The Hague Academy of International Law Advanced Course in Hong Kong: First Edition: Current Trends on International Commercial Dispute Settlement

In cooperation with the Asian Academy of International Law, the Hague Academy of International Law will hold its first edition of its Advanced Courses in Hong Kong from 7 to 11 December 2020. The topic will be: "Current Trends on International Commercial Dispute Settlement".

For this special programme, the Secretary-General of The Hague Academy of International Law has invited leading academics and practitioners from Paris (Professor Diego P. Fernández Arroyo), New York (Professor Franco Ferrari), Bonn (Professor Matthias Weller), Singapore (Ms Natalie Morris-Sharma), and Beijing (Judge Zhang Yongjian) to present expert lectures on the United Nations Convention on International Settlement Agreements Resulting from Mediation, Investor-State Dispute Settlement, international commercial arbitration, settlement of international commercial disputes before domestic courts, and the developments of the International Commercial Court. Registered participants will have pre-course access to an e-learning platform that provides reading documents prepared by the lecturers. At the end of the course, a certificate of attendance will be awarded.

For more information see here.

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The Artist, the Actor and the EEO Regulation; or, how the English Courts and the Spanish Constitutional Court prevented a cross-border injustice threatened via the EEO Regulation in the litigation concerning Gerardo Moreno de la Hija and Christopher Frank Carandini Lee

Written by Jonathan Fitchen, University of Aberdeen

Introduction

The EEO Regulation (805/2004) was mooted in the mid-1990's to combat perceived failings of the Brussels Convention that were feared to obstruct or prevent 'good' judgment creditors from enforcing 'uncontested' (i.e. undisputable) debts as cross-border debt judgments within what is now the EU. The characterisations 'good' and 'bad' are not employed facetiously; the unreasonable obstruction of a creditor who was assumed to pursue a meritorious debt claim was and remains a central plank of the EEO project: hence the Regulation offers an alternative *exequatur* and public policy free procedure for the cross-border enforcement of such uncontested monetary civil and commercial claims that, until 2002, fell under the quite different enforcement procedures of the Brussels Convention. The 2004 EEO Regulation covers money enforcement titles (judgments, settlements and authentic instruments) that are already enforceable in the Member State of origin and hence are offered an alternative route to cross-border enforcement in the Member State addressed via the successors to the Brussels Convention, first the Brussels I Regulation and now the

Brussels Ia Regulation, on an expedited basis due to omitting both an *exequatur* stage and the ability of the Member State addressed to refuse enforcement because of public policy infringements.

As the EEO Regulation was introduced some years *after* the cross-border enforcement provisions of the Brussels Convention had been replaced by those of the Brussels I Regulation, many of the EEO's 'innovations' to remedy 'unnecessary' or abusive delays, caused by either a 'bad' debtor or by an overly cautious enforcement venue, had already been mitigated three years before it came into force in 2005. This fact and other issues (e.g. a preference among lawyers for the familiar and now streamlined Brussels I Regulation enforcement procedure, the issue of ignorance of the EEO procedures, and a greater than expected willingness for creditors to litigate debt claims directly in foreign venues) contributed to a lower than expected take up of the EEO Regulation in the context of contentious legal proceedings.

Anecdotal evidence of low use of the EEO in contentious matters has led to a view that the EEO Regulation is somewhat redundant. The coming into force of the *exequatur*-free Brussels Ia Regulation and the surveys connected with the IC²BE project have re-enforced this view of its redundancy. An expected recasting for the 2004 Regulation did not however occur in 2012 as the Commission withdrew it. The same year the Commission had received a less than complimentary report from RAND Europe concerning the Regulation (with which it disagreed and continues to disagree). It may be speculated that having lost the argument on restricting or deleting public policy in the course of the re-casting of the Brussels I Regulation, the Commission may have feared that the re-casting of the EEO might tend towards its *de facto*deletion if the Member States were permitted to consider its reliance on control in the Member State of origin and the lack of a public policy exception given examples of national case law that were already suggestive of structural difficulties with the Regulation and its underlying drafting assumptions (e.g. see G Cuniberti's comment on French Cour de cassation chambre civile 2, 6 janvier 2012 N° de pourvoi: 10-23518).

As matters stand, the EEO Regulation continues to apply and continues to cause particular difficulties for debtors (and also creditors, enforcement authorities and the CJEU), whether in the Member State of origin or in the Member State addressed. This assertion is supported by two litigation notes, of which this is the first (and most extraordinary): indeed, it is suggested that the difficulties that

arose in the litigation discussed below are at least as significant for European private international law as the infamous case C-7/98 *Krombach v Bamberski*; *Krombach* and *Lee* each indicate the need for the inclusion of an overt public policy exception for those cases in which domestic civil procedure and the norms of European and international civil procedure have malfunctioned to such an extent that EU PIL is in danger of being 'understood' to force the Member State of enforcement to grant cross-border legal effect to a judgment granted improperly in flagrant breach of European and domestic human rights standards.

Facts

In January 2014 the civil judgment enforcement officials of the English High Court received a European Enforcement Order (EEO) application from a Spanish gentleman's lawyers requesting the actual enforcement of the Spanish judgment and costs recorded by the EEO certificate for €923,000. The enforcement target – who had been contacted officially by a letter from the applicant's lawyers *for the first time in the proceedings* shortly before this application and given 14 days to pay – was the well-known actor Christopher Lee, who was domiciled in the UK and resident in London where he had lived for many years.

Thus began the enforcement stage of a cross-border saga in which the judgment creditor and judgment debtor sought respectively to enforce or resist the enforcement of an EEO certificate that was incomplete (hence defective on its face) and unquestionably should never have been granted because it related to a Spanish judgment that should never have been delivered (or declared enforceable) concerning a debt, that had not been properly established according to Spanish procedural law, and relating to an at best contestable (and at worst fanciful) legal liability alleged to somehow fall upon an actor in a film concerning a subsequent unauthorised use by the DVD distributor of that film of the claimant artist's copyrighted artwork from that film in connection with the European DVD release of that film. The claim under Spanish copyright law was based on proceedings dating from June 2007 commenced before the Burgos Commercial court that unquestionably were never at any time (whether as a process, a summons or a judgment) in the following seven years served properly on the famous and foreign-domiciled defendant in accordance with the service provisions of the EU Service Regulation.

The original claim named three parties: 1) a production company (The Quaid

Project Ltd); 2) Mr. Juan Aneiros (who was alleged to have signed a contract pertaining to the artwork for the film with the claimant artist in 2004 and who was the son-in-law of Christopher Lee and who seemingly ran Mr Lee's website) and 3) Christopher Lee himself. The proceedings attempted in Spain however encountered an initial problem of how to serve these 'persons' in or from Spain. The solution selected as far as Lee was concerned did not use the Service Regulation nor did it anticipate the later reasoning of the CJEU in *Case C 292/10 G v de Visser ECLI:EU:C:2012:142*. After not finding Lee resident in Spain, the hopeless fiction of service by pinning the originating process to the noticeboard of the Burgos Commercial Court for a period of time was employed: it was then claimed that this properly effected service in circumstances where it was claimed to be impossible to find or serve a world renowned and famous English actor (or the actor's agent) in Spain (where he did not live).

Such modes of service where the defendant is likely to be domiciled in another state have been condemned as insufficient by the ECJ in cases such as: *Case 166/80 Peter Klomps v Karl Michel [1981] ECR 1593; Case C-300/14 Imtech Marine Belgium NV v Radio Hellenic SA ECLI:EU:C:2015:825; Case C-289/17 Collect Inkasso OU v Aint 2018 EU:C:2018*. These defects in serving Lee as intended defendant, and then as an enforcement target, proved fatal in February 2020 when, after roughly six years of challenges by Lee (and from mid 2015 by his Widow), the Spanish Constitutional Court decided that the consequences flowing from the service violations were sufficiently serious to remit the Spanish proceedings back to square one for noncompliance with Article 24 of the Spanish Constitution by the Spanish civil courts.

Significant aspects of the claim are unclear, in particular, why Lee was regarded as potentially liable for the claim. The various law reports make clear that the claim concerned compensation sought under Spanish copyright law by an artist whose contracted artwork for a film called 'Jinnah' (in which Christopher Lee had starred) had later been used without his permission for the subsequent European DVD release of that film. Though Spanish law permits such a contractual claim by the artist against the relevant party who uses his artwork, it is unclear from the various English and Spanish law reports how, in connection with the DVD release, this party was Christopher Lee. It is stated at para 11 of [2017] EWHC 634 (Ch) that Lee's lawyers told the English court that their client (who was not a producer or seemingly a funder of the original film) did not sign *any* contract with the

claimant. It is hence not clear that Lee made (or could make) any decisions concerning the artwork for the film and still less concerning its later use for the European DVD release to breach the claimant's copyright. Such decisions appear to have been made by other natural and legal persons, without any link to Lee capable of making him liable for the compensation claimed.

Though it is doubtful that the issue will ever be resolved, a few statements in the Spanish press (*El Pais,* 22 March 2010) suggest both that the claimant regarded Lee as having been amongst those who had 'authorised' his original appointment to the film as its artist/illustrator but also, and confusingly, that the artist had not been able to speak to Lee about the issue and did not, subject to what the court might hold, consider him responsible for the misuse. Though it is speculation, it may be that a connection was supposed by the claimant (or his lawyers) analogous to a form of partnership liability between Lee and some of the other defendants who might have been presumed to have been involved in the original decision to employ the artist at the time of the film and hence might possibly have later been involved in the decision to re-use the same artwork (this time without the artist's consent) for the European DVD release. Neither the matter nor the nature of Lee's potential liability is though clear.

Further uncertainty arises from the issue of quantum. Spanish law allows an aggrieved artist to bring a claim for contractual compensation to seek sums representing those revenues that would have accrued to him had there been a reasonable contractual agreement to use his artwork in this manner. One function of the Spanish court in such a claim is to determine the correct quantum of this sum by considering representations from *each* party to the claim: this process could not occur properly in the present case as the service defects meant that only the views of the claimant were ever presented. Why was €710,000 the correct sum? Why not €720,000, €700,000 or €10,000? Trusting the artist's own estimation seems optimistic given that the sum claimed was large and the matter concerned the European DVD release of a film that was many orders of magnitude less well-budgeted or commercially successful than other films in which Christopher Lee had starred (e.g. Star Wars and the Lord of the Rings). Equally, did the artist really have all the data in his possession to allow him to demonstrate unilaterally the proper quantum in a forensic manner?

Despite these uncertainties the suggested liability and quantum were asserted for the purposes of formulating the Spanish claim that led to the *in absentia*

judgment granted in March 2009 which, by May 2009, (in default of any appeal by the officially uncontacted Lee) was declared final. In October 2009 the judgment was declared enforceable by yet another notice from the same Burgos court that was again pointlessly fixed to the notice board of the court in default of employing any effective mode of service that should have been used in this context.

The matter was reported (inaccurately) in the UK press and media in 2010, possibly based on not quite understood Spanish newspaper reports, without however securing any comment from Lee. It is unclear if Lee ever did know unofficially of the Spanish proceedings, but it seems likely that he did as his son-in-law was involved in these. Such unofficial knowledge does not, of course, excuse successive service failures. One point that the UK media did record accurately in 2010 was that no defendant had appeared in the earlier Spanish proceedings.

