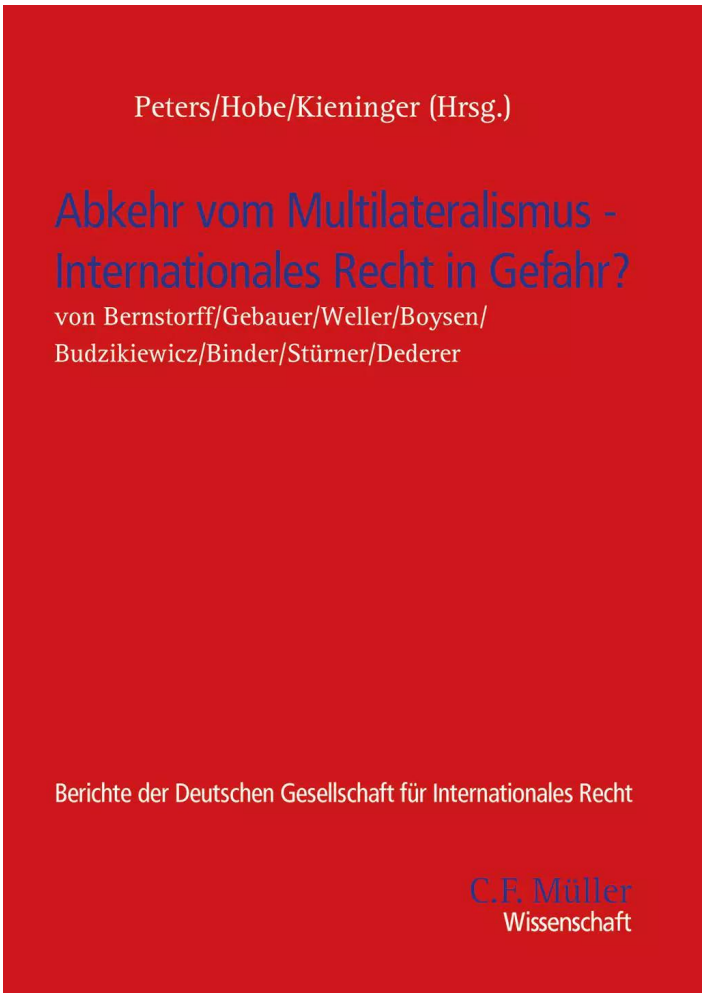
Out Now: “Turning away from Multilateralism – International Law in Danger?” (Proceedings of the German Society of International Law, Issue 51)



Recently, the German Society of International Law (DGIR) has published the proceedings of its 37 Biennial Conference held in Heidelberg from 9 to 11 March 2022. The volume is devoted to the – very timely – topic of “**Turning away from Multilateralism – International Law in Danger?**” and contains five contributions (in German) explicitly discussing issues related to Private International Law:

- ***Internationalization versus Europeanization and Renationalization in Private International Law***
  by Prof. Dr. Martin Gebauer, Tübingen, Judge at the Court of Appeal in Stuttgart
- ***The Crisis of Uniform Law***
  by Prof. Dr. Matthias Weller, Mag.rer.publ., Bonn
- ***The Influence of Human Rights on Private International Law***
  by Prof. Dr. Christine Budzikiewicz, Marburg
- ***Crisis and Future of State Courts as an Instrument of Dispute Resolution in International Trade***
  by Prof. Dr. Michael Stürner, M.Jur (Oxford), Konstanz
- ***Arbitration Reform from an International Law Perspective***
  by Hans-Georg Dederer, University of Passau

The **English-language summaries,** provided for by the authors and the publisher, are available here.

Same-sex relationships concluded abroad in Namibia – Between (Limited) Judicial Recognition and Legislative Rejection

There is no doubt that the issue of same-sex marriage is highly controversial. This is true for both liberal and conservative societies, especially when the same-sex union to be formed involves parties from different countries. Liberal societies may be tempted to open up access to same-sex marriage to all, especially when their citizens are involved and regardless of whether the same-sex marriage is permitted under the personal law of the other foreign party. For conservative societies, the challenge is even greater, as local authorities may have to decide whether or not to recognise same-sex marriages contracted abroad (in particular

when their nationals are involved). The issue becomes even more complicated in countries where domestic law is hostile to, or even criminalises, same-sex relationships.

