Issues 2018.3 and 4 Dutch Journal on Private International Law (NIPR)

The Dutch Journal on Private International Law (*Nederlands Internationaal Privaatrecht)* publishes papers in Dutch and in English.

Here are the abstracts of the last two issues of 2018.

Issue 2018.3

Ian Sumner, 'Editorial: Groundbreaking decision or a tiny tremor? The Court of Justice decision in *Coman*', p. 1-3.

The third issue of 2018 of the Dutch Journal on Private International Law, Nederlands Internationaal Privaatrecht, contains contributions on the recognition of legal parentage established abroad, the recent decision rendered by the Supreme Court of the Netherlands on recognition and enforcement of annulled arbitral awards (NLMK), the main private international law aspects of the new Geo-blocking Regulation (especially with regard to cross-border consumer contracts), the most glaring contradictions and ambiguities in jurisprudence on the free movement of companies in the EU and the decision of the Court of Justice of the European Union in Bolagsupplysningen about the internet, freedom of speech and the protection of privacy.

Susan Rutten, 'Erkenning van in het buitenland gevestigde afstamming', p. 4-24.

This contribution discusses current case law on the recognition of legal parentage established abroad. The issues that are involved concern the descent from polygamous marriages, descent from invalid, void or non-existing marriages, and the recognition of children abroad by married men. With the judgment of the Dutch Supreme Court of 19 May 2017 (ECLI:NL:HR:2017:942; NJ 2017/435) on the descent of children born from polygamous marriages in mind, it will be examined which interests judges consider to be essential when assessing and deciding the foreign parentage, and whether or not the foreign parentage can be

recognized as legal parentage in the Netherlands. Th e conclusion of the article is that the principles involved in the judicial decisions, in particular the principles of family life and public policy, do not seem to be always consistently relied upon by the Supreme Court.

D.G.J. Althoff, 'Internationale arbitrage en IPR: toepassing van erkenningsvoorwaarden uit het Nederlandse commune IPR bij erkenning en tenuitvoerlegging van vernietigde buitenlandse arbitrale vonnissen onder het Verdrag van New York 1958', p. 25-43.

This article discusses the recent decision rendered by the Supreme Court of the Netherlands on recognition and enforcement of annulled arbitral awards (NLMK). The court ruled that the wording 'may be refused' in Article V(1) preamble of the New York Convention (NYC) grants the court a certain margin of discretion to recognise a foreign arbitral award and grant enforcement even if in the specific case one or more of the grounds for refusal set out in Article V(1) NYC apply. Only under special circumstances does Article V(1)(e) NYC not prevent the court from using the margin of discretion to recognise or grant enforcement of annulled foreign arbitral awards. The special circumstance focused on in this article is the one that arises if the foreign judgment that annuls the award is not eligible for recognition in the Netherlands on the basis that one or more conditions for the recognition of foreign judgments under Dutch private international law are not fulfilled. The article commences with a short description of the New York Convention and Article V(1)(e) NYC. After analysing the Yukos Capital/Rosneft-decision and the NLMK-decision within the broader discussion on recognition and enforcement of annulled arbitral awards under the New York Convention, a comparison of both decisions is made. Further, the article discusses the application of the conditions for the recognition of foreign judgments under Dutch private international law in recognition and enforcement procedures of annulled foreign arbitral awards.

María Campo Comba, 'The new Geo-blocking Regulation: general overview and private international law aspects', p. 44-57.

This contribution will focus on the main private international law aspects of the new Geo-blocking Regulation, especially with regard to cross-border consumer contracts. The Geo-blocking Regulation has recently entered into force in the EU with the objective of preventing unjustified discrimination regarding online sales.

The new Regulation is of special interest from a private international law point of view because of the possible impact on the interpretation of the EU rules on jurisdiction and applicable law concerning cross-border consumer contracts. The present contribution will analyse whether the obligations imposed by the Geo-blocking Regulation might affect the concept of 'directed activities' laid down in the Brussels I bis Regulation and Rome I Regulation and interpreted by the ECJ.

Aleksandrs Fillers, 'Contradictions and ambiguities in ECJ case-law on free movement of companies', p. 58-72.

The present article looks at some of the most glaring contradictions and ambiguities in jurisprudence on the free movement of companies in the EU. The first major case on free movement of companies was rendered by the ECJ in 1988. After this, the Court rendered a few landmark cases that step by step reshaped the freedom granted to companies in the internal market. In 2017, the ECJ rendered the Polbud case, thereby granting companies more freedom than ever before to choose the legal system they consider best for reincorporation. The road towards greater corporate mobility has been rocky and not always transparent. The ECJ does not expressly overrule its previous cases, but rather creates new distinctions and constantly re-interprets its older jurisprudence. As a result, the judgments are often not only ambiguous and mutually contradictory but even self-contradictory. The author makes an attempt at identifying these contradictions and ambiguities and analyses their causes and their relevance within the current jurisprudence.