In 2011, at the request of the claimant, the Burgos court issued him with an EEO certificate. It was seriously incomplete, omitting ticks for the boxes found at: 11.1 (that service had been as per the Service Regulation); 12.1 (ditto the summons); 13.1 (that service of the judgment had been as per the Regulation); 13.3 (that the defendant had a chance to challenge the judgment); and, 13.4 (that the defendant had not so challenged). The judgment on which the EEO certificate was based was claimed in the certificate to be one dated 26 April 2010 (seemingly never produced in the later London enforcement proceedings) while the certificate wrongly gave as Lee's London address as the address of his son-in-law and misspelled Lee's middle name.

In October 2013 the claimant applied to the Spanish courts for the rectification of the 2011 EEO certificate: such rectification was however confined only to correct the misspelled name and to add over €200,000 to the original 'debt' as costs due in part, it may be supposed from the comments of the Constitutional Court, to unsuccessful attempts to pursue the Spanish property of Lee's Spanish son-in-law. Seemingly no rectification was sought for the other serious omissions. The October 2013 EEO certificate was presented in January 2014 in London to Lee and to the English court. Lee's correct address had now been ascertained by the claimant's lawyers instructed to seek the cross-border enforcement of the EEO certificate concerning the 'uncontested' sums apparently due in Spain via its expedited and public policy free procedures.

On finally learning officially of the existence of the earlier Spanish *in absentia* proceedings when met with a lawyer's letter to his address demanding payment of the entire alleged debt within 14 days, Lee instructed his English lawyers and appointed Spanish lawyers to commence challenges to the earlier Spanish proceedings and to secure stays of enforcement in Spain and in the UK (the latter being via Art 23(c) EEO). By reason of a good-faith error, Lee's English lawyers 'jumped-the-gun' and represented to the English court that the Spanish challenge proceedings had already commenced – in fact at that point the Spanish lawyers had only been *instructed* to bring a challenge – and secured the English Art.23(c) stay some 17 days ahead of the actual commencement of the Spanish challenge proceedings. The creditor, via his lawyers, objected (correctly) to the premature grant and also to the continuation of the stay under Art.23(c) which first required the commencement of the Spanish challenges: this objection led to a Pyric victory when the English court dispensed with the erroneous stay but replaced it, seamlessly, with another stay granted as part of its inherent jurisdiction (rather than via any provision of the EEO Regulation) which it justified as appropriate given the presentation of a manifestly defective and incomplete EEO certificate. The stay was to endure for the duration of the Spanish appeals and all Spanish challenges to enforcement. Lee's death in mid 2015 saw the stay endure for the benefit of his widow.

While the stay proceedings were ongoing in England, the attempts by Lee's lawyers to challenge the earlier Spanish proceedings before the Spanish civil courts and appeal courts went from bad to worse. The said courts all took the astonishing view (summarised in paras 23 – 30 of [2017] EWHC 634 (Ch) (03 April 2017)) that there had been sufficient service and that Lee was now out-of-time to raise objections by civil appeal. All Spanish stay applications were rejected; even the Constitutional Court rejected such a stay application (on an earlier appeal prior to the 2020 case), finding the earlier conclusions of the civil courts that there was no demonstrable irreparable harm for Lee without the stay to be in accordance with the Constitution. Appeal attempts before the civil courts to object to the frankly ridiculous triple failure of service of process, summons and judgment, or to the existence of a viable claim, or to the lack of the quantification stage required by Spanish procedural law, all fell on deaf ears in these courts.

In this sense, because the Spanish civil courts all demonstrated their unwillingness to remedy the successive misapplication of EU laws, the private

international law and procedural law of the EU all failed in this case in the Member State of origin. That this failure did not result in immediate actual enforcement against Lee's estate in the Member State addressed was due only to the extemporisation by an English court of an inherent jurisdiction stay in response to an incomplete certificate supporting the application. Without this extemporised stay the enforcement would have proceeded in the UK without any possibility of Lee requesting corrective intervention by English authorities to invoke a missing public policy exception. The English court was clear that had the empty boxes been ticked, there would have been no basis for the stay and enforcement would have been compelled. So much for the Recital 11 assurances of the EEO Regulation:

"This Regulation seeks to promote the fundamental rights and takes into account the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure full respect for the right to a fair trial as recognised in Article 47 of the Charter."

These events left Lee's lawyers with only one remaining challenge possibility in Spain, viz. arguing that the Spanish civil courts had violated the Spanish Constitution. These challenges were brought to the Spanish Constitutional Court by lawyers acting first for Lee and then, after his death, acting for his widow. The decision of the Constitutional Court was delivered on 20 February 2020 (see comment by M Requejo Isidro) and found that there had indeed been a significant domestic breach of the Spanish Constitution, specifically, Section 24 para 1 which (in English) reads

"All persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defense."

The Constitutional Court – which necessarily is restricted to a consideration of the matters that go directly to the operation of the Spanish Constitution and hence has no further general appellate competence over the actions of the civil courts – concluded that the initial failure to serve a non-domiciled person, whose address was claimed to be unknown, but would have been very simple to discover, in accordance with the provisions of the relevant EU Service Regulation meant that Christopher Lee, and later his widow, were not adequately protected by the Spanish courts as required by Section 24 of the Spanish Constitution and hence

had been deprived impermissibly of the defence that had to be provided. The order of the Constitutional Court annulled the earlier Spanish proceedings and sent the contingency-fee-funded claimant back to square one to recommence any subsequent proceedings properly and with due service concerning his alleged claim against whatever parts of the estate of the late Christopher Lee might now still be located within the UK or the EU.

Reflections on some of the wider issues

Though this litigation was compared above with the cause-celebre that was *Krombach*, it can be argued to represent a greater Member State of origin catastrophe than the earlier case: at least Herr Krombach was officially notified, served, summoned to the proceedings and then notified of the judgment. *Krombach* and *Lee* do both however illustrate why a public policy exception in the Member State addressed is essential. Unfortunately, in *Lee* this illustration is set against the absence of that exception. Thus, *Lee* demonstrates the grim prospects facing the 'debtor of an uncontested sum' (who only has this status due to blatant and successive breaches of service and private international law procedures) in cross-border enforcement procedures if the 'emergency brake' of public policy has been removed by drafters keen to prevent its unnecessary application to facilitate faster 'forward-travel' in circumstances in which the application of the said brake would not be necessary.

Had not the presented EEO certificate been so deficient, the English courts would not have been willing to extemporise a stay and the whole sum would have been enforced against Lee in London long before the civil and constitutional proceedings – all of which *Lee* also had to fund – concluded in Spain. Few ordinary people could have effectively defended the enforcement across two venues for six years when facing a claimant pursuing a speculative claim via a conditional fee arrangement (with its clear significance for the likely recovery of defence costs and a resulting impact upon the need to fund your own lawyers in each jurisdiction). It must be presumed that, despite manifest breaches of EU law and human rights standards, most ordinary persons would simply have had to pay-up. Whether this has already occurred, or occurs regularly, are each difficult to ascertain; what can though be said is that the design and rationale of the EEO Regulation facilitate each possibility.

Lee was fortunate indeed to face an incomplete EEO certificate and to find

English judges who, successively, were favourably disposed towards his applications despite a Regulation drafted to dismiss them. Though some may be disposed to regard the judiciary of *that* ex-Member State as 'constitutionally' predisposed to effect such interpretative developments, this would be a mistake, particularly in the present context of applications to the Masters in question (members of the judiciary who deal with incoming foreign enforcement applications). In any case, judicial willingness to extemporise a solution when faced with a defective EEO certificate to avert an immediate cross-border injustice seems a slender thread indeed from which to hang the conformity of the operation of the EEO Regulation with the basic human rights that should have been, but were not, associated with the treatment of Lee throughout these proceedings.

It is suggested that the circumstances of *Lee* demonstrate the failure of both the EEO Regulation, and of EU PIL in general, to protect the rights of an unserved and officially unnotified defendant to object to a cross-border enforcement despite the grossest of failings in the Member State of origin that, given the existence of Article 24 of the Spanish Constitution, proved astonishingly unsusceptible to Spanish appeal procedures. Had the judgment creditor been compelled to proceed to enforcement under the Brussels I Regulation (or later under the Recast of that Regulation) the service defects would probably have been more evident whether in the assumption of jurisdiction and / or at the point of enforcement outside Spain: the judgment debtor would also have had the option to raise the public policy exception to defend the enforcement proceedings plus better stay options in the enforcement venue.

Further it is suggested that *Lee* indicates that the EEO Regulation is no longer fit for purpose and should be recast or repealed. *Lee,* like *Krombach*, illustrates the danger of relying on the Member State of origin when drafting cross-border procedures of a non-neutral nature, i.e. reflecting assumptions that certified claims sent abroad by the 'creditor' will be 'good'. It is not always correct that all will remain 'fixable' in the Member State of origin such that objections to enforcement in the Member State addressed and a public policy exception are unnecessary. *Krombach* and *Lee* may be exceptional cases, but it is for such cases that we require the equally exceptional use of a public policy exception in the enforcement venue.

From anti-suit injunctions to ‘quasi’ anti-suit injunctions and declaratory relief for breach of a choice of court agreement: a whiter shade of pale?

Nearly a year ago I reported on a Greek judgment refusing execution of two English orders issued on the basis of a High Court judgment which granted declaratory relief to the applicants. This came as a result of proceedings initiated in Greece, in breach of the settlement agreements and the exclusive jurisdiction clauses in favor of English courts. A recent judgment rendered by the same court confirmed the incidental recognition of the same High Court judgment, which resulted in the dismissal of the claim filed before Greek courts due to lack of jurisdiction.

Piraeus Court of Appeal Nr. 89/31.01.2020

THE FACTS

The facts of the case are clearly presented in the case *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* [2014] EWHC 3068 (Comm) (26 September 2014. The UK defendants invoked before the Piraeus first instance court the judgment aforementioned, and requested incidental recognition in Greece. The Piraeus court granted recognition, and dismissed the claim. The plaintiffs appealed, seeking reversal on two grounds: Lack of res iudicata and violation of Article 34 (1) Brussels I Regulation.

THE RULING

The Piraeus CoA founded its ruling on point 39 of the English judgment:

> 39. *So far as the Hellenic settlement agreement is concerned, clause 2 expressly provides that the payment of U.S.$4.8 million is "in full and final settlement of all and any claims they may have under the Policy in relation to the loss of [the vessel] against the Underwriters and/or against any of its servants and/or agents.." As with the CMI and LMI settlement agreements, that wording settles claims under the policy in relation to the loss of the vessel. Accordingly, by application of the reasoning of Longmore LJ in the Court of Appeal, as set out at [32] to [35] above,* ***the claims against Hellenic in Greece are within the settlement and indemnity provisions in the Hellenic settlement agreement and in breach of the exclusive jurisdiction clause in the Hellenic settlement agreement and the arbitration clause in the underlying Policy****…*

Res iudicata and public policy

The Piraeus court had no difficult task in establishing the finality of the English judgment: It simply referred to the certificate issued by the English court.

The public policy defence was also considered as unfounded, by reference to Article 35 (2 and 3) Brussels I Regulation.

