Court of Justice of the EU on the recognition of parentage

After the Coman judgment of 2018, the Grand Chamber of the Court of Justice of the European Union (CJEU) has again rendered a judgment in the field of free movement of citizens that is of importance for private international law. Like in Coman, the judgment in V.M.A. of 14 December 2021 concerned a non-traditional family of which the members sought to make use of their right to free movement in the EU under the Treaty on the Functioning of the European Union (TFEU) and Directive 2004/38. The Charter of Fundamental Rights of the EU (Charter) was also pertinent, particularly its Article 7 on respect for private and family life, Article 9 on the right to marry and the right to found a family, Article 24 on the rights of the child, and Article 45 on freedom of movement and of residence.

While Coman concerned the definition of “spouse” under Article 2 of the Directive, in V.M.A. the CJEU addressed the definition of “direct descendants” in the same provision.

Two women, V.M.A., a Bulgarian national, and K.D.K., a national of the United Kingdom, were married and lived in Spain. A daughter, S.D.K.A., was born in Spain. Her Spanish birth certificate indicated V.M.A. as “mother A” and K.D.K. as “mother”. V.M.A. applied to the Sofia municipality for a birth certificate for S.D.K.A. in order to obtain a Bulgarian identity document for her. She submitted a legalised and certified translation into Bulgarian of the extract from the civil register of Barcelona.

The Sofia municipality refused this application, due to the lack of information on S.D.K.A.’s biological mother and because the reference to two mothers was contrary to Bulgarian public policy.

The Administrative Court of the City of Sofia, to which V.M.A. appealed the municipality’s decision, posed four questions to the CJEU. It sought to know whether Articles 20 and 21 of the TFEU and Articles 7, 24 and 45 of the Charter oblige Bulgaria to recognise the Spanish birth certificate despite its mentioning two mothers and despite the fact that it was unclear who the biological mother of the child was. It also questioned EU Member States’ discretion regarding rules

for the establishment of parentage. A further relevant point was Brexit and the fact that the child would not be able to get EU citizenship through the other mother, who is a UK citizen.

The Grand Chamber ruled as follows:

Article 4(2) TEU, Articles 20 and 21 TFEU and Articles 7, 24 and 45 of the Charter of Fundamental Rights of the European Union, read in conjunction with Article 4(3) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, must be interpreted as meaning that, in the case of a child, being a minor, who is a Union citizen and whose birth certificate, issued by the competent authorities of the host Member State, designates as that child's parents two persons of the same sex, the Member State of which that child is a national is obliged (i) to issue to that child an identity card or a passport without requiring a birth certificate to be drawn up beforehand by its national authorities, and (ii) to recognise, as is any other Member State, the document from the host Member State that permits that child to exercise, with each of those two persons, the child's right to move and reside freely within the territory of the Member States.

The CJEU thus obliges Bulgaria, through EU law, to recognise the Spanish birth certificate. The CJEU is not concerned with the issue of a birth certificate in Bulgaria, but rather with the identity document (the requirements under national law for the identity document cannot be used to refuse to issue such identity document – see para 45).

The parentage established lawfully in Spain has the result that the *parents of a Union citizen who is a minor and of whom they are the primary carers, be recognised by all Member States as having the right to accompany that child when her right to move and reside freely within the territory of the Member States is being exercised* (para 48)

The CJEU refers to the identity document as the document that permits free movement. This wording seems, on a first reading, to be broader than the ruling

in Coman, where the CJEU ruled on the recognition of the same-sex marriage only for purposes of the right to residence. However, in para 57 the Court seems to include the Coman limitation: *Such an obligation does not require the Member State of which the child concerned is a national to provide, in its national law, for the parenthood of persons of the same sex, or to recognise, for purposes other than the exercise of the rights which that child derives from EU law, the parent-child relationship between that child and the persons mentioned on the birth certificate drawn up by the authorities of the host Member State as being the child's parents.*

But I'm sure much debate will follow about the extent of the obligation to recognise. As readers might be aware, the European Commission earlier this year set up an Expert Group on the Recognition of Parentage between Member States.

XXIInd volume of the Yearbook of Private International Law (2020/2021) published

Thanks to Ilaria Pretelli for the tip-off.

The XXIInd volume of the Yearbook of Private International Law (2020/2021) has been released. It contains articles on the most important innovations in multilateral and national private international law by authors from all over the world. The readers will find an analysis on cross-border mobility of union citizens and continuity of civil status by Johan Meeusen as well as how to cope with the obstacles to mobility due to the pandemics (Bernard Haftel) and Brexit (Katarina

Trimmings and Konstantina Kalaitsoglou). Two inspiring sections nourish the core of the volume: the editors present the most challenging innovations of Regulation Brussels II ter (EU Regulation 2019/1111), and the consequences of the global reach of the internet for private international law. The National reports section hosts articles on the new Croatian and Uruguayan Private International law Statutes.

The most recent innovations on classical themes of private international law (torts, muslim divorces, the degree of deference by state courts to international commercial arbitral awards, etc.) add to this already rich volume.