It is in this broader context that the decision of the Supreme Court of Namibia in *Digashu v. GRN, Seiler-Lilles v. GRN* (SA 7/2022 and SA 6/2022) [2023] NASC (16 May 2023) decided that same-sex marriages concluded abroad should be recognised in Namibia and that the failure to do so infringes the right of the spouses to dignity and equality. Interestingly, the Supreme Court ruled as it did despite the fact that Namibian law does not recognise, and also criminalises same-sex relationships (see *infra*). Hence, the Supreme Court's decision provides valuable insights into the issue of recognition of same-sex unions contracted abroad in Africa and therefore deserves attention.

I. General Context

In his seminal book (*Private International Law in Commonwealth Africa* (Cambridge University Press, 2013) p. 182), Richard F. Oppong describes the issue of same-sex unions in Commonwealth Africa as follows: '*It still remains highly contentious in most of the countries under study whether the associations between persons of the same sex should be recognized as marriage. In Zambia, a marriage between persons of the same sex is void. It only in South Africa where civil unions solemnised either as marriage or a civil partnership are recognized*' (footnotes omitted). As to whether other African countries would follow the South African example, Richard F. Oppong opined that '*[t]here is little prospect of this happening […]. Indeed, there have been legislative attempts […] in countries such as Nigeria, Uganda, Malawi and Zimbabwe – to criminalise same-sex marriage*.' (*op. cit.* p. 183). For a detailed study on the issue, see Richard F. Oppong and Solomon Amoateng, 'Foreign Same-Sex Marriages Before Commonwealth African Courts', *Yearbook of Private International Law*, Vol. 18 (2016/2017), pp. 39-60. On the prohibition of same-sex marriages and same-sex unions and other same-sex relationships in Nigeria under domestic law and its implication on the recognition of same-sex unions concluded abroad, see Chukwuma S. A. Okoli and Richard F. Oppong, *Private International Law in Nigeria* (Hart Publishing, 2020) pp. 271-274.

II. The Law in Namibia

A comprehensive study of LGBT laws in Namibia shows that same-sex couples cannot marry under either of the two types of marriage permitted in Namibia, namely civil or customary marriages (see Legal Assistance Center, *Namibian Laws on LGBT Issues* (2015) p. 129). In one of its landmark decisions decided in 2001 known as 'the *Frank* case' (*Chairperson of the Immigration Selection Board v Frank and Another 2001 NR 107 (SC)*), the Supreme Court held that the term 'marriage' in the Constitution should be interpreted to mean only a '*formal relationship between a man and a woman*' and not a same-sex relationship. Accordingly, same-sex relationships, in the Court's view, are not protected by the Constitution, in particular by Article 14 of the Constitution, which deals with family and marriage. With regard to same-sex marriages contracted abroad, the above-mentioned study explains that according to the general principles of law applicable in Namibia, a marriage validly contracted abroad is recognised in Namibia, subject to exceptions based on fraud or public policy (p. 135). However, the same study (critically) expressed doubt as to whether Namibian courts would be willing to recognise a foreign same-sex marriage (*ibid*). The same study also referred to a draft bill discussed by the Ministry of Home Affairs and Immigration which '*contained a provision specifically forbidding the recognition of foreign same-sex marriages*' (p. 136).

III. The Case

The case came before the Supreme Court of Namibia as a consolidated appeal of two cases involving foreign nationals married to Namibians in same-sex marriages contracted abroad.

In the first case, the marriage was contracted in South Africa in 2015 between a South African citizen and a Namibian citizen (both men) under South African law (Civil Union Act 17 of 2006). The couple in this case had been in a long-term relationship in South Africa since 2010. In 2017, the couple moved to Namibia.

In the second case, the marriage was contracted in Germany in 2017 under German law between a German citizen and a Namibian citizen (both women). The

couple had been in a long-term relationship since 1988 and had entered into a formal life partnership in Germany under German law in 2004. The couple later moved to Namibia.