No anti-suit injunction order

It then stressed out that the foreign judgment solidifies the exclusive international jurisdiction of English courts, without ordering the claimants/appellants to refrain from filing an action or moving ahead with the proceedings before Greek courts, by imposing any measures for this purpose. Hence, the court continues, the foreign judgment in question fulfils the criteria under Article 32 Brussels I Regulation, and therefore it is not considered as an anti-suit injunction, because it does not hinder the Greek court to examine their jurisdiction. For the above reasons, the English judgment may be incidentally recognized, which means that the Greek court is bound by its findings on the international jurisdiction issue. Finally, it should be underlined that no reference to the *Gothaer* ruling of the CJEU was made by the Piraeus court.

Clarifications

Finally, the Piraeus court explained the reasons which led to a different outcome from that of the judgment issued by the same court a year ago. First of all, the court was not bound by the res iudicata of the 2019 judgment, because the defendants were not the same. Secondly, the 2019 judgment examined an application for the enforcement of the English orders, whereas in the present case the subject matter was the existence or non-existence of the choice of court clause.

For all the above reasons, the appeal was dismissed.

SHORT COMMENT

Following the case law of the CJEU on anti-suit injunctions, and the non-recognition of the orders, which were labelled by the 2019 judgment as 'quasi' anti-suit injunctions, the defendants used the seemingly sole remaining tool for avoiding a re-examination of international jurisdiction on the merits by the Greek courts; the outcome proves them right. The question however remains the same: Are declaratory orders stating that English courts have exclusive jurisdiction and that proceedings in other Member States are in breach of an English exclusive jurisdiction agreement in line with the mutual trust principle? In his thesis [pp. 146 et seq.], Mukarrum Ahmed argues that those orders are at odds with the above principle.

The Greek Supreme will have the final word.

Of course, a preliminary request remains a possibility.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2020: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts

(IPRax)“ features the following articles:

E. Schollmeyer: **The effect of the entry in the domestic register is governed by foreign law: Will the new rules on cross-border divisions work?**

One of the most inventive conflict-of-law rules that secondary law of the European Union has come up with, can be discovered at a hidden place in the new Mobility Directive. Article 160q of the Directive assigns the determination of the effective date of a cross-border division to the law of the departure Member State. The provision appears as an attempted clearance of the complicated brushwood of the registration steps of a cross-border division of a company. This article explores whether the clearance has been successful.

F. Fuchs: **Revolution of the International Exchange of Public Documents: the Electronic Apostille**

The Apostille is of utmost importance for the exchange of public documents among different nations. The 118 states currently having acceded to the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents issue, altogether, several millions of Apostilles per year in order to certify the authenticity of public documents emanating from their territory. Some years ago, the electronic Apostille was implemented, which allows states to issue their Apostilles as an electronic document. Interested parties may verify the authenticity of such an electronic document via electronic registers which are accessible on the internet. Whereas Germany has not yet acceded to that new system, 38 other jurisdictions already have done so.

G. Mäsch: **Third Time Lucky? The ECJ decides (again) on the place of jurisdiction for cartel damages claims**

In three decisions now the ECJ has dealt with the question of where the “place of the causal event” and the “place where the damage occurred” are to be located in order to determine, based on the ubiquity principle enshrined in Article 7(2) of the Brussels Ibis Regulation, the place of jurisdiction for antitrust damages (tort) claims. In this paper the overall picture resulting from the ECJ decisions in CDC Hydrogen Peroxides, flyLAL-Lithuanian Airlines and now Tibor-Trans is analysed. The place of the “conclusion” of a cartel favoured by the ECJ to determine the place of the causal event is not only unsuitable in the case of infringements of Art. 102 TFEU (abuse of a dominant market position), but also in cases of

infringement of Art. 101 TFEU (prohibition of cartels). The same criticism applies to the ECJ's localisation of the place where the damage occurred at the place where the competition is impaired and the victim of the cartel or the abuse of the dominant market position (claimant) sustained the financial loss. In this paper it is suggested to dock the place of the causal event to the actual seat(s) of the cartel offender(s) and the place where the damage occurred exclusively to the affected market.

J. Kleinschmidt: **Jurisdiction of a German court to issue a national certificate of succession ('Erbschein') is subject to the European Succession Regulation**

The European Succession Regulation provides little guidance as to the relationship between the novel European Certificate of Succession and existing national certificates. In a case concerning a German "Erbschein", the CJEU has now clarified an important aspect of this relationship by holding that jurisdiction of a Member State court to issue a national certificate is subject to the harmonised rules contained in Art. 4 et seq. ESR. This decision deserves approval because it serves to avoid, as far as possible, the difficult problems ensuing from the existence of conflicting certificates from different Member States. It remains, however, an open question whether the decision can be extended to national certificates issued by notaries.

K. Thorn/K. Varón Romero: **The Qualification of the Lump-Sum Compensation for Gains in the Event of Death Pursuant to Section 1371 (1) of the German Civil Code (BGB) in Accordance with the Regulation (EU) No. 650/2012**

In "Mahnkopf" the CJEU had to decide whether the material scope of application of the Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4/7/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession also covers national provisions which, like Section 1371 (1) of the German Civil Code (BGB), grant the surviving spouse a lump-sum compensation for gains after the death of the other spouse by increasing his or her inheritance. Hence, this was a question of the qualification of Section 1371 (1) BGB, which had been discussed controversially in Germany for a long time and had only been clarified on a

national level in 2015. The CJEU decided in favour of a qualification under inheritance law at the level of Union law, and thus took a view which contradicts that of the Federal Court of Justice (BGH) for national conflict of laws. The authors agree with the result of the CJEU but criticise the methodical approach to the implementation of the functional qualification. The article identifies the new questions and problems that will now have to be clarified by the German courts as a result of the CJEU decision and in this context analyses two recent decisions of Higher Regional Courts. The authors note that in the context of Section 1371 (1) BGB, the question of the (temporal) scope of application of the Regulation is likely to become more important in the future, asotherwise, in their opinion, the BGH case law will still have to be considered. Accordingly, in the opinion of the authors, for future German jurisdiction much will depend on whether the BGH adapts its previous case law to that of the CJEU.

P. Mankowski: **Recognition and free circulation of names 'unlawfully' acquired in other Member States of the EU**

The PIL of names is one of the strongholds of the recognition principle. The touchstone is whether names "unlawfully" acquired in other Member States of the EU must also be recognised. A true recognition principle implies that any kind of révision au fond is interdicted. Yet any check on the "lawfulness" or "unlawfulness" of acquiring a certain name abroad amounts to nothing else than a révision au fond.

M. Gernert: **Termination of contracts of Iranian business relations due to US sanctions and a possible violation of the EU Blocking Regulation and § 7 AWV**

US secondary sanctions are intended to subject European economic operators to the further tightened US sanctions regime against Iran. In contrast, the socalled Blocking Regulation of the European Union is intended to protect European companies from such extraterritorial regulations and prohibits to comply with certain sanctions. In view of the great importance of the US market and the intended uncertainty in the enforcement of US sanctions, many European companies react by terminating contracts with Iranian business partners in order to rule out any risk of high penalties by US authorities. This article examines if and to what extent the Blocking Regulation and § 7 AWV influence the effectiveness of such terminations.

B. Rentsch: **Cross-border enforcement of provisional measures – lex fori as a default rule**

Titles from provisional measures are automatically recognised and enforced under the Brussels I-Regulations. In consequence, different laws will apply to a title's enforceability (country of the rendering of the provisional measure) and ist actual enforcement (country where the title is supposed to take effect). This sharp divide falls short of acknowledging that questions of enforceability and the actual conditions of enforcement are closely entangled in preliminary measure proceedings, especially the enforcement deadline under Sec. 929 para. 2 of the German Code of Civil Procedure (ZPO). The European Court of Justice, in its decision C-379/17 (Societ Immobiliare Al Bosco Srl) refrained from creating a specific Conflicts Rule for preliminary measures and ruled that the deadline falls within the scope of actual enforcement. This entails new practical problems, especially with regard to calculating the deadline when foreign titles are involved.

A. Spickhoff: **"Communication torts" and jurisdiction at the place of action**

Communication torts in more recent times are mostly discussed as "internet torts". Typically, such torts will be multi-state torts. In contrast, the current case of the Austrian Supreme Court concerns the localisation of individual communication torts. The locus delicti commissi in such cases has been concretised by the Austrian Supreme Court according to general principles of jurisdiction. The locus delicti commissi, which is characterised by a falling apart of the place of action and place of effect, is located at the place of action as well as at the place of effect. In the event of individual communication torts, the place of effect is located at the victim's place of stay during the phone call or the message arrival. The place of action has to be located at the sending location. On the other hand, in case of claims against individual third parties, the place of effect is located at the residence of the receiver. The Austrian Supreme Court remitted the case to the lower court for establishing the relevant facts for jurisdiction in respect of the denial of the plaintiff's claim. However, the court did not problematise the question of so-called "double-relevant facts". The European Court of Justice, in line with the judicial practice in Austria and Germany, has accepted a judicial review of the facts on jurisdiction only with respect to their conclusiveness.

R. Rodriguez/P. Gubler: **Recognition of a UK Solvent Scheme of**

Arrangement in Switzerland and under the Lugano Conventions

In recent years, various European companies have made use of the ability to restructure their debts using a UK solvent scheme of arrangement, even those not having their seat in the UK. The conditions and applicable jurisdictional framework under which the scheme of arrangement can be recognised in jurisdictions outside the UK are controversial. In Switzerland doctrine and jurisprudence on the issue are particularly scarce. This article aims to clarify the applicable rules of international civil procedural law as well as the requirements for recognition of a scheme of arrangement in Switzerland. It is held that recognition should be generally granted, either according to the 2007 Lugano Convention or, in a possible "no-deal Brexit" scenario, according to the national rules of private international law, or possibly even the 1988 Lugano Convention.

T. Helms: **Foreign surrogate motherhood and the limits of its recognition under Art. 8 ECHR**

On request of the French Court of Cassation the Grand Chamber of the European Court of Human Rights has given an advisory opinion on the recognition of the legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and its intended mother who is not genetically linked to the child. It held that Art. 8 ECHR requires that domestic law provides a possibility of recognition of a legal parent-child relationship with the intended mother. But it falls within states' margin of appreciation to choose the means by which to permit this recognition, the possibility to adopt the child may satisfy these requirements.

Corona and Private International Law: A Regularly Updated

Repository of Writings, Cases and Developments

by Ralf Michaels and Jakob Olbing

Note: This repository will stay permanent at www.conflictoflaws.net/corona.
Please send additions to olbing@mpipriv.de

Updated: November 08, 2021

The coronavirus has created a global crisis that affects all aspects of life everywhere. Not surprisingly, that means that the law is affected as well. And indeed, we have seen a high volume of legislation and legal regulations, of court decisions, and of scholarly debates. In some US schools there are courses on the legal aspects of corona. Some disciplines are organizing symposia or special journal issues to discuss the impact of the pandemic on the respective discipline.

For a time Private international law has been vividly discussing the relevance of the crisis for the field, and of the field for the crisis Private international law matters are crucial to countless issues related to the epidemic – from production chains through IP over possible vaccines to mundane questions like the territorial application of lockdown regulations.

Knowledge of these issues is important. It is important for private international lawyers to realize the importance of our discipline. But it is perhaps even more important for decision makers to be aware of both the pitfalls and the potentials of conflicts of law.

This site, which we hope to update continually, is meant to be a place to collect, as comprehensively as possible, sources on the interaction of the new coronavirus and the discipline. The aim is not to provide general introductions into private international law, or to lay out sources that could be relevant. Nor is this meant to be an independent scholarly paper. What we try to provide is a one-stop place at which to find private international law discussions worldwide regarding to coronavirus.

