally, the court concluded that there has not been a violation of the EEO Regulation, stating that the process under Article 923 CCP is not to be considered as part of *intermediate proceedings needed to be brought in the Member State of enforcement prior ro recognition and enforcement*; hence, the rule in Article 1 of the EEO Regulation is not violated.

III. COMMENTS

In general terms, one has to agree with the outcome of the case. Nevertheless, there are a number of issues to be underlined, so that the reader gets the full picture of the dispute.

- The claim before the Kyrenia District Court bears some similarities with the ruling of the ECJ in the *Apostolidis/Orams* case: The Court decided then that: *The suspension of the application of the acquis communautaire in those areas of the Republic of Cyprus in which the Government of that Member State does not exercise effective control, provided for by Article 1(1) of Protocol No 10 on Cyprus to the Act concerning the conditions of accession [to the European Union] … does not preclude the application of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to a judgment which is given by a Cypriot court sitting in the area of the island effectively controlled by the Cypriot Government, but concerns land situated in areas not so controlled.* In both cases, the property under dispute was located in the Kyrenia district. The difference lies in the defendants: Unlike the *Orams* case, the respondent here was a foreign State. Article 4 Brussels I Regulation grants the right to claimants to avail themselves of domestic rules of jurisdiction, which is presumably what the claimants did in the case at hand.
- The issue of the EEO certificate seems to run contrary to Article 2.1 EEO Regulation. The matter was not examined by the Thessaloniki courts, which focused on the subject matter, i.e. the refusal of the land registrar on the grounds of Article 923 CCP.
- The exequatur proceedings in Greece seem to be superfluous, given that a EEO may be enforced without the need for a declaration of enforceability

(Article 5 EEO Regulation). One reason which possibly triggered additional exequatur proceedings might have been the fact that, unlike the EEO Regulation, the acta iure imperii clause was not included in the Brussels I Regulation (see Article 1.1). Still, the matter was examined in the *Lechouritou* case even before the entry into force of the Brussels I bis Regulation. Hence, it would not have made a difference in the first place.
- The appellate court focused on the compatibility of Article 923 CCP with the EEO Regulation. However, the claimants carried out the execution in Greece on the grounds of the Cypriot judgment, not the EEO certificate.

Finally, two more points which should not be left without a comment.

- Throughout the proceedings, the Turkish State demonstrated buddhistic apathy. There was not a single remedy brought forward, neither in Cyprus nor in Greece. It was a victory in absentia. A reason for this stance was surely the following: The property of the Turkish state in Thessaloniki hosts one of its General Consulates in Greece. This is not just another Turkish Consulate around the globe: It is built upon the place where the father of the Turkish Republic (Mustafa Kemal Atatürk) was born. It also includes the house where he was raised.
- The Thessaloniki CoA emphasized that a potential refusal of the Greek Minister of Justice to grant leave for execution would not harm the essence of the Cypriot judgment: Enforceability and res iudicata remain untouched; hence, the claimants may seek enforcement of the judgment in the foreign country, i.e. Turkey… The argument was 'borrowed' by the ruling of the ECJ in the *Krombach* case (which is cited in the text of the decision); therefore, it is totally alien to the case at hand. Even if the claimants were to find any assets of the Turkish Republic in the EU, like the Villa Vigoni in Italy, the ruling of the ICJ in the case *Germany v. Italy: Greece intervening)* would serve as a tool to grant jurisdictional immunity to the Turkish state.

IV. CONCLUSION

Article 923 CCP is the first line of defence for foreign states in Greece. In the

unlikely event that the Greek Minister of Justice grants leave for execution, a judgment creditor will be confronted with a second hurdle, if (s)he's aiming at the seizure of property similar to the case discussed here: the maxim ne impediatur legatio (ad hoc see Greek Supreme Court, 29 November 2017, decision no. 1937/2017, reported in English here). Hence, the chances to capitalize on the enforceable title are close to zero.

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The assistant is supposed to support the organizational and educational work of the chairholder, to participate in research projects of the chair as well as to teach his or her own courses (students' exercise). Applicants are offered the opportunity to obtain a doctorate.

Applicants are expected to be interested in the chair's main areas of research. They should be fluent in German and possess an above-average German First State Examination (at least "vollbefriedigend") or a foreign equivalent degree. In addition, a thorough knowledge of German civil law as well as conflict of laws, comparative law and/or international procedural law is a necessity. Severely handicapped persons will be preferred provided that their qualification is equal.

Please send your application (CV, certificates and, if available, further proofs of talent) as a single pdf file via e-mail to ipr3@jura.uni-freiburg.de no later than 15

July, 2019. Alternatively, the documents may be sent to Prof. Dr. Jan von Hein, Institut für ausländisches und internationales Privatrecht, Abt. III, Peterhof, Niemensstr. 10, D-79098 Freiburg (Germany). As the application documents will not be returned, applicants are kindly requested to submit only unauthenticated copies.

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Further information can be found here.

The European Court of Human Rights delivers its advisory opinion concerning the recognition in domestic law of legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother.

As previously reported on Conflicts of Laws, the ECtHR was requested an advisory opinion by the French Court of Cassation.

On April 10th, the ECtHR delivered its first advisory opinion. It held that:

“In a situation where a child was born abroad through a gestational surrogacy arrangement and was conceived using the gametes of the intended father and a third-party donor, and where the legal parent-child relationship with the intended father has been recognised in domestic law,

1. the child’s right to respect for private life within the meaning of Article 8 of the European Convention on Human Rights requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the “legal mother”;
2. the child’s right to respect for private life does not require such

recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; another means, such as adoption of the child by the intended mother, may be used".

For a brief summary of the advisory opinion and the case background see the Press Release.

For further details see the Advisory Opinion.