In both cases, the foreign partners (appellants) applied for residency permits under the applicable legislation (Immigration Control Act). The Ministry of Home Affairs and Immigration ('the Ministry'), however, refused to recognise the couples as spouses in same-sex marriages contracted abroad for immigration purposes. The Appellants then sought, *inter alia*, a declaration that the Ministry should recognise their respective marriages and treat them as spouses under the applicable legislation.

IV. Issue and Arguments of the Parties

'*The central issue*' for the Court was to determine whether '*the refusal of the [Ministry] to recognise lawful same-sex marriage of foreign jurisdictions […] between a Namibian and a non-citizen [was] compatible with the [Namibian] Constitution*' (para. 20). In order to make such a determination, the Court had to consider whether or not the applicable domestic legislation could be interpreted to treat same-sex partners as 'spouses'.

The Ministry argued that, in the light of the Supreme Court's earlier precedent (the abovementioned *Frank* case), spouses in a same-sex marriage were excluded from the scope of the applicable legislation, irrespective of whether the marriage had been validly contracted abroad in accordance with the applicable foreign law (para. 58). The Ministry considered that the Supreme Court's precedent was binding (para. 57); and the position of the Supreme Court in that case (see II above) (para. 36) reflected the correct position of Namibian law (para. 59].

The appellants argued that the *Frank* case relied on by the Ministry was not a precedent, and should not be considered as binding (para. 54). They also argued that the approach taken by the Court in that case should not be followed (paras. 52, 55). The appellants also contended that the case should be distinguished, *inter alia*, on the basis that, unlike the *Frank* case were the partners were not *legally married* (i.e. in a situation of long-term cohabitation), the couples *in casu* had entered into lawful same-sex marriages contracted in foreign jurisdictions and that their marriages were valid *on the basis of general principles of common*

law – the *lex loci celebrationis* (para. 50). Finally, the appellants argued that the Ministry's refusal to recognise their marriage was inconsistent with the Namibian Constitution as it violated their rights (para. 51).

V. The Ruling

In dealing with the case, the Supreme Court focused mainly on the applicability of the doctrine of precedent in the Namibian context and the constitutional rights of the appellants. Interestingly, comparative law (with references to the law of some neighbouring African jurisdictions, English law, American law, Canadian law and even the case law of the European Court of Human Rights) was mobilised by the Court to reach its conclusion, i.e. that the Ministry's decision to interpret and apply the applicable legislation in a manner that excluded spouses in same-sex marriages validly entered into abroad violated the appellants' constitutional rights.

With regard to the validity of same-sex marriages contracted abroad, the Supreme Court ruled as follows:

[82] According to the well-established general principle of common law, if a marriage is duly concluded in accordance with the statutory requirements for a valid marriage in a foreign jurisdiction, it falls to be recognised in Namibia. […]

[83] […] The term marriage is likewise not defined in the [applicable legislation] and would contemplate valid marriages duly concluded and ordinarily recognised, including those validly contracted outside Namibia in accordance with the law applicable where the marriage is concluded in accordance with the general principle of common law already referred to. […].

[84] The Ministry has not raised any reason relating to public policy as to why the appellants' marriage should not be recognised in accordance with the general principle of common law. Nor did the Ministry question the validity of the appellants' respective marriages.

[85] On this basis alone, the appellants' respective marriages should have been recognised by the Ministry for the purpose of [the applicable legislation] and [the appellants] are to be regarded as spouse for the purpose of the [applicable

legislation][…]

VI. The Dissent

The views of the majority in this case were challenged in a virulent dissent authored by one of the Supreme Court's Justices. With respect to the issue of the validity of same-sex marriages concluded abroad, the dissent considered that the majority judgment holding that *'in the present appeals, the parties concluded lawful marriages in jurisdictions recognising such marriages'* (145) failed to consider that *'the laws of Namibia (including the Constitution of the Republic) do not recognise same-sex relationships and marriages.'* (146). The dissent then listed many examples, including the criminalisation of sodomy and other legislation excluding same-sex relationships or providing that marriage shall be valid when two parties are of different sexes (para. 146).