For this purpose, we limit ourselves to the discipline as traditionally understood—jurisdiction, choice of law, recognition and enforcement, international procedure. Coronavirus has other impacts on transnational private law and those deserve attention too, but we want to keep this one manageable.

Please help make this a good informative site. Please share any reference that you have – from any jurisdiction, in any legislation – and we will, if possible, share them on this site. Please contact olbing@mpipriv.de

General

In the early beginning of the Pandemic, contributions from scholars, courts, international institutes and politicians where of a more general character as it was difficult to predict the scope and duration of the new situation.

The European Law Institute for example issued a set of Principles for the COVID-19 Crisis, covering a variety of legal topics such as Democracy (Principle 3) and Justice System (Principle 5) as well as Moratorium on Regular Payments, Force Major and Hardship, Exemption from Liability for simple Negligence (Principles 12 to 14). Ending with something everybody hopes for: Return to Normality (Principle 15).

The Secretary General of the Hague Conference recorded a short online message from his home addressing the most urgent topics. Ensuing, the Permanent Bureau developed a Toolkit for resources and publications relevant to the current global situation.

The university of Oxford's Blavatnik School of Government collects all measures by governments around the world in the "Coronavirus Government Response Tracker".

A German journal is dedicated solely to the topic "COVID-19 and the Law". The journal is interesting for academics and practitioners alike, since it publishes papers on specific COVID-19 related issues, as well as an extensive overview of German judgements.

An open access project by intersentia examines the COVID-19 legislation and its consequences in European states, bringing together contributions from over 85 highly regarded academics and practitioners in one coherent, open access resource.

Matthias Lehmann discusses the role of private international law on a number of issues – the impact of travel restrictions on transportation contracts, contract law issues for canceled events, canceled or delayed deliveries, but also liability for infections.

Online Workshops, Webinars and Conferences

In time of travel restrictions and social distancing the academic exchange is still active and sometimes more diverse than bevor, since people from all around the

world come together, as the great number of workshops and symposiums that are held online shows.

Mid November (17 to 19), the Mexican Academy of Private International and Comparative Law discusses during its XLIV seminar among other topics the impacts of the pandemic on international family as well as aspects surrounding vaccines. participants will discuss in Spanish and the online participation is free of charge.

Contrary to the regular sessions of The Hague Academy of International Law's Centre for Studies and Research, the upcoming edition is entirely online. The topic will be "Epidemics and International Law" and held from September 2020 to June 2021. The collective works will be published later by the Academy. You will find application and programme here.

The Minerva Center for Human Rights at Tel Aviv University hosted an international socio-legal (zoom-) workshop on 22-23 June 2021 to explore the impact of the Covid-19 crisis and its regulation on cross-border families. A call for papers expired on 28 February 2021.

Another series of events organized by the University of Sydney's Centre for Asian and Pacific Law will regularly discuss topics such as social justice, civil rights, trade and investment in light of (post) pandemic developments. Of that series one webinar on the aftermath of the pandemic in the Asia-Pacific region focussed on commercial dispute resolution and issues related to private international law.

Marc-Philippe Weller discussed in a workshop on December 1, 2020 about "Nationalism, Territorialism, Unilateralism: Managing the Pandemic Through Private International Law?" if the measures enacted due to the pandemic may have an effect on the connecting factors in European private international law. He had a particular focus on the determination of habitual residence.

A comparative analysis of reactions in Japan and Germany on COVID-19 in private and public law with scholars from both jurisdictions was the topic of an online conference (mostly in German) on August 2020. Recordings of the presentations are online.

During a live youtube conference on July 23, 2020 Humberto Romero-Muci presented with several others his views on "Migrantes, pandemia y política en el

Derecho Internacional Privado". The video is still online.

A webinar organized by experts from MK Family Law (Washington) and Grotius Chamber (the Hague) discussed pertinent issues relating to international child abduction in times of COVID-19.

Matthias Lehmann presented his views on the application of force majeure certificates and overriding mandatory provisions n international contracts in an online-workshop on "COVID-19 and IPR/IZVR".

Another webinar was held on "Vulnerability in the Trade and Investment Regimes in the Age of #COVID19", which is available online, as part of the Symposium on COVID-19 and International Economic Law in the Global South.

The University of New South Wales held a talk on "COVID-19 and the Private International Law" in May, which you find on youtube.

As a follow-up of a webinar on PIL & COVID-19, Inez Lopez and Fabrício Polido give "some initial thoughts and lessons to face in daily life"

A group of Brazilian scholars organized an online symposium on Private International Law & Covid-19. Mobility of People, Commerce and Challenges to the Global Order. The videos are here.

The Organization of American States holds a weekly virtual forum on "Inter-American law in times of pandemic" (every Monday, 11:00 a.m., UTC-5h). One topic of many will be on "New Challenges for Private International Law" (Monday, June 15, 2020).

State Liability

Some thoughts are given to compensation suits brought against China for its alleged responsibility in the spread of the virus. One main issue here is whether China can claim sovereign immunity.

In the United States, several suits have been brought in Florida (March 12), Nevada (March 23) and Missouri (April 21) against the Peoples republic of China (PRC), which plaintiffs deem responsible for the uncontrolled spread of the virus,

which later caused massive financial damage and human loss in the United States. Not surprisingly officials and scholars in China were extremely critical (see here and here).

But legal scholars, including Chimène Keitner and Stephen L. Carter, also think such suits are bound to fail due to China's sovereign immunity, as do Sophia Tang and Zhengxin Huo. Hiroyuki Banzai doubts that the actions can succeed since it will be difficult to prove a causal link between the damages and the (in-) actions by the Chinese Gorvernment. Lea Brilmayer suspects that such a claim will fail since it would be unlikely, that a court will assume jurisdiction. The same conclusion is drawn by Angelica Bonfanti and Chimène Keitner after a thorough analysis of the grounds on which a liability of china could be based. An overview and detailed presentation of many class actions and suits filed by states can be found here.

Until now, only very little has happened concerning the American suits. Some suits where (voluntarily) dismissed or tossed. One suit against the PRC for damages amounting to $ 800 billion was ordered to be dismissed by the District Court, since the plaintiff failed to state a claim (*James-El v the Peoples Republic of China* (M.D.N.C. 2020) WL 3619870). For a general update on the lawsuits against the PRC from January 22, 2021 see here.

In an interview with a German newspaper Tom Ginsburg lays out the legal issues that will be faced, if the claims of state liability are brought in front of a German court. Fabrizio Marrella discusses the Italian perspective on that issue. Brett Joshpe analyzes more generally China's private and public liability in the domestic and international framework.

A Republican Representative is introducing two House Resolutions urging the US Congress to waive China's sovereign immunity in this regard; such a waiver has also been proposed by a Washington Post author. The claim has also found support by Fox News.

Interestingly, there is also a reverse suit by state-backed Chinese lawyers against the United States for covering up the pandemic. Guodong Du expects this will likewise be barred by sovereign immunity.

Martins Paparinskis shares the concerns about a successful litigation against foreign states. However, he suggests to change the law of state responsibility

fundamentally to be prepared for further international catastrophes such as the current pandemic.

In the UK, the conservative Henry Jackson Society published a report suggesting that China is liable for violating its obligations under the International Health Regulations. The report discusses ten (!) legal avenues towards this goal, most of them in public international law, but also including suits in Chines, UK and US courts (pp 28-30). Sovereign immunity is discussed as a severe but not impenetrable barrier.

Contract Law

Both the pandemic itself and the ensuing national regulations impede the fulfilment of contracts. Legal issues ensue. An overview of European international contract law and the implications of COVID-19 is given here and here. Two chapters of the book "*La pandemia da COVID-19. Profili di diritto nazionale, dell'Unione Europea ed internazionale*" edited by Marco Frigessi di Rattalma are dedicated to jurisdiction and applicable law in contract matters.

The UNIDROIT Secretariat has released a Note on the UNIDROIT Principles of International Commercial Contracts and the COVID-19 health crisis.

Bernard Haftel highlights three different techniques to apply COVID-19 legislation to an international contract: as *lex contractus*, as *lois des police* and through consideration within the applicable law.

Gerhard Wagner presents COVID caused defaults under the aforementioned ELI principles.

If a contracting party is unable to perform its contractual obligations, incapacity to perform can be based on force majeure or hardship. Some contributions suggest to apply for force majeure certificates which are offered by most countries, for example by China, Russia. How such a certificate can influence contractual obligations under English and New York Law is shown by Yeseung Jang. The German perspective is given by Philip Reusch and Laura Kleiner. Further the South Korean, French and the Common Law perspective on force majeure have been published. Bruno Ancel compares the French and American

approach. The difficulty to implement appropriate force majeure clauses in a contract is shown by Matteo Winkler.

Drawing from recent cases and experiences Franz Kaps analyses the difficulties in the operation within ICC force majeure clauses and suggests how “state-of-the-art force majeure clauses” should be constructed to include an international pandemic.

Victoria Lee, Mark Lehberg, Vinny Sanchez and James Vickery go beyond force majeure implications on contracts in their expert analysis.

William Shaughnessy presents issues which might occur in international construction contracts.

Another crucial aspect is the application of overriding mandatory rules on international contracts. Ennio Piovesani discusses whether Italian decree-laws enacted in view of the pandemic can operate as overriding mandatory rules and whether that would be compatible with EU law. So does Giovanni Zarra on international mandatory rules. Aposotolos Anthimos adds the Greek perspective, Claire Debourg the French to the discussion.

The applicability of self-proclaiming mandatory provisions in Italian law in respect to package travels in general and the Directive (EU) 2015/15 on package travel in particular, is discussed by Fabrizio Marongiu Buonaiuti.

Matthias Lehmann considers more broadly possible private international law issues and responses under European law. José Antonio Briceño Laborí and Maritza Méndez Zambrano add the Venezuelan view.

The crisis hits in particular global value and production chains. Impacts are discussed by Tomaso Ferando, by Markus Uitz and Hemma Parsché and by Anna Beckers, though neither focuses specifically on private international law.

Caterina Benini explains a new Italian mandatory rule providing a minimum standard of protection for employees.

Klaus Peter Berger and Daniel Behn in their historical and comparative study on force majeure and hardship, highlight that such remedies are quite regular to find and fit to distribute the risk emanating from such a crisis evenly.

CISG

The CISG has long been of very little importance in international contract law but now is subject to many discussions. André Janssen and Johannes Wahnschaffe dedicate a detailed analysis to exemptions from liability and cases of hardship under the CISG.

Performance on advance purchase agreements on delivering the COVID-19 vaccines, have been a major political debate recently. While asking which law is applicable on such contracts Ben Köhler and Till Maier-Lohmann suspect, that if CISG is in fact the applicable law, the consequences would be far reaching and could be the very first time the CISG enters the "global centre stage". Unfortunately, a Belgian court deciding over a claim by the EU against AstraZeneca for the delivery of doses of vaccines, did not even consider the application of the CISG.

Corporate Law

If the questions of purchasing COVID-19 vaccines shifts to buying the entire company the issue at hand becomes more political. Arndt Scheffler analyses the situation in which a foreign investor tries to purchase a company, which is crucial for the domestic battle against the pandemic and the search for a vaccine.

Employment Law

Closed borders and practically everybody working from has its impact on employment law.