Jan-Jaap Kuipers, 'Nieuwe ronde, nieuwe kansen? Een nieuw arrest van het HvJEU over het internet, vrijheid van meningsuiting en bescherming van de persoonlijke levenssfeer: HvJEU 17 oktober 2017, zaak C-194/16 (Bolagsupplysningen)', p. 73-80.

The decision of the Court of Justice of the European Union in e-Date Advertising has provoked widespread criticism in academic literature. In Bolagsupplysningen, the CJEU has taken the opportunity to confirm its earlier decision. The CJEU also clarified the right of a victim to bring proceedings before the court of its centre of interest. The CJEU however found that a person alleging that his personality rights have been infringed by the publication of incorrect information about him on the internet and the failure to remove comments relating to him cannot bring an action for rectification of that information and removal of those comments

before the courts of the individual Member States in which the information published on the internet is or was accessible. Although the CJEU does not go back on its earlier case-law, the concerns raised in legal writings appear to have been taken seriously.

Issue 2018.4

Paulien van der Grinten, '2018: A year of anniversaries in private international law, p. 1-4.

C.A. de Visser, 'The EU conflict of laws rules on the law governing the effects of an assignment against third parties: some fundamental problems of the Proposal', p. 5-18.

The EU's Proposal for conflict of laws rules on the law governing the effects of an assignment against third parties aims to provide predictability for parties involved in an assignment. This contribution concludes that, unfortunately, the Proposal's suggested conflict of laws rule, based on which the law of the assignor's habitual residence governs the third-party effects, does not provide that predictability. It also concludes that there are some other fundamental problems with the Proposal and the assumptions underlying it. Most importantly, it questions whether the Proposal's suggestion that priority between competing assignments is determined by the assignment that is valid and effective first in time has a proper legal basis. It also analyses what law governs the effects of an assignment against third parties (other than the debtor of the assigned claim) and concludes that this is the law governing the assigned claim.

Aleksandrs Fillers, 'The curious evolution of ECJ's case-law on personal names: beyond the recognition of decisions, p. 19-33.

Free movement of EU citizens has significant influence on the law of personal names in Europe. Since the ruling in the Grunkin-Paul case, the non-recognition of personal names obtained in another Member State, under certain circumstances, may be qualified as an impediment to free movement of EU citizens. The Grunkin-Paul case seemed to operate within the paradigm of recognition of decisions. The author of the article argues that the said paradigm is not a precise conceptualization of the ECJ's method. This is shown by two later rulings in the Sayn-Wittgenstein and Runevi?-Vardyn cases. The Court's reasoning in the Sayn-Wittgenstein case shows that the recognition method used by the ECJ

may expand to recognition of situations that do not validly exist in any legal order at the moment when recognition is requested. Pursuant to the Runevi?-Vardyn case, non-recognition of the spelling of the personal name may not be an impediment to free movement of EU citizens. The said cases show that the pillar of the Court's methodology is the so-called 'serious inconvenience' test. The test determines the extent to which free movement of EU citizens requires recognition of personal names. Since the ruling in the Grunkin-Paul case, the test has evolved. In the Grunkin-Paul case it functioned within the paradigm of recognition of foreign decisions. Currently, it may be used to restrict that form of recognition or to expand recognition beyond that of foreign decisions.

Georgia Antonopoulou, 'Defining international disputes – Reflections on the Netherlands Commercial Court proposal', p. 34-49.

The last decade has seen the rise of international commercial courts also known as international business courts in Europe. Apart from the use of English as court language and the adoption of distinct procedural rules, the emerging courts share the aim to solely handle international disputes. Hence, the internationality of the dispute sets the jurisdictional scope of the international commercial courts and draws the line between these and the rest of the domestic courts. This article focuses on the upcoming Netherlands Commercial Court (NCC) and discusses the provisions defining the international character of a dispute under the respective proposal. First, the NCC internationality criteria are compared to the respective criteria under the Brussels Ibis Regulation and the Hague Convention on Choice of Court Agreements. Subsequently, this article zooms in on two internationality criteria, namely the application of foreign law and the use of a foreign language in the contract. In a comparative way, the suitability of these criteria to effectively encompass disputes with an international aspect is explored. This article concludes highlighting the need for narrow internationality criteria that are aligned with the criteria used under the Brussels Ibis Regulation and the Hague Convention on Choice of Court Agreements so as to safeguard the foreseeability of the NCC's jurisdiction and square its professed aim to solely handle international disputes.

M.H. ten Wolde, '*Oberle*. De juiste balans tussen de belangen van nalatenschapsgerechtigden en het belang van rechtszekerheid? Hof van Justitie EU 21 juni 2018, C-20/17, NIPR 2018, 295 (*Oberle*)', p. 50-58.