More importantly, the dissent also criticised the recognition of the same-sex marriages based on their being valid under the law of the place where they were concluded by stating as follow:

[152] [the main finding of the majority judgment] has its basis on a well-established principle of common law, that if a marriage is duly concluded in accordance with the statutory requirements for a valid marriage in a foreign jurisdiction, it fall to be recognised in Namibia and that, that principle find its application to these matters. […].

[170] […] The common law principle relied on by the majority is sound in law but there are exceptions to the rule and Namibia is under no obligation to recognise a marriage inconsistent with its policies and laws for the reason that the said marriage is warranted by the municipal law of the country in which it was contracted. The marriages of the appellants offend the policies and laws of Namibia […]. (Emphasis in the original).

VII. Comments

The case presented here is interesting in many regards.

First, it introduces the Namibian approach to the question of the validity of marriages in general, including same-sex marriages. According to the majority judgment and the dissenting judgment, the validity of marriages is to be determined in accordance with the 'well-established common law principle' that a marriage should be governed by the law of the place where it was contracted (i.e. *lex loci celebrationis*).

According to the Namibian Supreme Court judges, the rule arguably applies to marriages contracted within the jurisdiction as well as to marriages contracted abroad. The rule also appears to apply to both the formal and substantive (essential) validity of marriages. This is a particularly interesting point. In Richard F. Oppong's survey of approaches in Commonwealth Africa (but not including Namibia), the author concludes that '*most of the countries surveyed make a distinction between the substantive and formal validity of marriage*' (*op. cit.* 185). The former is generally determined by the *lex domicilii* (although there may be different approaches to this), while the latter is determined by the *lex loci celebrationis*. (*op. cit.*, pp. 183-186). The author goes on to affirm that '*the main exception appears to be South Africa, where it has been suggested that the sole test of validity [for both substantive and formal validity] is the law of the place of celebration*' (op. cit., p. 185). The case presented here shows that Namibia also follows the South African example. This is not surprising given that the majority opinion relied on South African jurisprudence for its findings and analysis (see paras. 82, 90, 108 for the majority judgment and paras. 152, 155-162 of the dissenting opinion).

Secondly, the majority judgment and the dissenting opinion show the divergent views of the Supreme Court judges as to whether the *lex loci celebrationis* rule should be subject to any limitation (*cf.* II above). For the majority, the rule is straightforward and does not appear to be subject to any exception or limitation. Indeed, in the words of the majority, '*if a marriage is duly solemnised in accordance with the legal requirements for a valid marriage in a foreign jurisdiction, it falls to be recognised in Namibia*' (emphasis added). No exception is allowed, including public policy. It is indeed interesting that the majority simply brushed aside public policy concerns by considering that that the Ministry had not raised any public policy ground (para. 84) (as if the intervention of public policy depended on its being invoked by the parties).

This aspect of the majority decision was criticised by the dissenting opinion.

According to the dissenting opinion (para. 170), the application of the *lex loci celebrationis* is subject to the intervention of public policy. In other words, public policy should be invoked to refuse recognition of marriages validly celebrated abroad (cf. Oppong, *op. cit*, p. 186) if the marriage is '*inconsistent with the policies and laws*' of Namibia.

Finally, and most importantly, it should be pointed out that although the majority generally reasoned about 'marriage' and 'spouses' in broad terms. Indeed, the majority repeatedly pointed out that the appellants 'had concluded valid marriages' that should be recognised in application of the *lex loci celebrationis*. Yet, when the the majority reached its final conclusions, it carefully indicated that the issue of the recognition of same-sex marriages was addressed *for immigration purposes only.* Indeed, the majority was eager to include the following paragraph at the end of its analyses:

[134] the legal consequences for marriages are manifold and multi-facetted and are addressed in a wide range of legislation. This judgment only addresses the recognition of spouses for the purpose of [the applicable legislation] and is to be confined to that issue. (Emphasis added).