In export-oriented economies such as Germany, it is very common, that employees are posted abroad on a long-term basis. COVID-19 legislation shapes and influences the legal relation between employer and employee, but also between employee and host-country. Roland Falder and Constantin Franke-Fahle discuss these influences with particular attention to the question of the applicable law here.

Tort Law

Damages caused by an infection are mostly subject to tort law but can also arise in a contractual relation. Focusing on the applicable law on non-contractual liability Rolf Wagner explains, that sometimes damages can be claimed both, as contractual and as non-contractual. He stresses that as the substantive law on damages caused by an infection is still to evolve, applying foreign law is a particular challenge.

An extensive overview about the law applicable to damages caused by an COVID-19 infection under Indian international tort law is given by Niharika Kuchhal, Kashish Jaitley and Saloni Khanderia. Khanderia published a second article, concerning the need of a codification of Indian conflict of laws on tort in respect of a foreseeable surge in international tort proceedings, caused by the pandemic.

General implications of the coronavirus on product liability and a possible duty to warn costumers, without specific reverence to conflict of laws.

In Austria, a consumer protection association is considering mass litigation against the Federal State of Tyrolia and local tourist businesses based on their inaction in view of the spreading virus in tourist places like Ischgl. A questionnaire is opened for European citizens. Matthias Weller reports.

Florian Heindler discusses how legal measures to battle the virus could be applicable to a relevant tort case (either as local data or by special connection), by analyzing the hypothetical case of a tourist who gets infected in Austria.

Jos Hoevenars and Xandra Kramer discuss the potential of similar actions in the Netherlands under the 2005 Collective Settlement Act, WCAM.

Family Law

Implications also exist in family law, for example regarding the Hague Abduction Convention.

In an Ontario case (Onuoha v Onuoha 2020 ONSC 1815), concerning children taken from Nigeria to Ontario, the father sought to have the matter dealt with on an urgent basis, although regular court operations were suspended due to Covid-19. The court declined, suggesting this was “not the time” to hear such a motion, and in any way international travel was not in the best interest of the child. For the discussion see here.

Further sspects of travel restrictions in international abduction cases are analysed by Gemme Pérez.

A general overview of abduction in times of corona was published by Nadia Rusinova. Another article by Nadia by her covers recent case law and legislation on remote child related proceedings which were conducted during the last weeks around the world. She also highlights, that COVID-19 measures can impact Article 8 ECHR.

Also cases of international surrogacy come into mind which are affected by COVID-19, as Mariana Iglesias shows.

Personal Data

The protection of personal data in transnational environments has always been a controversial topic in conflict of laws. Jie Huang shows, that due to COVID-19 existing tensions between the EU, the USA and China are reflected in their conflict of laws approach.

The European Commission published a “toolbox for the use of technology and data to combat and exit from the COVID-19 crisis”, which was an opportunity for some contributions on the GDPR and Tracing Apps.

Economic Law

The crisis puts stress on global trade and therefore also economic law. Sophie Hunter discusses developments in the competition laws of various countries (though with no explicit focus on conflict of laws issues).

A list of authors from around the world analyses the interrelation between “Competition law and health crises” in its international context in the current issue Concurrences.

Intellectual Property

Due to lockdowns and school closures, online work and teaching has exorbitantly increased but, as Marketa Trimble stresses, with little notion of transnational copyright issues.

To tackle those a prominently endorsed letter to the World Intellectual Property Organization, emphasizes the need to ensure that intellectual property regimes should support the efforts against the Coronavirus and should not be a hindrance.

Public Certification

In times of lockdown and closed borders notarization and public certification become almost impossible. Therefore, various countries have adjusted their legislation. You will find an overview here.

The electronic Apostille Program (e-APP)experiences a new popularity, as a considerable number of countries have implemented new components of the e-APP. For more information see here.

Dispute Resolution

In Dispute resolution two main questions are being discussed.

On the one hand the question of jurisdiction as such, for example for claims suffered within contractual or non-contractual relationships. Rolf Wagner gives the European and German perspective presenting the possible courts of jurisdiction under Brussel I Regulation (recast), the Lugano Convention and the German code of civil procedure.

In a recent case by the Supreme Court of Queensland (AUS), the court examined

the impact of COVID-19 on a foreign jurisdiction clause. You can find Jie Huang's comments on the decision here.

One the other hand, it is being discussed to what extend the requirement of physical presence in courts can conform with social distancing and travel restrictions. As a more drastic reaction some courts suspended their activities except for urgent matters all together. Developments in Italy are discussed here, developments in English law here.

On the other hand, another possibility is the move to greater digitalization, as discussed comparatively by Emma van Gelder, Xandra Kramer and Erlis Themeli. The Hague Conference on Private International Law (HCCH) published a Guide to Good Practice on the Use of Video-Link under the 1970 Evidence Convention, discussed also with reference to Corona by Mayela Celis.

Using the pandemic, Gisela Rühl analyses why the potential of digitalization is so scarcely used in civil procedure and how it can be improved to serve the needs of a digital society.

Benedikt Windau analyses the German civil procedure and how international digital heraings could be possible within the existing law.

In litigation, virtual hearings become a prominent measure to overcame restrictions on physical presence. While in on some jurisdiction such hearings are possible, Luigi Malferrari discusses the question if such hearings should also be enabled before the CJEU.

Maxi Scherer takes the crisis as an opportunity to analyse virtual hearings in international arbitration. Complications and long-term effects of virtual arbitration are presented here. Mirèze Philippe however sees this development as a positive game changer not just in health aspect but also to protect the environment and saving time as well as travelling costs (further articles covering international arbitration and virtual hearings: here and here).

A very broad presentation of legislation in France, Italy and Germany in civil procedure, including cross border service and taking of evidence as well as its implications on international child abduction and protection, is given by Giovanni Chiapponi.

Jie Huang examines the case of substitute service under the Hague Service Convention during the pandemic in the case Australian Information Commission v Facebook Inc ([2020] FCA 531).

A US project guided by Richard Suskind collects cases of so-called “remote courts” worldwide.

The EU gives information about the “impact of the COVID-19 virus on the justice field” concerning various means of dispute resolution.

Gilberto A. Guerrero-Rocca analyses the impacts of COVID-19 on international arbitration in relation to the CISG.

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Third-party liability of classification and certification societies in the context of conflict of laws and public international law – a comment on the CJEU’s recent ‘Rina judgement’

Written by Yannick Morath

Yannick Morath, doctoral candidate at the University of Freiburg, has kindly provided us with his thoughts on the CJEU's judgement in the case of LG and Others v Rina SpA, Ente Registro Italiano Navale (C-641/18 – ECLI:EU:C:2020:349)

(See also the earlier post by Matthias Weller concerning the CJEU's judgement).

1. **Introduction**

Private-law classification and certification societies play a vital role in modern economies. Especially in the maritime sector, external auditors issue certificates dealing with public tasks such as the seaworthiness and safety of vessels. Not only their contractual partners but also third parties rely on the accuracy of such certificates. Due to cross-border mobility of certificates and certified items, issues of Private International Law have to be taken into account when dealing with a certifiers' liability.

When not applying the appropriate level of care, classification and certification agencies can – according to the CJEU – be sued in the courts of the Member State where the agency is seated. By finding this ruling, the CJEU had to deal with two interesting questions: Firstly, it had to establish whether an action for damages, brought against private certifiers falls within the concept of 'civil and commercial matters', and therefore, within the scope of the Regulation 44/2001 (Brussels I). Secondly, the CJEU had to examine the legitimacy of the certifier's plea based on the principle of customary international law concerning immunity from state jurisdiction.

2. Facts of the 'Rina-case'

In 2006, the *Al Salam Boccaccio '98*, a ship sailing under the flag of the Republic of Panama, sunk in the Red Sea, tragically causing the loss of more than 1,000 lives. Relatives of the victims and survivors have brought an action under Italian law before the Tribunale di Genova (District Court, Genoa, Italy) against two private law corporations (the Rina companies), that are seated in Genoa and were responsible for the classification and certification of the ship.

The applicants argue that the defendants' operations, carried out under a contract concluded with the Republic of Panama, are to blame for the ship's lack of stability and its lack of safety at sea, which are the causes of its sinking.

Therefore, they claim compensation from the Rina companies for the losses they suffered.

The Rina companies counter that the referring court lacks jurisdiction, relying on the international-law principle of immunity from jurisdiction of foreign States. They state that they are being sued in respect of activities, which they carried out as delegates of the Republic of Panama. The activities in question were a manifestation of the sovereign power of a foreign State and the defendants carried them out on behalf of and in the interests of that State.

The applicants, however, argue in favour of the case's civil law nature, within the meaning of Article 1 (1) of Regulation 44/2001. As the Rina companies are seated in Genoa, the Italian courts should have jurisdiction under Article 2 (1) of that regulation. They submit that the plea of immunity from jurisdiction does not cover activities that are governed by non-discretionary technical rules, which are, in any event, unrelated to the political decisions and prerogatives of a State.

The Tribunale di Genova decided to stay the proceedings and consult the CJEU for further clarification under Article 267 TFEU.

3. Background: The dual role of classification and certification societies

When dealing with the classification and certification of ships it is important to be aware of the dual role private-law societies play in this area. Traditionally they are hired by a shipowner to attest that a ship is built in accordance with the standards of a specific ship class. Those 'class rules' are developed by the classification societies themselves. The maritime industry depends on these services, as the classification of a ship is necessary to evaluate its insurability and marketability. Therefore, these voluntary classifications are mainly prompted by private interest. This is referred to as the 'private function' of classification.

On the other hand, the same societies fulfil a 'public function' as well. Under international maritime law, states have a duty to take appropriate measures for ships flying under their flag to ensure safety at sea (Article 94 (3) of the United Nations Convention of the Law of the Sea). For this purpose ships have to be surveyed by a qualified personnel to make sure it meets all relevant safety and environmental standards. Flag states can perform these tasks themselves; however, most of them delegate executive powers to classification societies. Pursuant to Article 3 (2) of Directive 2009/15 this is also possible under EU law.

When executing these powers classification agencies are subject to two contracts: The first one is the agreement on the delegation of powers with the flag state, the second contract is the actual certification agreement with the owner of the ship that is about to be surveyed. Whereas shipowners are free to choose one of the recognized classification societies, the certification itself is compulsory.

It must be noted that the classification according to class rules (private function) is a prerequisite for the statutory inspection and certification (public function). In the case at hand, the Rina companies were responsible for both aspects. They classified the ship in accordance with their class rules and then issued the statutory certificate on behalf of and upon delegation from the Republic of Panama. This public law background caused the need for clarification by the CJEU.

4. The CJEU on the interpretation of 'civil and commercial matters'

Under Article 1(1) of Regulation 44/2001, the scope of that regulation is limited to 'civil and commercial matters'. It does not extend, in particular, to revenue, customs or administrative matters. In order to ascertain whether Italian courts have jurisdiction pursuant to Article 2 (1) of that regulation it is necessary to interpret the concept of 'civil and commercial matters'. This concept is subject to an autonomous European interpretation. By determining whether a matter falls within the scope of the Regulation, the nature of the legal relationships between the parties to the dispute is crucial. It must be noted that the mere fact that one of the parties might be a public authority does not exclude the case from the scope of the Regulation. It is, however, essential whether the party exercises public powers (*acta iure imperii*). These powers are 'falling outside the scope of the ordinary legal rules applicable to relationships between private individuals' (para. 34).