Readers are invited to view the table of contents and the foreword by the editors.

Update: HCCH 2019 Judgments Convention Repository

In preparation of the Conference on the HCCH 2019 Judgments Convention on 9/10 September 2022, planned to be taking place on campus of the University of Bonn, Germany, we are offering here a Repository of contributions to the HCCH 2019 Judgments Convention. Please email us if you miss something in it, we will update immediately…

Update of 19 December 2021: New entries are printed bold.

Please also check the "official" Bibliography of the HCCH for the instrument.

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Department of Justice Hong Kong; HCCH	"Inaugural Global Conference – 2019 HCCH Judgments Convention: Global Enforcement of Civil and Commercial Judgments", 9 September 2019 (recording available here)
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Update: HCCH 2019 Judgments Convention Repository

HCCH 2019 Judgments Convention Repository

In preparation of the Conference on the HCCH 2019 Judgments Convention on 9/10 September 2022, planned to be taking place on campus of the University of Bonn, Germany, we are offering here a Repository of contributions to the HCCH 2019 Judgments Convention. Please email us if you miss something in it, we will update immediately…

Update of 20 November 2021: New entries are printed bold.

Please also check the "official" Bibliography of the HCCH for the instrument.

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III. Recordings of Events Related to the HCCH 2019 Judgments Convention

ASADIP; HCCH	“Conferencia Internacional: Convención HCCH 2019 sobre Reconocimiento y Ejecución de Sentencias Extranjeras”, 3 December 2020 (full recording available here and here)
ASIL	“The Promise and Prospects of the 2019 Hague Convention”, 25-26 June 2020 (full recording available here and here)
HCCH	“22nd Diplomatic Session of the HCCH: The Adoption of the 2019 Judgments Convention”, 2 July 2020 (short documentary video available here)
JPRI; HCCH; UNIDROIT; UNCITRAL	“2020 Judicial Policy Research Institute International Conference – International Commercial Litigation: Recent Developments and Future Challenges, Session 3: Recognition and Enforcement of Foreign Judgments”, 12 November 2020 (recording available here)
UIHJ; HCCH	“3rd training webinar on the Hague Conventions on service of documents (1965) and recognition and enforcement of judgements (2019)”, 15/18 March 2021 (full recording available here in French and here in English)

University of Bonn; HCCH	“Pre-Conference Video Roundtable on the HCCH 2019 Judgments Convention: Prospects for Judicial Cooperation in Civil and Commercial Matters between the EU and Third Countries”, 29 October 2020 (full recording available here)

Netherlands journal PIL – 2021, issue 3

The third issue of 2021 of the Dutch journal on private international law (NIPR) is available. A number of papers are dedicated to Brexit and private international law.

Brexit en ipr/brexit and pilSumner, Eerst de echtscheiding, dan de afwikkeling! Brexit en het internationaal privaatrecht / p. 433-453

Abstract

Brexit has changed a lot in the legal landscape. There are few areas of the law that have been unaffected, and international family law is no exception. In this article, attention will be paid to the various areas of international family law that

have been affected by the Brexit, drawing attention to the new legal regimes that are applicable with respect to these areas of the law (for example divorce, child protection and maintenance). Each section will further discuss how the new regime differs from the old regime, drawing attention to particular difficulties that may occur in the application of these new rules to the specific situation of the United Kingdom.

Berends, Internationaal insolventierecht tussen het Verenigd Koninkrijk en Nederland na de Brexit / p. 454-470

Abstract

What are the legal consequences in the Netherlands of a British insolvency proceeding since Brexit? In the Netherlands, there is no Act on this matter, and the answers must be found in case law. A foreign representative does not need to apply for recognition. He can exercise his rights unless an interested party prevents him from doing so in a legal procedure, for instance on the ground that the recognition of the insolvency proceeding would be contrary to public policy. A foreign proceeding has the applicable legal consequences according to the law of the State where the insolvency proceeding was opened, with some exceptions. Execution against the debtor's assets in the Netherlands remains possible.

What are the legal consequences in the United Kingdom of a Dutch insolvency proceeding since Brexit? The United Kingdom has enacted the Model Law of the United Nations Commission on International Trade Law. A foreign representative must apply for recognition. Upon recognition, individual actions concerning the debtor's assets and execution are stayed, unless such actions and execution are necessary to preserve a claim against the debtor. The consequences of recognition can be modified or terminated if the Court is not satisfied that the interests of interested parties are adequately protected. The so-called Gibbs Rule applies: a party to a contract made and to be performed in England is not discharged from liability under such contract by a discharge in bankruptcy or liquidation under the law of a foreign country in which he is domiciled.