The reason for the inclusion of this paragraph seems obvious: the Court cannot simply ignore the general legal framework in Namibia. Moreover, one can see in the inclusion of the said paragraph an attempt by the majority to limit the impact of its judgment in a rather conservative society and the intense debate it would provoke (see VIII below). In doing so, however, the majority placed itself in a rather obvious and insurmountable contradiction. In other words, if the Court recognises the validity of the marriage under the *lex loci celebrationis*, and (in the words of the dissenting opinion) 'conveniently overlooks' (para. 162) the intervention of public policy, nothing prevents the admission of the validity of same-sex marriages in other situations, such as inheritance disputes, maintenance claims or divorce. Otherwise, the principles of legal certainty would be seriously undermined if couples were considered legally 'married' for immigration purposes only. For example, would couples be considered as married if they later wished to divorce? Would one of the spouses be allowed to enter into a new heterosexual marriage without divorcing? Can the parties claim certain rights by virtue of their status as 'spouses' (e.g. inheritance rights)?

This issue is particularly important even for the case at hand. Indeed, in one of

the consolidate cases, the appellants obtained before moving to Namibia an adoption order in South Africa declaring them joint care givers of a minor and granting them joint guardianship (para. 5). In a document prepared by the Ministry of Gender Equality and Child Welfare (Guide to Namibia's Child Care and Protection act 3 of 2015 (2019)), it was clearly indicated that '*only "spouses in a marriage" can adopt a child jointly*' and that '*[i]f same-sex partner were legally married in another country, it depends on whether the marriage is recognised as a marriage under the laws of Namibia*' (p. 10). Therefore, in light of the decision at hand, it remains to be seen whether the South African adoption order will be or not recognised in Namibia. (On the adoption by same-sex couples in Namibia and the recognition of same-sex adoptions concluded in other countries, see the study undertaken the Legal Assistance Center on the *Namibian Laws on LGBT Issues* (2015) pp. 143-145).

VIII. The Aftermath of the Ruling: The Legislative Response

It is undeniable that Supreme Court decision could be considered as groundbreaking. It is no surprise that human rights and LGBT+ activists have welcomed the decision, despite the majority judgment's confined scope. On the other hand, legislative reaction was swift. In an official letter addressed to the Parliament, the Prime Minister expressed the intention its Government to bring a bill that would reverse the Supreme Court decision by modifying '*the relevant common law principle in order that same sex marriage even where solemnized in Countries that permit such marriages cannot be recognised in Namibia*'. Later, two bills (among many others) were introduced in order to define ?the term 'marriage' as to exclude same-sex marriages; and ?to define the term 'spouse'. Both bills intend to prohibit the conclusion and the recognition of same-sex marriage in Namibia. Last July, the bills were discussed and approved by the Namibian's Parliament Upper House (The National Assembly). The bills need now to be approved by the Lower House (The National Council) and promulgated by the President to come into force.

Views and News from the 9th Journal of Private International Law Conference 2023 in Singapore

Four years after the 8th JPIL conference in Munich, the global community of PIL scholars finally got another opportunity to exchange thoughts and ideas, this time at Singapore Management University on the kind invitation of our co-editor Adeline Chong.

The conference was kicked off by a keynote speech by Justice *Philip Jeyaretnam* (Singapore International Commercial Court), providing an in-depth analysis of the Court of Appeal's decision in *Anupam Mittal v Westbridge Ventures II [2023] SGCA 1* (discussed in more detail here).

The keynote was followed by a total of 23 panels and four plenary sessions, a selection of which is summarised below by our editors.

Arbitration (Day 1, Panel 1)

Saloni Khanderia

The panel discussed various aspects of arbitration ranging from arbitration clauses to the recognition and enforcement of arbitral awards.

The session commenced with Dr. *Ardavan Arzendeh* of the National University of Singapore present his paper on 'Jurisdiction and Arbitration Clauses in the Same Contract', evaluating the treatment of jurisdiction and arbitration clauses in the same contract through the law of England and Wales. The speaker stated that there are 2 categories of such cases: 1) the clauses are naturally reconcilable through importance given either to the wording of the clauses or the intention of the parties; and 2) the clauses are not naturally reconcilable as the parties have included an exclusive jurisdiction and a mandatory arbitration clause in the agreement. The courts in these instances have typically given importance to the arbitration clause. The presentation suggested a more defensible course of action in such a situation: Courts should approve both the clauses and give a choice to the parties to pursue the matter either through litigation or arbitration. Hence, giving equal weight to the choices of the parties.