In ECJ Case C-20/17 (Oberle) of 21 June 2018 the central question is whether international jurisdiction in respect of the issuing of national certificates of succession regarding cross-border succession cases is governed by the jurisdiction rules of Succession Regulation No. 650/2012. The ECJ answered this question in the affirmative. Its argumentation for this decision is however very weak. At the same time the decision has a huge impact on the cross-border practice of winding up estates. A swift settlement of a cross-border estate by using both a national and a European certificate of succession from different participating Member States is no longer possible. The ECJ wrongly gives priority to legal certainty over the interests of those entitled to the estate of the deceased.

J.A. Pontier, 'Boekbespreking: Kirsten Henckel, Cross-Border Transfers of Undertakings – A European Perspective; Iris A. Haanappel-van der Burg, Grensoverschrijdende overgang van onderneming vanuit rechtsvergelijkend en conflictenrechtelijk perspectief', p. 59-68.

Job Vacancy: PhD Position/Fellow at the University of Hamburg, Germany

Professor Dr Peter Mankowski is looking for a highly skilled and motivated PhD candidate and fellow (Wissenschaftliche/r Mitarbeiter/in) to work at the Chair for Civil Law, Comparative Law and International Private and Procedural Law, University of Hamburg, Germany, on a part-time basis (50%) as of 1 June 2019.

The successful candidate holds a first law degree (ideally the First German State Examination) and is interested in civil law and international private and procedural law. A very good command of German and English is expected; additional language skills are an advantage.

The fellow will be given the opportunity to conduct his/her PhD project (according to the Faculty's regulations). The position is paid according to the German public salary scale E-13 TV-L, 50%. The initial contract period is three years, with an option to be extended. Responsibilities include research and teaching (with as independent teaching obligation of 2,25 hours per week during term time).

If you are interested in this position, please send your application (cover letter; CV; and relevant documents and certificates, notably university transcripts and a copy of law degree) to

Universität Hamburg
Fakultät für Rechtswissenschaft
Seminar für Internationales Privat- und Prozessrecht
Prof. Dr. Peter Mankowski
Rothenbaumchaussee 33
20148 Hamburg

by 27 March, 2019.

Further information can be found here.

Job Vacancy: PhD Position/Fellow at the University of Bonn, Germany

Professor Dr Matthias Lehmann is looking for a highly skilled and motivated PhD candidate and fellow (Wissenschaftliche/r Mitarbeiter/in) to work at the Institute for Private International and Comparative Law, University of Bonn, Germany, on a part-time basis (50%) as of 1 April 2019.

The successful candidate holds a first law degree (ideally the First German State Examination) and is interested in the international dimensions of private law, in

particular private international law, European law and/or comparative law. A very good command of German and English is expected; good IT skills are required.

The fellow will be given the opportunity to conduct his/her PhD project (according to the Faculty's regulations). 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 two to three years, with an option to be extended; the candidate is free to leave before at any point subject only to timely notification. Responsibilities include supporting the Institute's director in his research and teaching as well as independent teaching obligations (2 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 lehrstuhl.lehmann@jura.uni-bonn.de by February 4, 2019. The University of Bonn is an equal opportunity employer.

The Hague Convention on the International Protection of Adults – A position paper by experts involved in the ELI Adults' Project

The European Law Institute (ELI) has launched in 2017 a project on *The Protection of Adults in International Situations*.

The adults to which the project refers are persons aged 18 or more who are not in a position to protect their interests due to an impairment or insufficiency of their personal faculties.

The project purports to elaborate on the resolution of 1 June 2017 whereby the European Parliament, among other things, called on the European Commission to submit 'a proposal for a regulation designed to improve cooperation among the

Member States and the automatic recognition and enforcement of decisions on the protection of vulnerable adults and mandates in anticipation of incapacity'.

The Commission has made known that it does not plan to submit such a proposal in the near future. At this stage, the Commission's primary objective is rather the ratification of the Hague Convention of 13 January 2000 on the International Protection of Adults by the Member States that have not yet done so.

The ELI project builds on the idea that the Convention, which is currently in force for twelve States (ten of which are also Member States of the Union), generally provides appropriate answers to the issues raised by the protection of adults in situations with a foreign element. That said, the team of experts charged with the project has taken the view that it would be desirable for the Union to legislate on the matter, in a manner consistent with the Convention, with the aim of improving the operation of the latter among the Member States.

The ultimate goal of the project is to lay down the text of the measure(s) that the Union might take for that purpose.

While the project is still in progress, a position paper has been issued on 3 December 2018, signed by some of the members of the project team, to illustrate the main views emerged so far from the discussion.