Bens, Brussel na de Brexit: nieuwe regels in burgerlijke en handelszaken? / p. 471-492

Abstract

The UK formally left the EU on 31 January 2020, although the Brussels Ibis Regulation remained applicable in and for the UK until the end of the transition period on 31 December 2020. This article analyses the changes in the framework for international jurisdiction and the recognition and enforcement of decisions in cross-border civil and commercial matters between the Netherlands and the UK after 1 January 2021. After setting the historical context, the transitional provisions provided for the Brussels regime in the Withdrawal Agreement are scrutinised. It is argued that, considering these arrangements and the current EU framework for judicial co-operation in civil and commercial matters, the Brussels Convention and the NL-UK Enforcement Treaty of 1967 are not applicable to proceedings instituted after 1 January 2021. Consequently, the rules governing international jurisdiction and the cross-border recognition and enforcement of judgements applicable to 'new' cases and judgements are outlined and salient problems are highlighted. It is argued that most of these rules are not new, but are rather cast in a different perspective through Brexit, thereby raising some 'old' problems that require careful (re-)consideration of the post-Brexit legal framework.

Other articles

L.M. van Bochove, De voorzienbaarheid herzien? De fluctuerende invulling van het vereiste dat bevoegdheid ex artikel 7(2) Brussel I*bis* redelijkerwijs voorzienbaar is / p. 493-506

Abstract

This article discusses the requirement that the jurisdiction over matters in tort, based on Article 7(2) Brussels Ibis Regulation, is reasonably foreseeable for the defendant. An analysis of CJEU case law shows that the interpretation of what is 'reasonably foreseeable' fluctuates. Often, the threshold is set rather low, but in two recent cases the CJEU seems to have adopted a stricter interpretation. In VEB/BP and Mittelbayerischer Verlag, the foreseeability requirement actually precludes the attribution of jurisdiction on the basis of established (sub-)criteria, including the place of damage and the centre of main interest. This article attempts to identify the rationale for the use of different yardsticks of reasonable

foreseeability. It offers two possible explanations: the degree of the culpability of the defendant and the desired outcome in terms of jurisdiction, in particular the opportunity to use jurisdiction rules as a means to promote the enforcement of EU law. However, both explanations are problematic, in view of the Regulation's scheme and objectives. This paper argues in favour of a uniform, rather strict interpretation, which ensures that the defendant can reasonably foresee the jurisdiction of the court and avoids a multitude of competent courts. Current law offers no legal basis to consider the enforcement of (EU) law as a factor to establish a reasonably foreseeable jurisdiction; this would require intervention by the European legislator.

Schmitz, Rechtskeuze in consumentenovereenkomsten: artikel 6 lid 2 Rome I-Verordening en de Nederlandse rechter / p. 507-331

Abstract

Party autonomy has been a widely accepted principle of private international law ever since the Rome Convention. Yet, the right to choose the applicable law is often restricted when weaker parties are involved. According to Article 6(2) Rome I Regulation, the parties to a consumer contract may choose the applicable law provided that this choice does not deprive 'the consumer of the protection afforded to him' by the objectively applicable law (the law of his habitual place of residence). In the Netherlands, academic opinion is still divided on the issue of how 'deprived of protection' should be interpreted. Some argue that the objectively applicable law trumps the chosen law, even if the latter is more beneficial for the consumer. Others want to apply the law that better protects the consumer – regardless of whether it is the chosen or the objectively applicable law. This question goes hand in hand with a (possibly complex) legal comparison between both systems of law. How this comparison needs to be exercised is unclear. Delving deeply into Dutch case law shows that Dutch judges do not have a 'joined approach'. This paper uses a case study to illustrate that following a certain approach when applying Article 6(2) Rome I can alter the level of protection that the consumer enjoys. A lack of guidance from the European Court of Justice could be at fault here; and national courts should refer a question as to the 'right way' of applying Article 6(2) Rome I to the Court.

te Winkel, X.P.A. van Heesch, The *Shell* judgment – a bombShell in private international law? / p. 532-542

Abstract

This article discusses the recent judgment of the District Court of The Hague in Milieudefensie et al. v. RDS (May 26, 2021, ECLI:NL:RBDHA:2021:5337). It reviews the most important substantive rulings of the Court and then focusses on the private international law aspects of the case. Milieudefensie et al. argued that the adoption of the concern policy for the Shell Group by RDS qualifies as the Handlungsort and that Dutch law is therefore applicable to their claims based on Article 7 Rome II Regulation. RDS disagreed with this line of reasoning for multiple reasons. Since there is (as yet) no legal precedent regarding this discussion, both Milieudefensie and RDS relied on the analogous application of case law that concerned the interpretation of the Handlungsort under the Brussels Ibis Regulation. The legal debate between the parties regarding this aspect and the conclusion of the Court are set out in this article. The authors conclude with an analysis of the assessment of the Court and suggest that, given the impact of this ruling and the fact that there is no legal precedent, the Court ex officio should have requested a preliminary ruling from the Court of Justice.

Case note

Arons, HvJ EU 12 mei 2021, zaak C-709/19, ECLI:EU:C:2021:377, *NIPR* 2021, 267 (*VEB/BP*) / p. 543-550

Abstract

In this judgment the CJEU has ruled on localising purely financial losses in order to determine jurisdiction in tort claims. A claimant may sue a defendant on the basis of Article 7(2) of the Brussels Ibis Regulation in the court of another Member State at the place where the harmful event occurred or may occur. The CJEU has reiterated that the ‘place where the harmful event occurred’ may not be construed so extensively as to encompass any place where the adverse consequences of an event caused damage to the claimant.