Following the Advocate General's opinion and the CJEU's judgement in *Pula Parking* (C-551/15 – ECLI:EU:C:2017:193), the Court notes that 'it is irrelevant that certain activities were carried out upon delegation from a State' (para. 39). The fact that the operations were carried out on behalf of and in the interest of the Republic of Panama and that they fulfil a public purpose, do not, in themselves, 'constitute sufficient evidence to classify them as being carried out *iure imperii*' (para. 41.).

In fact it must be taken into account that 'the classification and certification operations were carried out for remuneration under a commercial contract governed by private law concluded directly with the shipowner of the *Al Salam Boccaccio '98*' (para. 45). Moreover, it is the responsibility of the flag state to interpret and choose the applicable technical requirements for the certification necessary to fly their flag.

The CJEU continues to examine the agency's decision-making power. If the agency decides to withdraw a certificate, the respective ship is no longer able to sail. It argues, however, that this effect does not originate from the decision of the agency but rather from the sanction which is imposed by law (para. 47). The role of the certifier simply 'consists in conducting checks of the ship in accordance with the requirements laid down by the applicable legislative provisions.' As it is for the States to fix those provisions, it is ultimately their power to decide on a ship's permission to sail.

Whereas the general remarks on the interpretation of 'civil and commercial matters' are convincing and based on settled case law, the findings about the 'decision making power' of recognised organisations give rise to further questions. If a ship does not comply with the relevant requirements, the statutory certificate must not be issued and the shipowner is not allowed to sail under the flag of the respective state. Even though this legal consequence is finally imposed by law, it is the certifier's application of that law that leads to this effect. Whenever a certification agency refuses to issue a certificate, the ship is initially not able to sail. The CJEU's technical perspective in paragraph 47 does not sufficiently appreciate the factual decision making of the certifier. The judgement does unfortunately not explicitly address the issue of legal discretion and its consequences on the concept of 'civil and commercial matters'.

However, there are other grounds to qualify the case a 'civil matter'. As the CJEU pointed out as well, it follows from Regulation 6 (c) and (d) of Chapter I of the International Convention for the Safety of Life at Sea, that the final responsibility is allocated to the flag state (para. 48). Therefore, the state is subject to far-reaching supervisory duties. Even though this is not expressively regulated by international or EU law, it appears like the flag state can at any time overrule an agency's decision to issue or withdraw the certificate. This would result in a limitation to the finality of the agency's powers and prepare the ground for a civil law qualification. Some further remarks by the CJEU about this aspect would have

been interesting.

5. The CJEU on state immunity from jurisdiction

Doubts regarding the jurisdiction of the Italian courts arose from the Rina companies' plea based on the principle of customary international law concerning immunity from jurisdiction. Pursuant to the principle *par in parem non habet imperium*, a State cannot be subjected to the jurisdiction of another State. 'However, in the present state of international law, that immunity is not absolute, but is generally recognised where the dispute concerns sovereign acts performed *iure imperii*. By contrast, it may be excluded if the legal proceedings relate to acts which do not fall within the exercise of public powers' (para. 56).

The CJEU held that this principle does not preclude the application of the Regulation in this case, although it is the referring court that has to examine whether the Rina companies had recourse to public powers within in the meaning of international law. It must be noted that a rule of customary international law will only exist where a given practice actually exists that is supported by a firm legal view (*opinio iuris*). Following the Advocate General, the CJEU finds that the case-law cited by the defendants 'does not support the unequivocal conclusion that a body carrying out classification and certification operations may rely on immunity from jurisdiction in circumstances such as those of the present case` (c.f. para. 109 of his opinion).

In regard of state immunity, the CJEU changes its perspective on the case. Whereas the interpretation of 'civil and commercial matters' was driven by EU law, the doctrine of state immunity requires a different methodological approach, as it originates from international law. Nevertheless, the CJEU's overall convincing remarks are in line with its earlier findings, setting a high bar for statutory certification societies to plead for state immunity.

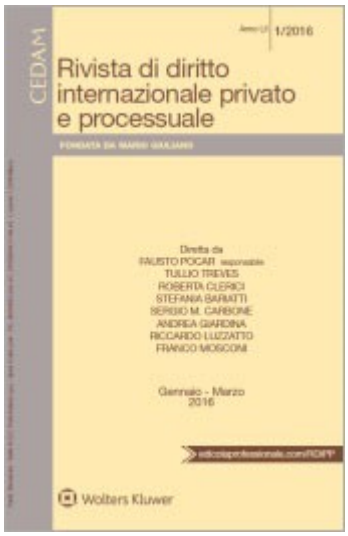
6. Final remarks

The CJEU established legal security for the victims of maritime disasters such as the sinking of the *Al Salam Boccaccio '98*. The judgement indirectly clarified the applicability of the Brussels I Regulation in cases where maritime certifiers operate only in their private function. When statutory certifications are a civil matter, this must *a fortiori* be the case for voluntary classifications. Having consistent results when establishing jurisdiction in such cases, also meets with

the principle of foreseeability. The remarks on the applicability of the Brussels I regulation are also of significant relevance when dealing with the Brussels Ibis and the Rome I and II Regulations, as all of them apply the concept of 'civil and commercial matters'.

Moreover, the judgement underlines the responsibility of private-law certifiers and recognises their vital role as regulators that operate in the public interest. Even though the CJEU' findings on the interpretation of 'civil matters' are consistent with its earlier developed broad understanding of the concept, further clarification regarding privatised decision making powers would have been desirable.

Rivista di diritto internazionale privato e processuale (RDIPP) No 1/2020: Abstracts



The first issue of 2020 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released. It features:

Antonietta Di Blase, Professor at the University of Roma Tre, **Sull'interpretazione delle convenzioni e delle norme dell'Unione europea in materia di diritto internazionale privato** ('On the Interpretation of the European Private International Law Conventions and Provisions'; in Italian)

- The paper provides an overview of the practice of international and national Courts relating to the interpretation of private international law conventions and EU rules, where uniform approach and autonomy from the national legal orders of Member States are construed as fundamental criteria. Some elements, especially drawn from the Court and the Italian practice, makes it evident that the national judicial organs have substantially endorsed the interpretation by the Court of Justice of the EU of the acts adopted within the framework of the judicial cooperation in civil matters. Possible gaps in EU rules could be overcome through interpretation – in keeping with the main human rights principles – taking into account that sometimes the legislation in force in the Member States follow a different approach, as in the case of family law. Finally, the paper addresses problems connected to the interpretation of conventions with Third States, also taking into account the consequences of the UK's exit from the European Union.

Gilles Cuniberti, Professor at the University of Luxembourg, **Signalling the Enforceability of the Forum's Judgments Abroad** (in English)

- The aim of this article is to document and assess the efforts made by international commercial courts to signal the enforceability of their judgments abroad. To that effect, three strategies were developed. The first and most obvious one was to enter into agreements providing for the mutual enforcement of judgments of contracting States which could serve the same function as the 1958 New York Convention for arbitral awards. Yet, as the 2005 Hague Convention has a limited scope and the 2019 Hague Convention is not yet in force, alternative strategies were identified. Several international commercial courts are actively pursuing the conclusion of non-binding documents with other courts or even law firms suggesting that the judgments of the forum would be enforced by the courts of other States. Finally, one international court has also explored how it could convert its judgments into arbitral awards.

Laura Baccaglini, Associate Professor at the University of Trento, **L'esecuzione transfrontaliera delle decisioni nel regolamento (UE) 2015/848** ('Cross-Border Enforcement of Decisions Pursuant to (EU) Regulation 2015/848'; in Italian)

- This paper addresses the cross-border enforcement of insolvency decisions in Europe. Notably, it examines how the claims brought in the interest of an insolvency proceeding opened in one Member State can be pursued in other Member States. The topic refers to EU Regulation 848/2015 that, as of 26 June 2017, replaced EC Regulation No 1346/2000 without introducing any significant new features as regards the circulation of such judgments, which remain subject to a system of automatic recognition. The reference made by such Regulation to Regulation No 1215/2012 makes the enforcement of those judgments equally automatic, without the need for prior exequatur by the court of the State addressed but only requiring the delivery of a certificate of enforceability by the court of the State of origin. The problem is examined by taking the liquidation procedure as a model, assuming that it was opened in a Member State other than Italy, where the insolvency practitioner needs to recover assets that have been disposed of by the debtor, after the opening of the procedure. The question is addressed as to how the insolvency practitioner can prevent the continuation of individual enforcement proceedings still pending and whether he can intervene to have the assets liquidated, withholding the proceeds. More generally, the problem arises as to which rules govern the liquidation of assets located in Italy and belonging to the debtor. In all these cases, the issue is whether the foreign judgment should be enforced and, if so, how it should be enforced.

The following comment is also featured:

Giovanna Adinolfi, Professor at the University of Milan, **L'accordo di libero scambio tra l'Unione europea e la Repubblica di Singapore tra tradizione e innovazione** ('The Free Trade Agreement between the European Union and the Republic of Singapore between Tradition and Innovation'; in Italian)

- The Free Trade Agreement (FTA) with Singapore entered into force on 21 December 2019. It is one of the so-called new generation treaties negotiated and concluded by the European Union within the framework of the trade policy strategy launched in 2006. The FTA is complemented by the Investment Protection Agreement (IPA), signed in 2018 and whose entry into force requires the ratification by all EU Member States, in addition to the EU and Singapore. The overall purpose of the contribution

is to assess to what extent the parties to the two agreements have not overlooked the dense network of other treaties and conventions that already govern their cooperation in economic matters. Indeed, the substantive provisions and the dispute settlement mechanisms established under the FTA and IPA have been inspired by these external sources and by their relevant case law. The analysis focuses, first, on the FTA provisions on trade in goods and services, establishment, subsidies, government procurement and intellectual property rights (para 2-6). Thereafter, the IPA is taken into consideration for the purposes of identifying possible overlaps with the FTA rules on establishment (para 7). Finally, focus is placed on the envisaged dispute settlement mechanisms, in view of the role they may play for a proper safeguard of the businesses' interests (para 7). This issue arises because of the provisions included in both the FTA and the IPA excluding the direct effects of the two agreements in the parties' legal order. Against this framework, the investor-State dispute settlement mechanism established under the IPA is called on to play a crucial role, also in the light of the detailed provisions on the enforcement of awards under art. 3.22 IPA.

In addition to the foregoing, this issue features the following book review by *Angela Lupone*, Professor at the University of Milan: Nora Louisa Hesse, **Die Vereinbarkeit des EU-Grenzbeschlagnahmeverfahres mit dem TRIPS Abkommen**, Mohr Siebeck, Tübingen, 2018, pp. XI-274.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2020: Abstracts

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

A. Stein: **The 2019 Hague Judgments Convention – All's Well that Ends Well?**

The Hague Convention on the Recognition and Enforcement of Foreign Judgments, which was concluded in July 2019, holds the potential of facilitating the resolution of cross-border conflicts by enabling, accelerating and reducing the cost of the recognition and enforcement of judgments abroad although a number of areas have been excluded from scope. As the academic discussion on the merits of this instrument unfolds and the EU considers the benefits of ratification, this contribution by the EU's lead negotiator at the Diplomatic Conference presents an overview of the general architecture of the Convention and sheds some light on the individual issues that gave rise to the most intense discussion at the Diplomatic Conference.