The paper suggests that the Union should consider the adoption of measures aimed, *inter alia*, to:

(*i*) enable the adult concerned, subject to appropriate safeguards, to choose in advance, at a time when he or she is capable, the Member State whose courts should have jurisdiction over his or her protection: this should include the power to supervise guardians, persons appointed by court or by the adult (by way of a power of attorney), or having power *ex lege* to take care of the adult's affairs;

(*ii*) enlarge the scope of the adult's choice of law, so that he or she can also choose at least the law of the present or a future habitual residence, in addition to the choices currently permitted under Article 15 of the Hague Convention of 2000;

(*iii*) outline the relationship between the rules in the Hague Convention of 2000 and the rules of private international law that apply in neighbouring areas of law

(such as the law of contract, maintenance, capacity, succession, protection against violence, property law, agency);

(*iv*) specify the requirements of formal and material validity of the choice of the law applicable to a private mandate, including the creation and exercise (and supervision by the courts) of such mandates;

(*v*) address the practical implications of a private mandate being submitted (by virtue of a choice of law, as the case may be) to the law of a State whose legislation fails to include provisions on the creation or supervision on such mandates, e.g. by creating a "fall-back" rule in cases of choice of the "wrong" law, which does not cover the matters addressed (or at least applying Article 15(1) of the Hague Convention of 2000);

(*vi*) extend the protection of third parties beyond the scope of Article 17 of the Hague Convention of 2000 to the content of the applicable law, and possibly also to lack of capacity (or clarifying that the latter question is covered by Article 13(1) or the Rome I Regulation);

(*vii*) make it easier for those representing and/or assisting an adult, including under a private mandate, to provide evidence of the existence and scope of their authority in a Member State other than the Member State where such authority has been granted or confirmed, by creating a European Certificate of Powers of Representation of an Adult (taking into account the experience developed with the European Certificate of Succession);

(*viii*) clarify and make more complete the obligations and procedures under Articles 22, 23 and 25 of the Convention in order to ensure 'simple and rapid procedures' for the recognition and enforcement of foreign measures; further reflection is needed to determine whether, and subject to which safeguards, the suppression of exequatur would be useful and appropriate for measures of protection issued in a Member State;

(*ix*) facilitate and encourage the use of mediation or conciliation.

The ELI project will form the object of a short presentation in the framework of a conference on *The Cross-border Protection of Vulnerable Adults* that will take place in Brussels on 5, 6 and 7 December 2018, jointly organised by the European Commission and the Permanent Bureau of the Hague Conference on Private

International Law.

Vacancy at the University of Bremen: Paid PhD-Researcher Position in Private International Law

The **University of BremenLaw School** will recruit a **doctoral researcher in Private International Law** ('wissenschaftlicher Mitarbeiter' m/w/d), part time 50 per cent, starting in early 2019, for a duration of 36 months.

The researcher will work on the project '*Rome Regulations. Commentary, 3rd ed. (Calliess/Renner eds.)*'. In addition, there is a teaching obligation of 2 hours/week, 28 weeks/year in small groups under the supervision of Professor Calliess. Next to that candidates are expected to work on a PhD-thesis (*doctor iuris*), preferably in the area of private international law, international civil procedural law, or transnational private law.

Candidates shall hold a law degree comparable to the German 'Prädikatsexamen' (4-5 years of studies and graduation among the top 20 per cent of the year). A very good command of English is required, while a good command of German is an additional asset.

The position will provide a net income of ca. 1200-1300 €/month and includes social security. For further inquiries and to apply contact Professor Calliess at g.calliess@uni-bremen.de.

Deadline for applications with a letter of motivation, CV and certificates: **7 January 2019**.

The legally binding call for applications **A305/18**is in German only and to be

found here.

Blockchain Networks and European Private International Law

Written by Anton S. Zimmermann, Institute for Comparative Law, Conflict of Laws and International Business Law (Heidelberg)

Blockchain technology and its offspring have recently attracted considerable attention in both media and scholarship. Its decentralised nature raises several legal questions. Among these are, for example, the challenges that blockchain technology poses to data protection laws and the threats it creates with regard to the effective enforcement of legal claims.

This post sheds light on issues of private international law relating to blockchain networks from a European perspective.

The concept of blockchain technology and its fields of application

Blockchain technology – put simply – involves two fundamental concepts. *Firstly*, data is written into so-called "blocks". Each block of data is connected to its respective predecessor using so-called "hashes" that are calculated for each individual block. Consequently, each block does not only include its own hash but also the hash of its predecessor, thereby fixating consecutive blocks to one another. The result is a chain of blocks – hence the name blockchain. *Secondly*, the entire blockchain is decentrally stored by the networks' members. Whenever a transaction concerning the blockchain is requested, it isn't processed by just one member. On the contrary: several members check the transaction and

afterwards share their result with the other members in what can best be described as a voting mechanism: From among potentially different results provided by different members, the result considered correct by the majority prevails. This mechanism bears the advantage that any attempt to tamper with data contained in a blockchain is without consequence as long as only the minority of members is affected.