For jurisdiction on this basis a close connection has to be established between the place where the damage occurred and the court addressed by the claimant. This ensures certainty for the defendant: the defendant has to be able to reasonably

foresee the court(s) where he may be sued.

The mere location of an investment account is not sufficient to establish the required close connection; additional circumstances are required (paras. 34 and 35). In the Kolassa case (C-375/13) information was published and notified by the defendant in a prospectus aimed at investors in Austria. The CJEU ruled that foreseeability is not ensured if the claim is brought before the courts in the Member State where the investment account used for the purchase of securities listed on the stock exchange of another State is situated, and the issuer of those securities is not subject to statutory reporting obligations in the Member State where the investment account is held by the purchaser (para. 34). A claim can only be brought on the basis of Article 7(2) against a listed company for publishing misleading information to investors in the jurisdiction where that company had to comply, for the purposes of its listing, with statutory reporting obligations. It is only in that Member State that a listed company can reasonably foresee the existence of an investment market and incur liability (para. 35).

Rescheduled: "The HCCH 2019 Judgments Convention: Prospects for Judicial Cooperation in Civil Matters between the EU and Third Countries" – Conference (now) on 9 and 10 September 2022,

University of Bonn, Germany

HCCH 2019 Judgments Convention Repository

Rescheduled: "The HCCH 2019 Judgments Convention: Prospects for Judicial Cooperation in Civil Matters between the EU and Third Countries" – Conference (now) on 9 and 10 September 2022, University of Bonn, Germany

As a result of the ongoing pandemic situation, we decided to reschedule the Conference **to Friday and Saturday**, **9 and 10 September 2022**. For further details and a (preliminary) programme, please visit the Conference Section on the website of the Institute for German and International Civil Procedure at the University of Bonn.

In preparation of the Conference on the HCCH 2019 Judgments Convention (now) on 9/10 September 2022, planned to be taking place on campus of the University of Bonn, Germany, we are offering here a Repository of contributions to the HCCH 2019 Judgments Convention. Please email us if you miss something in it, we will update immediately…

Update of 2 August 2021: New entries are printed bold.

Please also check the "official" Bibliography of the HCCH for the instrument.

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ASADIP; HCCH	"Conferencia Internacional: Convención HCCH 2019 sobre Reconocimiento y Ejecución de Sentencias Extranjeras", 3 December 2020 (full recording available here and here)
ASIL	**"The Promise and Prospects of the 2019 Hague Convention", 25-26 June 2020 (full recording available here and here)**
HCCH	"22nd Diplomatic Session of the HCCH: The Adoption of the 2019 Judgments Convention", 2 July 2020 (short documentary video available here)
JPRI; HCCH; UNIDROIT; UNCITRAL	"2020 Judicial Policy Research Institute International Conference – International Commercial Litigation: Recent Developments and Future Challenges, Session 3: Recognition and Enforcement of Foreign Judgments", 12 November 2020 (recording available here)

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University of Bonn; HCCH	“Pre-Conference Video Roundtable on the HCCH 2019 Judgments Convention: Prospects for Judicial Cooperation in Civil and Commercial Matters between the EU and Third Countries”, 29 October 2020 (full recording available here)

UK & Lugano : the final no

Written by Ekaterina Pannebakker

On 1 July 2021, Switzerland, which is the depository of the Lugano Convention 2007, notified the Parties to the Convention of the EU’s refusal to give its consent to the UK’s accession to the Convention. The notification is available on the website of the Swiss Department of Foreign Affairs in several languages. It states the EU is not ‘in a position to give its consent to invite the United Kingdom to accede to the Lugano Convention’, quoting the note verbale received by the depository from the EU on 28 June 2021.

This is the final chord in the consideration of the UK’s after-Brexit application to accede to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Lugano, 2007. As previously reported on conflictoflaws (inter alia), the accession to the Convention is subject to the consent of all the current Parties. The EU’s refusal was expected, since the European Commission gave a negative advice to the European Parliament. Noteworthy is perhaps that the Convention does not limit the number of attempts a State can make to accede to the Convention. This means (theoretically) the UK

can apply again in the future.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2021: Abstracts

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

O. Remien: **The European Succession Regulation and the many questions of the European court practice – five years after entry into force**

After five years of application of the European Succession Regulation it is time to have a look at European court practice: The general connecting factor of habitual residence has somehow been addressed by the European Court of Justice (ECJ) in *E.E.*, but especially national court practice shows many interesting cases of the necessary overall assessment. Choice of law by the testator is particularly important and a notary should point not only at the present situation, but also at possible developments in the future. Estate planning has become more interesting. The legacy *per vindicationem* (*Vindikationslegat*, i.e. with *in rem* effect) recognized in *Kubicka* poses specific problems. The position of the surviving spouse under § 1371 BGB in German law has become a highly debated subject and here the aspect of free movement of persons is highlighted. The European Succession Certificate also raises many questions, among them the applicability of the competence rules in case of national notarial succession certificates or court certificates, cases *Oberle*, *WB* and *E.E.*. The article pleads for an equilibrated multilateral approach. Donation *mortis causa* will have to be dealt with by the ECJ soon. Five years of application of the Succession Regulation – and many questions are open.