C. North: **The 2019 HCCH Judgments Convention: A Common Law Perspective**

The recent conclusion of the long-awaited 2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the "Judgments Convention") provides an opportunity for States to reconsider existing regimes for the recognition and enforcement of foreign judgments under national law. This paper considers the potential benefits of the Judgments Convention from a common law perspective. It does so by considering the existing regime for recognition and enforcement at common law, and providing an overview of the objectives, structure and a number of key provisions of the Judgments Convention. It then highlights some of the potential benefits of the Convention for certain common law (and other) jurisdictions.

P.-A. Brand: **Recognition and enforcement of decisions in administrative law matters**

Whereas for civil and commercial matters there are extensive rules of international and European civil procedural law on mutual legal assistance and in particular on the recognition and enforcement of civil court decisions, there is no similar number of regulations on legal assistance and for the international enforcement of administrative court decisions. The same applies to the recognition of foreign administrative acts. This article deals with the existing rules, in particular with regard to decisions in administrative matters, and

concludes that the current system of enforcement assistance in the enforcement of administrative decisions should be adapted to the existing systems of recognition and enforcement of judgments in civil and commercial matters.

B. Hess: **About missing legal knowledge of German lawyers and courts**

This article addresses a decision rendered by the Landgericht Düsseldorf in which the court declined to enforce, under the Brussels Ibis Regulation, a provisional measure issued by a Greek court. Erroneously, in its decision the Landgericht held that applications for refusal of enforcement of foreign decisions (article 49 Brussels Ibis Regulation) are to be lodged with the Landgericht itself. Since the party lodged its application with the Landgericht on the last day of

the time limit, the Oberlandesgericht Düsseldorf eventually held that the application was untimely as it was not lodged with the Oberlandesgericht, instead. The Oberlandesgericht refused to restore the status quo ante because the information about the competent court had been manifestly erroneous, whereas the lawyer is expected to be familiar with articles 49 (2) and 75 lit b) of the Brussels Ibis Regulation. This article argues that jurisdiction over applications for refusal of enforcement is not easily apparent from the European and German legal provisions and that the legal literature addresses the issue inconsistently. This results in a certain degree of uncertainty as concerns jurisdiction over such applications, making it difficult to establish cases of possibly manifestly incorrect applications.

C.F. Nordmeier: **Abuse of a power of attorney granted by a spouse – The exclusion of matrimonial property regimes, the place of occurrence of the damage under Brussels Ibis and the escape clause of art. 4 (3) Rome II**

The article deals with the abuse of power of attorney by spouses on the basis of a decision of the Higher Regional Court of Nuremberg. The spouses were both German citizens, the last common habitual residence was in France. After the failure of the marriage, the wife had transferred money from a German bank account of the husband under abusive use of a power of attorney granted to her. The husband sues for repayment. Such an action does not fall within the scope of the exception of matrimonial property regimes under art. 1 (2) (a) Brussels Ibis Regulation. For the purpose of determining the place where the damage occurred (Art. 7 No. 2 Brussels Ibis Regulation), a distinction can be made between cases

of manipulation and cases of error. In the event of manipulation, the bank account will give jurisdiction under Art. 7 No. 2 Brussels Ibis Regulation. Determining the law applicable by Art. 4 (3) (2) Rome II Regulation, consideration must be given not only to the statute of marriage effect, but also to the statute of power of attorney. Particular restraint in the application of Art. 4 (3) (2) Rome II Regulation is indicated if the legal relationship to which the non-contractual obligation is to be accessory is not determined by conflict-of-law rules unified on European Union level.

P.F. Schlosser: **Governing law provision in the main contract – valid also for the arbitration provision therein?**

Both rulings are shortsighted by extending the law, chosen by the parties for the main contract, to the arbitration provision therein. The New York Convention had good reasons for favoring, in the absence of a contractual provision specifically directed to the arbitration provision, the law governing the arbitration at the arbitrators' seat. For that law the interests of the parties are much more predominant than for their substantive agreements.

F. Rieländer: **Choice-of-law clauses in pre-formulated fiduciary contracts for holding shares: Consolidation of the test of unfairness regarding choice-of-law clauses under Art. 3(1) Directive 93/13/EEC**

In its judgment, C-272/18, the European Court of Justice dealt with three conflict-of-laws issues. Firstly, it held that the contractual issues arising from fiduciary relationships concerning limited partnership interests are included within the scope of the Rome I Regulation. While these contracts are not covered by the exemption set forth in Art. 1(2)(f) Rome I Regulation, the Court, unfortunately, missed an opportunity to lay down well-defined criteria for determining the types of civil law fiduciary relationships which may be considered functionally equivalent to common law trusts for the purposes of Art. 1(2)(h) Rome I Regulation. Secondly, the Court established that Art. 6(4)(a) Rome I Regulation must be given a strict interpretation in light of its wording and purpose in relation to the requirement "to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence". Accordingly, this exception is applicable only if the consumer needs to leave the country in which he has his habitual residence for the purpose of enjoying the benefits of the services. Thirdly, the Court re-affirmed that choice-of-law clauses in pre-formulated

consumer contracts are subject to a test of unfairness under Art. 3(1) Directive 93/13/EEC. Since the material scope of this Directive is held to apply to choice-of-law clauses, such a clause may be considered as unfair if it misleads the consumer as far as the laws applicable to the contract is concerned.

U. Bergquist: **Does a European Certificate of Succession have to be valid not only at the point of application to the Land Registry, but also at the point of completion of the registration in the Land Register?**

When it comes to the evidentiary effect of European Certificates of Successions, there are different opinions on whether a certified copy of the certificate has to be valid at the time of the completion of a registration in the Land register. The Kammergericht of Berlin recently ruled that a certified copy loses its evidentiary effect in accordance with art. 69 (2) and (5) of the European Succession Regulation (No. 650/2012) after expiry of the (six-month) validity period, even if the applicant has no influence on the duration of the registration procedure. This contribution presents the different arguments and concludes – in accordance with the Kammergericht – that not the date of submission of the application but the date of completion of the registration has to be decisive for the required proof.

D. Looschelders: **International and Local Jurisdiction for Claims under Prospectus Liability**

The judgment by the Austrian Supreme Court of Justice (Oberster Gerichtshof, OGH) deals with international and local jurisdiction for a claim under prospectus liability. It is mainly concerned with the determination of the place in which the harmful event occurred, as stated in Art. 5(3) of Regulation No 44/2001. Specifying the damage location can pose significant problems due to the fact that prospectus liability compensates pure economic loss. The OGH had stayed the proceedings in order to make a reference to the European Court of Justice (ECJ) for a preliminary ruling on several questions related to this issue. However, the decision by the ECJ left many details unsettled. This article identifies the criteria developed by the OGH in light of the case. The author agrees with the OGH to designate the damage location in this particular case as the injured party’s place of residence. Nevertheless, he points out the difficulties of this approach in cases where not all investment and damage specific circumstances point to the investor’s country of residence.

W.Voß: **U.S.-style Judicial Assistance – Discovery of Foreign Evidence from Foreign Respondents for Use in Foreign Proceedings**

In the future, will German litigants in German court proceedings have to hand over to the opposing party evidence located on German territory based on American court orders? In general, under German law, the responsibility to gather information and to clarify the facts of the case lies with the party alleging the respective facts, while third parties can only be forced to produce documents in exceptional circumstances. However, the possibility to obtain judicial assistance under the American Rule 28 U.S.C. § 1782(a) increasingly threatens to circumvent these narrow provisions on document production in transatlantic relations. For judicial assistance under this Federal statute provides parties to foreign or international proceedings with access to pre-trial discovery under U.S. law, if the person from whom discovery is sought "resides or is found" in the American court district. Over the years, the statute has been given increasingly broad applicability – a trend that is now being continued by the recent ruling of the Second Circuit Court of Appeals discussed in this article. In this decision, the Court addressed two long-disputed issues: First, it had to decide on whether the application of 28 U.S.C. § 1782(a) is limited to a person who actually "resides or is found" in the relevant district or whether the statute could be read more broadly to include all those cases in which a court has personal jurisdiction over a person. Second, the case raised the controversial question of whether 28 U.S.C. § 1782 allows for extraterritorial discovery.

M. Jänterä-Jareborg: **Sweden: Non-recognition of child marriages concluded abroad**

Combatting child marriages has been on the Swedish legislative agenda since the early 2000s. Sweden's previously liberal rules on the recognition of foreign marriages have been revisited in law amendments carried out in 2004, 2014 and 2019, each reform adding new restrictions. The 2019 amendment forbids recognition of any marriage concluded abroad as of 1/1/2019 by a person under the age of 18. (Recognition of marriages concluded before 1/1/2019 follows the previously adopted rules.) The marriage is invalid in Sweden directly by force of the new Swedish rules on non-recognition. It is irrelevant whether the parties had any ties to Sweden at the time of the marriage or the lapse of time. The aim is to signal to the world community total dissociation with the harmful practice of child marriages. Exceptionally, however, once both parties are of age, the rule of

nonrecognition may be set aside, if called upon for “extraordinary reasons”. No special procedure applies. It is up to each competent authority to decide on the validity of the marriage, independently of any other authority’s previous decision. While access to this “escape clause” from the rule of non-recognition mitigates the harshness of the system, it makes the outcome unpredictable. As a result, the parties’ relationship may come to qualify as marriage in one context but not in another. Sweden’s Legislative Council advised strongly against the reform, as contrary to the aim of protecting the vulnerable, and in conflict with the European Convention on Human Rights, as well as European Union law. Regrettably, the government and Parliament took no notice of this criticism in substance.

I. Tekdogan-Bahçivanci: **Recent Turkish Cases on Recognition and Enforcement of Foreign Family Law Judgements: An Analysis within the Context of the ECHR**

In a number of recent cases, the Turkish Supreme Court changed its previous jurisprudence, rediscovered the ECHR in the meaning of private international law and adopted a fundamental-rights oriented approach on the recognition and enforcement of foreign judgements in family matters, i.e. custody and guardianship. This article aims to examine this shift together with the jurisprudence of the European Court of Human Rights, to find a basis for this shift by analysing Turkey’s obligation to comply with the ECHR and to identify one of the problematic issues of Turkish private international law where the same approach should be adopted: namely recognition and/or enforcement of foreign judgements relating to non-marital forms of cohabitation.

ERA: Recent European Court of Human Rights Case Law in Family

Matters (conference report)

Report written by Tine Van Hof, researcher at the University of Antwerp

On the 13th and 14th of February 2020, the Academy of European Law (ERA) organized a conference on 'Recent ECtHR Case Law in Family Matters'. This conference was held in Strasbourg and brought together forty participants coming from twenty-one different countries. This report will set out some of the issues addressed at the conference.

The presentation, made by ***Ksenija Turkovi?***, Judge at the European Court of Human Rights, focused on children on the move and more specifically on minors in the context of migration. On this topic the European Court of Human Rights (ECtHR) has developed a child-specific human rights approach. This approach implies taking into account three particular concepts: vulnerability, best interests and autonomy. Judge Turkovi? pointed to the interesting discussion on whether vulnerability could only apply to young migrant children. On this discussion, there is now agreement that the vulnerability applies to all children under the age of 18 and regardless whether they are accompanied by adults. The ECtHR made very clear in its case law that migrant children are especially vulnerable and that this vulnerability is a decisive factor that takes precedence over the children's migrant status. This vulnerability also plays a role in the cases on the detention of children. The more vulnerable a person is, the lower the threshold for a situation of detention to fall within the scope of Article 3 of the European Convention on Human Rights (ECHR), encompassing the prohibition of torture.