The potential fields of application for blockchain technology are manifold and far from being comprehensively explored. For example, blockchain technology can replace a banking system in the context of cryptocurrencies such as Bitcoin or it can be used to de-personalize monitoring and sanctioning of non-performance within a contractual relation. In short: Blockchain technology is an option whenever data is to be stored unalterably in a certain order without a (potentially costly) centralised monitoring entity.

Applicable rules of private international law

The first issue regarding blockchain technology and private international law concerns the applicable conflict rules. Blockchain technology involves a technical voting mechanism and, hence, requires a certain degree of cooperation between the members of the network. One might, therefore, be tempted to assume that blockchain networks constitute some kind of company. If this were indeed the case, the written conflict rules, especially those of the Rome I Regulation, would not be applicable (cf. Art. 1(1) lit. f) Rome I Regulation) and the unwritten conflict rules relating to international companies would claim application instead. However, this approach presupposes that the factual cooperation within a blockchain network suffices to create a company in the sense of European private international law. This is, however, not the case. The constitution of blockchain networks is only cooperative in a technical way, not in a legal one. The network is not necessarily based on a (written or unwritten) cooperation agreement and, therefore, lacks an essential prequisite of a company. Consequently, the determination of the law applicable to blockchain technology is not necessarily a question of international company law. Parties are, however, not precluded from creating a company statute that reflects the decentral structures of blockchain technology, whereas the mere decision to engage in a blockchain network does not suffice to create such a company.

Thus, the private international law of blockchain technology must also take into

account the Rome I Regulation as well as the Rome II Regulation. Unfortunately, blockchain networks *per se* are not suitable as connecting factors: *firstly*, a *de*centralised network naturally escapes the classical European principle of territorial proximity. *Secondly*, the use of blockchain technology is usually not an end in itself but functionally subordinate to the purpose of another act, e.g. a contract, a company or a tort. This factor should, however, not be seen as a problem, but as a hint at a potential solution: although a *super*ordinate act may render a blockchain network insufficient to determine the substantive law, the superordinate act itself can serve as a connecting factor.

The following two examples illustrate the proposed method of accessory connection and show that the European legal framework relating to private international law is capable to cope with several questions raised by novel phenomena such as blockchain technology. The remaining questions have to be dealt with on the basis of the principle of proximity.

First scenario: blockchain networks within centralised contracts

Blockchain technology often serves to achieve the goal of a centralised act. In this case, legal questions regarding the use, misuse and abuse of blockchain technology, e.g. access rights and permissions to write regarding data contained in a blockchain, should be governed by the substantive law governing the superordinate act.

To give an example: The parties of a supply chain decide to implement a blockchain in order to collectively store data concerning (1) when and in what quantity products arrive at their warehouse and (2) certificates of quality checks performed by them. As a result, production routes and quality control become more transparent and cost-efficient along the supply chain. Blockchain technology can thus be used e.g. to ensure the authenticity of drugs, food safety etc. The legal questions regarding the smart contract should in this scenario be governed by the substantive law governing the respective purchase agreement between the parties in question. The choice of law rules of the Rome I Regulation, hence, also determine the substantive law regarding the question how blockchain technology may or may not be used in the context of the purchase agreement. The application of blockchain technology becomes a part of the respective contract.

If one were to apply the substantive law governing the contract only to the contract itself but not to blockchain technology, one would create unjust distinctions: The applicable law should not depend on whether the parties pay an employee to regularly check on their warehouse and issue certificates in print, or whether they employ blockchain technology, achieving the same result.

Second scenario: blockchain networks within *de*centralised companies

The scenario described above shows that the decentralised nature of blockchain networks does not necessarily require special connecting criteria. This is a consequence of the networks' primarily serving function to the respective superordinate entity.

Difficulties arise when parties agree on a company statute whose content reflects the decentralisation of blockchain technology. In this scenario, there is a decentral company that utilises only decentral technology as its foundation. A much-discussed case of this kind was "The DAO", a former company based on blockchain technology. The DAO's establishment was financed by investors providing financial resources in exchange for so-called tokens. These tokens can be described as the digital counterpart of shares and hence as an expression of the respective investor's voting rights. Within the resulting investment community, voting rights were exercised in order to decide on investment proposals. The results of the votes were implemented automatically. The company thus consisted only of the investors and information technology but had no management body, no administrative apparatus, and no statutory seat.

Hence, the DAO did not only lack a territorial connection on the level of information technology, but also on the level of the companies' legal constitution: it neither had an administrative seat nor a statutory seat. The connecting factors usually applied to determine the law applicable to companies were, therefore, ineffective. Because the DAO was a company, it was also exempt from the scope of the Rome I Regulation (cf. Art. 1 (2) lit. f. Rome I Regulation).