P. Hay: **Product Liability: Specific Jurisdiction over Out-of-State Defendants in the United States**

"Stream of commerce" jurisdiction in American law describes the exercise of jurisdiction in product liability cases over an out-of-state enterprise when a product produced and first sold by it in another American state or a foreign country reached the forum state and caused injury there. The enterprise cannot be reached under modern American rules applicable to "general" (claim unrelated) jurisdiction. Can it be reached by exercise of "specific" (claim related) jurisdiction even though it did not itself introduce the product into the forum state? This is an important question for interstate American as well as for foreign companies engaged in international commerce. The applicable federal constitutional limits on the exercise of such "stream of commerce" jurisdiction have long been nuanced and uncertain. It was often assumed that the claim must have "arisen out of" the defendant's forum contacts: what did that mean? The long-awaited U.S. Supreme Court decision in March 2021 in Ford vs. Montana now permits the exercise of specific jurisdiction when the claim arises out of or is (sufficiently) "related" to the defendant's in-state contacts and activities. This comment raises the question whether the decision reduces or in effect continues the previous uncertainty.

W. Wurmnest: **International Jurisdiction in Abuse of Dominance Cases**

The CJEU (Grand Chamber) has issued a landmark ruling on the borderline between contract and tort disputes under Article 7(1) and (2) of the Brussels I-bis Regulation. *Wikingerhof* concerned a claim against a dominant firm for violation of Art. 102 TFEU and/or national competition law rules. This article analyses the scope of the ruling and its impact on actions brought against dominant firms for violation of European and/or national competition law and also touches upon the salient question as to what extent such disputes are covered by choice of court agreements.

C.F. Nordmeier: **The waiver of succession according to Art. 13 Regulation**

(EU) 650/2012 and § 31 IntErbRVG in cases with reference to third countries

According to Art. 13 Regulation (EU) 650/2012, a waiver of succession can be declared before the courts of the state in which the declarant has his habitual residence. The present article discusses a decision of the Cologne Higher Regional Court on the acceptance of such a declaration. The decision also deals with questions of German procedural law. The article shows that – mainly due to the wording and history of origin – Art. 13 Regulation (EU) 650/2012 presupposes the jurisdiction of a member state bound to the Regulation (EU) 650/2012 to rule on the succession as a whole. Details for establishing such a jurisdiction are examined. According to German procedural law, the reception of a waiver of succession is an estate matter. If Section 31 of the IntErbRVG is applicable, a rejection of the acceptance demands a judicial decree which is subject to appeal.

P. Mankowski: **The location of global certificates – New world greets old world**

New kinds of assets and modern developments in contracting and technology pose new challenges concerning the methods how to locate assets. In many instances, the rules challenged are old or rooted in traditional thinking. Section 23 of the German Code of Civil Procedure (ZPO) is a good example for such confrontation. For instance, locating global certificates requires quite some reconsideration. Could arguments derived from modern legislation like the Hague Intermediated Securities Convention, Art. 2 pt. (9) EIR 2015 or § 17a DepotG offer a helping hand in interpreting such older rules?

S. Zwirlein-Forschner: **All in One Star Limited – Registration of a UK Company in Germany after the End of the Brexit Transition Period**

Since 1 January 2021, Brexit has been fully effective as the transition period for the UK has ended. In a recent decision, the Federal Court of Justice (BGH) has taken this into account in a referral procedure to the Court of Justice of the European Union (CJEU). The decision raises interesting questions on the demarcation between register law and company law, on conflict of laws and on

the interpretation of norms implementing EU law. This article comments on these questions.

K. Sendlmeier: **Informal Binding of Third Parties – Relativising the Voluntary Nature of International Commercial Arbitration?**

The two decisions from the US and Switzerland deal with the formless binding of third parties to arbitration agreements that have been formally concluded between other parties. They thus address one of the most controversial issues in international commercial arbitration. Both courts interpret what is arguably the most important international agreement on commercial arbitration, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. The Supreme Court has ruled that the Convention does not preclude non-signatories from being bound by arbitration based on equitable estoppel in US arbitration law. In the Swiss decision, the binding nature of a non-signatory is based on its interference in the performance of the main contract of other parties. According to the established case law of the Swiss Federal Tribunal, this binding approach does not conflict with the New York Convention either.