Family unification and the free movement of family status was the second topic of the day. ***Michael Hellner***, professor at Stockholm University, discussed several cases of the ECtHR (Ejimson v Germany) and the Court of Justice of the EU (CJEU) (K.A. v Belgium, Coman and S.M.). He concluded that family life does not automatically create a

right of residence but it can create such a right in certain circumstances. In the Coman case for example, the CJEU decided that Romania had to recognize the marriage between the two men for the purpose of enabling such persons to exercise the rights they enjoy under EU law (i.e. free movement). Professor Hellner noted that it seems to be quite easy to circumvent national law in the future if one looks at the Coman case. He considered it positive if the consequence was that same-sex marriages and surrogacy arrangements created abroad
were recognized. However, he made the interesting observation that it might be a very different story if one thinks about child marriages and the recognition thereof.

Maria-Andriani Kostopoulou,
consultant in family law for the Council of Europe, thereafter shared her insights on parental rights, pre-adoption foster care and adoption. She discussed i.a. the evolution in the case law of the ECtHR on the representation of the child before the Court. In the Strand-Lobben case, the Court stated that the issue of representation does not require a restrictive or technical approach and thus made clear that a certain level of flexibility is necessary. In the Paradisio and Campanelli case, the ECtHR provided three criteria that should be taken into account for assessing the representation of the child: the link between the child and the representative, the subject-matter of the case and any potential conflict of interests between the interests of the child and those of the representative. The latest case, A. and B. against Croatia, introduced a security safeguard. In this case, the ECtHR asked the Croatian Bar Association to appoint a legal representative for the child for the procedure before the ECtHR since the Court was not sure that there were no conflict of interests between the child and the mother, who proposed to be the representative.

To end the first conference day, ***Dmytro Tretyakov***, lawyer at the Registry of the ECtHR, enlightened us about the misconceptions and best practices of submitting a case to the Court. His most important tips for a submission to the Court are the following:

- Use the current application form and not an old one;
- Submit well in time and certainly within the six-month period;

- Summarize the facts of the case on the three pages provided. This summary has to be clear, readable (for those that do it in handwriting) and comprehensible;
- To state claims, refer to the relevant Article from the ECHR (do not cite it) and explain what the specific problem is with regard to that Article;
- Support each claim with documents; and
- Sign the form in the correct boxes and carefully look where the signature of the applicant and where the signature of the representative is required.

The second day of the conference started with the presentation of ***Nadia Rusinova***, attorney-at-law and lecturer at the Hague University of Applied Science, on international child abduction. She discussed i.a. the issue of domestic violence in child abduction cases. Several questions can be raised in this regard, for example: what constitutes domestic violence? When should a court accept the domestic violence to be established? What is adequate protection in light of the Hague Convention on International Child Abduction (1980) and who decides on this? In the case O.C.I. and others v Romania, one of the questions was whether there is such a thing as light violence that does not amount to a grave risk in the sense of Article 13(1)(b) of the Hague Convention. The ECtHR approached this issue very critically and stated that no form of corporal punishment is acceptable. Regarding the adequate measures, the Court stated that domestic authorities have a discretion to decide what is adequate but the measures should be in place before ordering the return of the child. Another point raised by Ms. Rusinova is the time factor that is required. If one looks at Article 11(2) of the Hague Convention and at Article 11(3) of the Brussels IIbis Regulation together, six weeks is the required time period for the return proceedings. The Brussels IIbis Recast clarified that the procedure should take no more than six weeks per instance. However, according to Ms. Rusinova it is hardly possible to do the procedures in six weeks; it will only work when the proceeding is not turned into an adversarial proceeding in which all kinds of claims of both parents are dealt with.

Samuel Fulli-Lemaire, professor at the University of Strasbourg, addressed the interesting evolution of reproductive rights and surrogacy. In the case of C. and E. v France, the French Court of Cassation asked the ECtHR for an advisory opinion on the question whether the current state of the case law in France was compatible with the obligations under Article 8 ECHR (the right to respect for private and family life). The status of the French case law was that the genetic parent was fully accepted but the other intended parent was required to adopt the child if he or she wished to establish parentage links. The ECtHR replied that the obligation under Article 8 entailed that there must be a possibility of recognition of the parent-child relationship but that it is up to the States to decide how to do this. Adoption is a sufficient method of recognizing such relationship, provided that it is quick and effective enough. The Court also refers to the possibility of transcription of the birth certificate as an alternative to adoption. However, professor Fulli-Lemaire pointed out that there is a misconception on what transcription means under French law. The mere transcription of the birth certificate does not establish legal parentage in France. The fact that the ECtHR says that an intended parent can adopt or transcribe the birth certificate is therefore tricky because under French law the effects of the two methods are not at all the same.

The very last presentation of the conference was given by ***Gabriela Lünsmann***, attorney-at-law and member of the Executive Board of the Lesbian and Gay Federation in Germany. She spoke about LGBTQI rights as human rights and hereby focused i.a. on transsexuals' gender identity and the case of X. v North-Macedonia. The question raised in that case is whether the state must provide for a procedure to recognize a different gender. The applicant had tried to change their gender but North-Macedonia did not offer any possibility to undergo an operation or to have medical treatment in that regard.
The applicant then went abroad for treatment. Back in North-Macedonia, he had his name changed but it was not possible to change his officially registered gender.
The applicant claimed that this amounted to a violation of Article 8 ECHR and specially referred to the obligation of the state to respect a person's physical and psychological integrity. The Court found that there was indeed a

violation. What is as yet unclear, and is thus an interesting point for reflection, is whether states are under an obligation to provide for a procedure for the recognition of a change of gender without the person having had an operation.

The author would like to thank ERA for the excellent organization of the conference and for the interesting range of topics discussed.

Same-sex parentage and surrogacy and their practical implications in Poland

Written by Anna Wysocka-Bar, Senior Lecturer at Jagiellonian University (Poland)

On 2 December 2019 Supreme Administrative Court of Poland (*Naczelny S?d Administracyjny*) adopted a resolution of seven judges (signature: II OPS 1/19), in which it stated that it is not possible – due to public policy – to transcribe into the domestic register of civil status a foreign birth certificate indicating two persons of the same sex as parents. The Ombudsman joined arguing that the refusal of transcription infringes the child's right to nationality and identity, and as a result may lead to infringement of the right to protection of health, the right to education, the right to personal security and the right to free movement and choice of place of residence. Interestingly, the Ombudsman for Children and public prosecutor suggested non-transcription. The background of the case concerns a child whose birth certificate indicated two women of Polish nationality as parents, a biological mother and her partner to a *de facto* union. Parents applied for such transcription in order to apply subsequently for the issuance of the passport for the child.

The Supreme Administrative Court stated that in accordance with the law on civil status register, the transcription must be refused if contrary to *ordre public* in

Poland. The public policy clause protects the domestic legal order against its violation. Such violation would result from the "recognition" of a birth certificate irreconcilable with fundamental principles of public policy. It was underlined that in accordance with Article 18 of the Constitution of Poland marriage is understood as a union between a man and a woman; family, motherhood and parenthood are under protection and guardianship of the State. In accordance with those principles and the whole system of family law, only one mother and one father might be treated as parents of a child. Any other category of "parent" is unknown. The Court underlined, at the same time, that transcription of the birth certificate into the domestic register should not be indispensable for a child to obtain a passport, as the child has, by operation of law, already acquired Polish nationality as inherited from the mother. However, in practical terms this would require challenging administrative authorities' approach (requesting domestic birth certificate) in another court procedure.

It should be explained here that the resolution was taken on the request of the panel of judges of the Supreme Administrative Court reviewing the cassation appeal brought by the parents, and therefore, in this particular case is binding. In other, similar cases panels of judges should, in general, follow the standpoint presented in such resolution. If the panel of judges is of a different view, it should request another resolution, instead of presenting a view contrary to the previous one. As a result, it might happen that there are two resolutions of seven judges presenting different views. Given the above, it can be said that the question of transcription is not as definitively answered as might seem at first glance.

A similar justification based on the public policy clause in conjunction with Article 18 of the Constitution has already been presented before in other cases, for example one concerning children born in the US out of surrogacy arrangements with a married woman, whose birth certificates indicated two men as parents, a (biological) father and his partner (identical judgments of 6 May 2015, signature: II OSK 2372/13 and II OSK 2419/13). The implications of these judgments were quite different as the Court refused to confirm that children acquired Polish nationality by birth from their father. In the eyes of the Court and according to fundamental principles of Polish family law, children born out of surrogacy (which is not regulated in Poland) by operation of law have filiation links only with the (biological, surrogate) mother and her husband. The paternity of the biological father (only) might be (at least theoretically) established, once the paternity of the

surrogate mother's husband is successfully disavowed in a court proceeding.

Here it should be added that opposite views were presented by the Supreme Administrative Court in other judgments. One of the cases concerned transcription of the birth certificate of a child born in India out of surrogacy arrangement. Such birth certificate indicates only the father (in this case a biological father) and do not contain any information about the (surrogate) mother. This was perceived as contrary to public policy by the administrative authorities, which underlined that in the Polish legal order establishing paternity is always dependent on the establishment of maternity. As a result, the lack of information about the mother raises doubts as to paternity of the man indicated on the birth certificate as father. Interestingly, based on the same birth certificate the acquisition of Polish nationality of the child was earlier confirmed by administrative authorities. In its judgment of 29 August 2018 (signature: II OSK 2129/16), Supreme Administrative Court criticized the way the public policy clause was so far understood. The Court (which hears the case after the refusal of administrative authorities of two instances and administrative court of the first instance – just as in all of the mentioned cases) underlined that this clause must be interpreted having regard to a broader context of the legal issue at hand, in particular it should take into account constitutional values (always prevailing best interest of a child) and international standards on protection of children's rights and human rights. This allows for the transcription of the birth certificate into civil status records in Poland.

Another interesting case concerned again the question of confirmation that the children acquired Polish nationality by birth after their father (four identical judgments of 30 October 2018, signatures: II OSK 1868/16, II OSK 1869/16, II OSK 1870/16, II OSK 1871/16). Four girls were born in US through surrogacy. The US birth certificates indicated two men as parents, one of them being a Polish national. The Supreme Administrative Court underlined that for the legal status of a child, including the possibility of confirming acquisition of Polish nationality, it should not matter that the child was born to a surrogate mother. What should matter is that a human being with inherent and inalienable dignity was born and this human being has a right to Polish nationality, as long as one of the parents is a Polish national.

The above mentioned cases, where the Supreme Administrative Court presented a conservative approach and approved the refusal of the confirmation that children

born out of surrogacy acquired Polish nationality by birth is now pending before European Court of Human Rights (Schlittner-Hay v. Poland). The applications raise violation by Poland of Article 8 (respect for private and family life) and Article 14 (discrimination on grounds of parents' sexual orientation) of the European Convention on Human Rights.

This shows that practical implications for children to same-sex parents and from surrogacy arrangements are of growing interest and importance also in Poland. The approaches of domestic authorities and courts seems to be evolving, but are still quite divergent. The view on the issue from the European Court of Human Rights is awaited.