This vacuum of traditional conflict rules necessitates the development of new ones. There is no other valid connecting factor that could result in a uniform *lex societatis*: Especially the habitual residence or nationality of the majority of members is arbitrary as the company is built on a concept of decentralism and

territorial detachment. Moreover, possible membership changes would lead to an intertemporally fluctuating statute whose current status could hardly be determined. The lack of a uniform connecting factor raises the question whether or not the ideal of a uniform *lex societatis*can be upheld. The fact that members of the DAO do not provide a feasible uniform connecting factor suggests a fragmentation of the applicable law (*dépeçage*).

Assuming that there is no uniform *lex societatis* for the DAO and that the applicable substantive law has to be fragmented, acts by the company become conceivable connecting factors. One might, for example, assume that preliminary questions concerning the company, i.e. its legal capacity, are subject to the substantive law that would govern the act in question. If the DAO enters into a contract that – given its validity – is governed by German substantive law according to Art. 4 of the Rome I-Regulation, German law should also determine the legal capacity of the DAO with respect to this particular contract. One might object that the Rome I-Regulation exempts both companies and legal capacity from its scope of application. This, however, only means that the Regulation is *not binding* within those fields. As the conflict rules of International company law do not lead to conceivable results, the principle of proximity has to be the guiding factor in the search for a new unwritten conflict rule. As the closest territorial connections of decentral organisations are their respective acts, e.g. contracts, the principle of proximity suggests that the respective act is what determines the closest connection of the company. The resulting conflict rule states an accessory subjection of the *lex societatis* to the law governing the company's respective acts. While the proposed solution does indeed lead to an *indirect* application of the Rome I Regulation, it nonetheless constitutes a self-reliant, unwritten conflict rule which is consequently not precluded by the catalogue of exemptions contained in the Rome I Regulation.

This fragmentation of applicable laws turns a membership in the DAO into a risky und legally uncertain endeavour, as – neglecting the tremendous practical and legal problems of the enforcement of claims – different legal orders impose different requirements for legal capacity, limitation of liability and other privileges.

Concluding thoughts

Blockchain technology is a novel phenomenon, but it does – in most cases – not

necessitate new connecting factors or conflict rules. If, however, the legal entity in question mirrors the decentralised structure of a blockchain network, the legal assessment becomes more complicated.

In those cases, the usually uniform*lex societatis*has to be fragmented which leads to a high chance of personal liability of the members. Whether or not one accepts this fragmentation largely depends on the definition of the hierarchy of technical-economic progress and the *lex lata*. In my opinion, technical developments may and should act as an impetus to *legislators*for legislative amendments but should not prevail over the existing rules of law. Those who desire legal advantages – such as a limitation of liability or even a uniform statute – must in exchange fulfil and adhere to the laws' requirements.

This post is based on A. Zimmermann, Blockchain-Netzwerke und Internationales Privatrecht – oder: der Sitz dezentraler Rechtsverhältnisse, published in IPRax 2018, 568 ff. containing references to further literature.

The Impact of the EU-UK Draft Agreement on Judicial Cooperation in Civil and Commercial Matters

Yesterday, on 14 November 2018, the UK cabinet, after five hours of deliberation, accepted the Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on the same day. The text (TF 50 [2018] 55) contains provisions on judicial cooperation in civil and commercial matters in Articles 66 to 69. Pursuant to Article 66(a) of the Draft Agreement, the Rome I Regulation shall apply in the UK in respect of contracts concluded before the end of the transition period, which will be on 31 December 2020 (Article 126 of the Draft Agreement). Under Article 66(b) of the Draft Agreement, the Rome II Regulation shall apply in the UK in respect of events giving rise to damage, where

such events occurred before the end of the transition period. The remaining EU Member States will continue to apply the Rome I and II Regulations in EU-British relations anyway following the principle of universal application (Article 2 Rome I, Article 3 Rome II).

Article 67 of the Draft Agreement deals with jurisdiction, recognition and enforcement of judicial decisions, and related cooperation between central authorities. This article reads as follows

"1. In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, in respect of legal proceedings instituted before the end of the transition period and in respect of proceedings or actions that are related to such legal proceedings pursuant to Articles 29, 30 and 31 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council, Article 19 of Regulation (EC) No 2201/2003 or Articles 12 and 13 of Council Regulation (EC) No 4/2009, the following acts or provisions shall apply:

(a) the provisions regarding jurisdiction of Regulation (EU) No 1215/2012;

(b) the provisions regarding jurisdiction of Regulation (EU) 2017/1001, of Regulation (EC) No 6/2002, of Regulation (EC) No 2100/94, of Regulation (EU) 2016/679 of the European Parliament and of the Council and of Directive 96/71/EC of the European Parliament and of the Council;

(c) the provisions of Regulation (EC) No 2201/2003 regarding jurisdiction;

(d) the provisions of Regulation (EC) No 4/2009 regarding jurisdiction.