K. Bälz: **Can a State Company be held liable for State Debt? Piercing of the Corporate Veil vs. attribution pursuant to Public International Law – Cour d'appel de Paris of 5 September 2019, No. 18/17592**

The question of whether the creditor of a foreign state can enforce against the assets of public authorities and state enterprises of that state is of significant practical importance, particularly in view of the increasing number of investment arbitrations. In a decision of 5 September 2019, the Paris Court of Appeal has confirmed that a creditor of the Libyan State can enforce an arbitral award against the assets of the Libyan Investment Authority (LIA), arguing that – although the LIA enjoys separate legal personality under Libyan law – it was in fact an organ *(émanation)* of the Libyan State, that was functionally integrated into the state apparatus without clearly separated assets of its own. This approach is based on public international law concepts of state liability and diverges from corporate law principles, according to which a shareholder cannot generally be held liable for the corporation's debts.

O.L. Knöfel: **Liability of Officials for Sovereign Acts (acta iure imperii) as a Challenge for EU and Austrian Private International Law**

The article reviews a decision of the Supreme Court of the Republic of Austria (Case 1 Ob 33/19p). The Court held that a civil action for compensation brought in Austria, by the victim of a downhill skiing accident, against a German school teacher on account of alleged negligence during a reconnaissance ride down an Austrian ski slope, does not constitute a “civil and commercial matter” under the Rome II Regulation, as it involves an *actum iure imperii* (Art. 1 cl. 1 Rome II Regulation). As a consequence, the Court applied German Law, relying on an alleged customary conflicts rule (*lex officii* principle), according to which indemnity claims against officials who act on behalf of the State are inevitably and invariably governed by the law of the liable State. Finally, the Court held that an action brought directly against a foreign official in Austria is not barred by sec. 9 cl. 5 of the Austrian Act of State Liability *(Amtshaftungsgesetz)*. The Court’s decision is clearly wrong as being at variance with many well-established principles of the conflict of laws in general and of cross-border State liability in particular.

E. Piovesani: **Italian Ex Lege Qualified Overriding Mandatory Provisions as a Response to the “COVID-19 Epidemiological Emergency”**

Art. 88-bis Decree-Law 18/2020 (converted, with modifications, by Law 27/2020) is headed “Reimbursement of Travel and Accommodation Contracts and Package Travel”. This provision is only one of the several provisions adopted by the Italian legislator as a response to the so-called “COVID- 19 epidemiological emergency”. What makes Art. 88-bis Decree-Law 18/2020 “special” is that its para. 13 qualifies the provisions contained in the same article as overriding mandatory provisions.

First Issue of 2021's Journal of Private International Law

The first issue of the *Journal of Private International Law* for 2021 was released today and it features the following articles:

Paul Beaumont, Some reflections on the way ahead for UK private international law after Brexit

Since 1 January 2021 the UK has moved out of the implementation period for its withdrawal from the European Union (EU) and it is an appropriate time to reflect on the way forward for the UK in developing private international law. This article considers the practical steps that the UK should take in the near future. There is significant work that the UK can do to progress its commitment to the "progressive unification of the rules of private international law" by improving its commitment to the effective functioning of several key Conventions concluded by the Hague Conference on Private International Law (HCCH). Some of these steps can and should be taken immediately, notably accepting the accessions of other States to the Hague Evidence and Child Abduction Conventions and extending the scope of the UK's ratification of the Adults Convention to England and Wales, and Northern Ireland. Other things require more consultation and time but there are great opportunities to provide leadership in the world by ratifying the Hague Judgments Convention 2019 and, when implementing that Convention which is based on minimum harmonisation, providing leadership in the Commonwealth by implementing, at least to some extent, the Commonwealth Model Law on Recognition and Enforcement of Civil and Commercial Judgments. Within the UK, as a demonstration of best constitutional practice, intergovernmental cooperation between the UK Government and the devolved administrations should take place to consider how intra-UK private international law could be reformed learning the lessons from the UK Supreme Court's highly divided decision in Villiers. Such work should involve the best of the UK's experts (from each of its systems of law) on private international law from academia, the judiciary and legal practice. Doing so, would avoid accusations that Brexit will see a UK run by generalists who give too little attention and weight to the views of experts. This use of experts should also extend to the UK's involvement in the future work of HCCH at all levels. The HCCH will only be able to be an effective international organisation

if its Members show a commitment to harnessing the talents of experts in the subject within the work of the HCCH.

Reid Mortensen, Brexit and private international law in the Commonwealth

"Brexit is a trading and commercial opportunity for the countries of the Commonwealth, as it makes it likely that, for many, their access to United Kingdom (UK) markets will improve significantly. The question addressed in this article is whether, to support more open and trading relationships, Brexit also presents opportunities for the development of the private international law of Commonwealth countries – including the UK. Focusing on Australia, Canada, New Zealand and Singapore, as well as the UK, an account is given of the relationship between the different systems of private international law in these Commonwealth countries in the period of the UK's membership of the European Union (EU). Accordingly, consideration is given to the Europeanisation of UK private international law and its resistance in other parts of the Commonwealth. The continuing lead that English adjudication has given to private international law in the Commonwealth and, yet, the greater fragmentation of that law while the UK was in the EU are also discussed. The conclusion considers the need to improve the cross-border enforcement of judgments within the Commonwealth, and the example given in that respect by its federations and the trans-Tasman market. Possible directions that the cross-border enforcement of judgments could take in the Commonwealth are explored."