2. In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, the following acts or provisions shall apply as follows in respect of the recognition and enforcement of judgments, decisions, authentic instruments, court settlements and agreements:

(a) Regulation (EU) No 1215/2012 shall apply to the recognition and enforcement of judgments given in legal proceedings instituted before the end of the transition period, and to authentic instruments formally drawn up or registered and court settlements approved or concluded before the end of the transition period;

(b) the provisions of Regulation (EC) No 2201/2003 regarding recognition and enforcement shall apply to judgments given in legal proceedings instituted before the end of the transition period, and to documents formally drawn up or registered as authentic instruments, and agreements concluded before the end of the transition period;

(c) the provisions of Regulation (EC) No 4/2009 regarding recognition and enforcement shall apply to decisions given in legal proceedings instituted before the end of the transition period, and to court settlements approved or concluded, and authentic instruments established before the end of the transition period;

(d) Regulation (EC) No 805/2004 of the European Parliament and of the Council shall apply to judgments given in legal proceedings instituted before the end of the transition period, and to court settlements approved or concluded and authentic instruments drawn up before the end of the transition period, provided that the certification as a European Enforcement Order was applied for before the end of the transition period.

3. In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, the following provisions shall apply as follows:

(a) Chapter IV of Regulation (EC) No 2201/2003 shall apply to requests and applications received by the central authority or other competent authority of the requested State before the end of the transition period;

(b) Chapter VII of Regulation (EC) No 4/2009 shall apply to applications for recognition or enforcement as referred to in point (c) of paragraph 2 of this Article and requests received by the central authority of the requested State before the end of the transition period;

(c) Regulation (EU) 2015/848 of the European Parliament and of the Council shall apply to insolvency proceedings, and actions referred to in Article 6(1) of that Regulation, provided that the main proceedings were opened before the end of the transition period;

(d) Regulation (EC) No 1896/2006 of the European Parliament and of the Council shall apply to European payment orders applied for before the end of the

transition period; where, following such an application, the proceedings are transferred according to Article 17(1) of that Regulation, the proceedings shall be deemed to have been instituted before the end of the transition period;

(e) Regulation (EC) No 861/2007 of the European Parliament and of the Council shall apply to small claims procedures for which the application was lodged before the end of the transition period;

(f) Regulation (EU) No 606/2013 of the European Parliament and of the Council shall apply to certificates issued before the end of the transition period."

Article 68 of the Draft Agreement concerns ongoing judicial cooperation procedures, in particular within the framework of the EU Regulations on cross-border service of documents and the taking of evidence. Article 69 of the Draft Agreement contains miscellaneous provisions dealing, inter alia, with legal aid, mediation, and relations with Denmark.

The full text of the Draft Agreement is available on the Commission's website here and in the press, e.g. via the Guardian's website here. It remains to be seen, however, whether the British Parliament will ratify this text (see here). Stay tuned!

Legal parentage of children born of a surrogate mother: what about the intended mother?

On October 5th, The *Cour de Cassation*, the highest court in France for private law matters, requested an advisory opinion of the ECtHR (Ass. plén. 5 octobre 2018, n°10-19053). It is the first time a Contracting State applies to the ECtHR for an advisory opinion on the basis of Protocol n° 16 which entered into force on August

1st, 2018. The request relates to the legal parentage of children born to a surrogate mother. More specifically, it concerns the intended mother's legal relationship with the child.

The *Mennesson* case is again under the spotlight, after 18 years of judicial proceedings. Previous developments will be briefly recalled, before the Advisory opinion request is summarized.

Previous developments in the *Mennesson* case:

A French couple, Mr and Mrs Mennesson, went to California to conclude a surrogacy agreement. Thanks to the surrogate mother, twins were born en 2000. They were conceived with genetic material from the intended father and eggs from a friend of the couple. The Californian Supreme Court issued a judgment referring to the couple as genetic father and legal mother of the children. Birth certificates were issued and the couple asked for their transcription into the French civil status register.

French authorities refused the transcription, arguing that it would be contrary to public policy. Surrogate motherhood, in particular, is forbidden under article 16-7 of the Civil Code. Such agreements are then considered void and resulting foreign birth certificates establishing parentage are considered contrary to public policy (Cass. Civ. 1ère, 6 avril 2011, n°10-19053).

As a last resort, The Mennesson family brought a claim before the ECtHR. They claimed that the refusal to transcribe the birth certificate violated their right to respect for private and family life. While the Court considered that the parent's right to family life was not infringed, it ruled that the refusal to transcribe the birth certificates violated the children's right to identity and was not in their best interest. As a consequence, it ruled that the refusal to establish the legal parentage of the indented parents was a violation of the children's right to private life, particularly so if the indented father was also the biological father.

After the ECtHR ruling: the French landscape

After the ECtHR ruling, the *Cour de Cassation* softened its position. In 2015, sitting in *Assemblée plénière*, it ruled that the mere fact that a child was born of a surrogate mother did not in itself justify the refusal to transcribe the birth certificate, as long as that certificate was neither unlawful nor forged, nor did it

contain facts that did not correspond to reality (Ass. plén., 3 juillet 2015, n° 14-21323 et n°15-50002).

As a consequence, the Court only accepted the transcription of foreign birth certificate when the intended father is also the biological father. When it came to the other intended parent, the *Cour de Cassation* refused the transcription. By so doing, the *Cour de Cassation* reiterates its commitment to the *Mater semper certa* principle as the sole basis of its conception of motherhood. Meanwhile, in 2017, the *Cour de Cassation* signalled that the genetic father's spouse could adopt the child if all the requirements for adoption were met and if it was in the best interest of the child (Cass. Civ. 1ère, 5 juillet, 2017, n°15-28597, n°16-16455, and n°16-16901 ; 16-50025 and the press release)

However, the Mennessons' fight was not over yet. Although according to the latest decisions, it looked like both Mr and Mrs Mennesson could finally establish their kinship with the twins, they still had to overcome procedural obstacles. As the Cour de Cassation had refused the transcription in its 2011 judgment which had become final, the parents were barred from applying for it again. As pointed out by the ECtHR in the *Foulon and Bouvet v. France* case (21/07/2016, Application n°9063/14 and 10410/14), French authorities failed to provide an avenue for the parties involved in cases adjudicated before 2014 to have them re-examined in the light of the subsequent changes in the law. Thus, France was again held to be in violation of its obligations under the Convention. (See also *Laborie v. France*, 19/01/2017, Application n°44024/13).

In 2016, the legislator adopted a new procedure to allow for the review of final decisions in matter of personal status in cases where the ECtHR had ruled that a violation of the ECHR had occurred. The review is possible when it appears that the consequences of the violation of the Convention are serious and that the just satisfaction awarded on the basis of article 41 ECHR cannot put an end to the violation (see articles L.452-1 to L.452-6 of the *Code de l'organisation judiciaire*).

Current situation:

Taking advantage of this new procedure, the Mennesson family asked for a review of their situation. They claimed that the refusal to transcribe the birth certificates was contrary to the best interest of the children. They also argued that, as it obstructed the establishment of parentage, it amounted to a violation of article 8

ECHR. Moreover, they argued that the refusal to transcribe the birth certificates on the ground that the children were born of a surrogate mother was discriminatory and infringed article 14 ECHR.

Sitting again in *Assemblée plénière*, the *Cour de Cassation* summarized its previous case law. It concluded that while the issue of the transcription of the father biological parentage is settled, the answer is less certain regarding the intended mother. The Court wondered if its refusal to transcribe the birth certificate as far as the intended mother is concerned is consistent with the State margin of appreciation under article 8. It also wondered whether it should distinguish between cases where the child is conceived with the genetic material of the intended mother and cases where it is not. Finally, it raised the issue of whether its approach of allowing the intended mother to adopt her husband's biological child was compatible with article 8 ECHR.

After pointing out the uncertain compatibility of its reasoning with ECtHR case law, the Court chose to request an advisory opinion from the ECtHR. Protocol 16 allows Contracting States to apply to the ECtHR for its advisory opinion "on questions of principles relating to the interpretation or application of the rights and freedom defined in the Convention or the protocols thereto" (Protocol 16 art.1).

Thus, the *Cour de Cassation* asked the ECtHR the two following questions:

- By refusing to transcribe into civil status registers the birth certificate of a child born abroad from a surrogate mother inasmuch as it refers to the intended mother as the "legal mother", while the transcription has been accepted when the intended father is the biological father of the child, does a State Party exceed its margin of appreciation under article 8 ECHR? In this respect, is it necessary to distinguish between whether or not the child is conceived with the gametes of the intended mother?
- If the answer to one of the two preceding questions is in the affirmative, does the possibility for the intended mother to adopt her husband's biological child, which constitutes a mean of establishing parentage open to her, comply with the requirements of article 8 of the Convention?

As the *Cour de Cassation* indicates on the press release accompanying the request of an advisory opinion, it seized the opportunity of initiating a judicial

dialogue between national jurisdictions and the ECtHR. However, it looks more like a sign of caution on the part of the French court, in a particularly sensitive case. Depending on the answer it receives, the *Cour de Cassation* will adapt its case law.

Although Protocol n°16 does not refer to a specific deadline, the Explanatory report indicates that it would be appropriate for the ECtHR to give high priority to advisory opinion proceedings.

Thus, it looks like the Mennesson saga will be continued soon…

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