Trevor Hartley, Arbitration and the Brussels I Regulation – Before and After Brexit

This article deals with the effect of the Brussels I Regulation on arbitration. This Regulation no longer applies in the UK, but the British Government has applied to join the Lugano Convention, which contains similar provisions. So the article also discusses the position under Lugano, paying particular attention to the differences between the two instruments. The main focus is on the problems that arise when the same dispute is subject to both arbitration and litigation. Possible mechanisms to resolve these problems – such as antisuit injunctions – are considered. The article also discusses other questions, such as freezing orders in

support of arbitration.

Maksymilian Pazdan & Maciej Zachariasiewicz, The EU succession regulation: achievements, ambiguities, and challenges for the future

The quest for uniformity in the private international law relating to succession has a long history. It is only with the adoption of the EU Succession Regulation that a major success was achieved in this field. Although the Regulation should receive a largely positive appraisal, it also suffers from certain drawbacks that will require a careful approach by courts and other authorities as to the practical application of the Regulation. The authors address selected difficulties that arise under its provisions and make suggestions for future review and reform. The article starts with the central notion of habitual residence and discusses the possibility of having a dual habitual residence. It then moves to discuss choice of law and recommends to broaden further party autonomy in the area of succession law. Some more specific issues are also addressed, including legacies by vindication, the relationship between the law applicable to succession, the role of the legis rei sitae and the law applicable to the registries of property, estates without a claimant, the special rules imposing restrictions concerning or affecting succession in respect of certain assets, as well as the exclusion of trusts. Some proposals for clarifications are made in that regard.

Stellina Jolly & Aaditya Vikram Sharma, Domestic violence and inter-country child abduction: an Indian judicial and legislative exploration

The Hague Convention on the Civil Aspects of International Child Abduction aims to prevent the abduction of children by their parents by ensuring the child's prompt return to his/her place of habitual residence. At the time of drafting the Convention, the drafters believed that non-custodial parents who were fathers perpetrated most of the abductions. However, the current statistics reveal the overwhelming majority of all abductors as primary or joint-primary caretakers. Unfortunately, it is unknown what exact proportion of these situations includes abductions triggered by domestic violence. In the absence of an explicit provision of domestic violence against spouses as a defence against an order of return, for a parent who has abducted a child to escape domestic violence, the relevant

defence is of “grave risk of harm” to and “intolerable situation” for the child under Article 13(1)(b) of the Convention. However, the lack of guidance on what constitutes “grave risk” and “intolerable situation”, at least in the past, and its operationalisation in the context of domestic violence brings in pervasive indeterminacy in child abduction. In 2012, the Hague Conference on Private International Law identified “domestic violence allegations and return proceedings” as a key issue and recommended steps for developing principles on the management of domestic violence allegations in return proceedings leading to the adoption of a Good Practice Guide on this issue in 2020.

The Ministry of Women and Child Development (WCD) and the Ministry of Law and Justice, India, cite that most Indian parents who abduct their children happen to be women escaping domestic violence abroad. Thus, they are victims escaping for themselves and their children’s safety. This research has summed up the judgments delivered by High Courts and the Supreme Court of India on child abduction between 1984 and 2019. Through judicial mapping, the paper discusses the cases in which battered women have highlighted and argued domestic violence as a reason against their children’s return. The paper evaluates whether the reason given by the two ministries against India’s accession to the Hague Convention is reflected in cases that have come up for judicial resolution and what are the criteria evolved by the judiciary in addressing the concerns of domestic violence against a spouse involved in child abduction. The paper analyses India’s legislative initiative, the Civil Aspects of International Child Abduction Bill, 2016 and assesses the measures proposed by the Bill for considering domestic violence against a spouse in abduction cases.

Kittiwat Chunchaemsai, Legal considerations and challenges involved in bringing the 2005 Hague Convention on Choice of Court Agreements into force within an internal legal system: A case study of Thailand

Thailand must consider two vital elements, namely its internal legal system and environment before signing the Hague Convention on Choice of Court Agreements 2005 (Hague Convention). This paper investigates whether the law of Thailand in its current form is inconsistent with the Hague Convention. Articles 1–15 are examined to identify areas of inconsistency and to suggest appropriate solutions. This study finds that the internal legal system of Thailand is not quite in

line with the Hague Convention. This conclusion leads to analytical recommendations to suit the needs of the current Thai legal system. Implementing these recommendations is necessary for Thailand if it intends to become a Party to the Hague Convention. Thailand must not only have a specific implementation act but must also review and revise the relevant laws appropriately.

Saeed Haghani, Evolution of *lex societatis* under Iranian law: current status and future prospects

There has been a growing attention to applicable law to companies (*lex societatis*) in Iranian legal research. A brief study of relevant legal literature leads us to a list of both disagreements and complexities on the subject. Meanwhile, a recent parliamentary effort on the issue, illustrates the importance of *lex societatis* in the eyes of the Iranian legislature. A comparative approach would be of great help in the analysis of the formation and evolution of relevant Iranian legal rules. This paper tries to provide the reader with a comprehensive view of the current transitory state of Iranian law regarding *lex societatis*.

Latest issue Dutch PIL journal (NIPR)

The latest issue (21/1) of the Dutch journal *Nederlands Internationaal Privaatrecht* has been published. It includes the following articles.

Vriesendorp, W. van Kesteren, E. Vilarin-Seivane & S. Hinse, Automatic recognition of the Dutch undisclosed WHOA procedure in the European Union / p. 3-17

On 1 January 2021, the Act on Court Confirmation of Extrajudicial Restructuring Plans ('WHOA') was introduced into the Dutch legal framework. It allows for extrajudicial debt restructuring outside of insolvency proceedings, a novelty in the Netherlands. If certain requirements – mostly relating to due process and voting – are met, court confirmation of the restructuring plan can be requested. A court-confirmed restructuring plan is binding on all creditors and shareholders whose claims are part of that plan, regardless of their approval of the plan. WHOA is available in two distinct versions: one public and the other undisclosed. This article assesses on what basis a Dutch court may assume jurisdiction and if there is a basis for automatic recognition within the EU of a court order handed down in either a public or an undisclosed WHOA procedure.

Arons, Vaststelling van de internationale bevoegdheid en het toepasselijk recht in collectieve geschilbeslechting. In het bijzonder de ipr-aspecten van de Richtlijn representatieve vorderingen / p. 18-34

The *application of international jurisdiction and applicable law rules in collective proceedings are topics of debate in legal literature and in case law. Collective proceedings distinguish in form between multiple individual claims brought in a single procedure and a collective claim instigated by a representative entity for the benefit of individual claimants. The 'normal' rules of private international law*

regarding jurisdiction (Brussel Ibis Regulation) and the applicable law (Rome I and Rome II Regulations) apply in collective proceedings. The recently adopted injunctions directive (2020/1828) does not affect this application.

Nonetheless, the particularities of collective proceedings require an application that differs from its application in individual two-party adversarial proceedings. This article focuses on collective redress proceedings in which an entity seeks to enforce the rights to compensation of a group of individual claimants.

Collective proceedings have different models. In the assignment model the individual rights of the damaged parties are transferred to a single entity. Courts have to establish its jurisdiction and the applicable law in regard of each assigned right individually.

In the case of a collective claim brought by an entity (under Dutch law, claims based on Art. 3:305a BW) the courts cannot judge on the legal relationships of the individual parties whose rights are affected towards the defendant. The legal questions common to the group are central. This requires jurisdiction and the applicable law to be judged at an abstract level.

Bright, M.C. Marullo & F.J. Zamora Cabot, Private international law aspects of the Second Revised Draft of the legally binding instrument on business and human rights / p. 35-52

Claimants filing civil claims on the basis of alleged business-related human rights harms are often unable to access justice and remedy in a prompt, adequate and effective way, in accordance with the rule of law. In their current form, private international law rules on jurisdiction and applicable law often constitute significant barriers which prevent access to effective remedy in concrete cases. Against this backdrop, the Second Revised Draft of the legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises has adopted a number of provisions on private international law issues which seek to take into account the specificities of such claims and the need to redress the frequent imbalances of power between the parties. This article analyses the provisions on jurisdiction and applicable law and evaluate their potential to ensure effective access to remedy for the claimants.

Conference report

Touw, The Netherlands: a *forum conveniens* for collective redress? / p. 53-67

On the 5th of February 2021, the seminar 'The Netherlands: a Forum Conveniens for Collective Redress?' took place. The starting point of the seminar is a trend in which mass claims are finding their way into the Dutch judicial system. To what extent is the (changing) Dutch legal framework, i.e. the applicable European instruments on private international law and the adoption of the new Dutch law on collective redress, sufficiently equipped to handle these cases? And also, to what extent will the Dutch position change in light of international and European developments, i.e. the adoption of the European directive on collective redress for consumer matters, and Brexit? In the discussions that took place during the seminar, a consensus became apparent that the Netherlands will most likely remain a 'soft power' in collective redress, but that the developments do raise some thorny issues. Conclusive answers as to how the current situation will evolve are hard to provide, but a common ground to which the discussions seemed to return does shed light on the relevant considerations. When legal and policy decisions need to be made, only in the case of a fair balance, and a structural assessment thereof, between the prevention of abuse and sufficient access to justice, can the Netherlands indeed be a forum conveniens for collective redress.

Latest PhDs

Van Houtert, Jurisdiction in cross-border copyright infringement cases. Rethinking the approach of the Court of Justice of the European Union (dissertation, Maastricht University, 2020): A summary / p. 68-72

The dissertation demonstrates the need to rethink the CJEU's approach to jurisdiction in cross-border copyright infringement cases. Considering the prevailing role of the EU courts as the 'law finders', chapter four argues that the CJEU's interpretation must remain within the limits of the law. Based on common methods of interpretation, the dissertation therefore examines the leeway that the CJEU has regarding the interpretation of Article 7(2) Brussels Ibis in cross-border copyright infringement cases.