The second speaker, Ms. *Ana Coimba Trigo* of the NOVA School of law presented her paper on 'Deference or Distrust? Recognizing Foreign Commercial Arbitration Awards in the US Against Procedural Fairness Concerns'. The presentation focused on Article V(1)(b) of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958, that allows parties to oppose the recognition and enforcement of arbitral awards on very selected grounds. Frequently referred to as "procedural fairness". However, the Convention is silent on the interpretation and application of this ground. Additionally, there is no indication of what law is appliable to this ground. This leads to uncertainty as to what standards the US courts apply in interpreting and applying Article V(1)(b) of the Convention. A reading of the existing empirical data allows us to understand whether the US courts cite other foreign courts and if they follow a comparative approach and what are the diverse standards (lex fori or another lenient approach) applied when distrust of foreign arbitrators is raised by the parties.

Following this, Dr. *Priskila Pratita Penasthika* from The Universitas Indonesia presented her paper on 'CAS Arbitration Award: Its Jurisdictional and Enforcement Issues in Indonesia'. The Court of Arbitration for Sport (CAS) does

not always require a specific arbitration agreement between the parties for conferring jurisdiction on it. Instead, the CAS may accept a sports related dispute if the statutes or regulations designate that it has jurisdiction. The presentation analysed whether sports- related arbitration would be covered under the ambit of commercial awards for them to be recognised and enforced in Indonesia under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

The final speakers, Mr. *Gautam Mohanty* from Kozminski University and Dr. Wasiq Abass Dar from O.P. Jindal Global University presented their paper on 'Strategic Leveraging of Party Autonomy in Private International Law: Determining the Limits in International Commercial Arbitration'. The presentation focused on demarcating the outer limits of party autonomy in private international law. It particularly focused on mandatory rules and public policy as they are limitations to party autonomy. It highlighted the impact of new dimensions of mandatory rules and public policy on party autonomy. The presentation analyses the conflict of laws situation when tribunals are faced with a situation of having to disregard the applicable law chosen by the parties on account of overriding mandatory norms. It also analyses the role and application of international and transnational public policy. The presentation analysed the theoretical approaches taken by tribunals in relation to mandatory norms such as contractual, jurisdictional and the hybrid approach.

Foreign Judgments (Day 1, Panel 2)

Tobias Lutzi

The first panel dedicated to foreign judgments began with *Aygun Mammadzada* (Swansea Law School) making the case for the UK and Singapore ratifying the 2019 HCCH Judgments Convention. Compared to the common-law rules on recognition & enforcement (to which many European judgments will also be subject in the UK post-Brexit), she argued the Convention offers an acceptable, more streamlined framework, e.g. because it does not require a judgment creditor to seek a domestic decision based on the judgment debt.

Anna Wysocka-Bar (Jagiellonian University) then looked in more detail at the exclusion of contracts of carriage from the 2019 Convention (Art 2(1)(f), putting it into the context of the specific treatment those contracts also receive in other contexts. According to the speaker, this peculiar treatment appears to be

primarily driven by the existence of other, potentially conflicting conventions such as the CMR Convention. Looking at the specific provisions in those Conventions pertaining to foreign judgments, though, Anna convincingly demonstrated that the potential for conflict is actually very small, making it difficult to justify the exclusion.

Jim Yang Teo (Singapore Management University) finally discussed the problem of res judicata within the framework of the *Belt & Road Initiative*, contrasting the approach advocated by China (based on a triple-identity test and limited to claim preclusion, at the exclusion of issue exclusion) with the transnational approach of the Singaporean courts emerging from *Merck Sharp & Dohme Corp v Merck KGaA* [2021] SGCA 14. According to the speaker, this latter approach, which notably includes consideration of comity, may be particularly relevant interesting in the context of an inherently transnational project like the *Belt & Road Initiative*.

Plenary Session 2

Michael Douglas

The second plenary session, chaired by *Ardavan Arzandeh* (NUS), explored some interesting issues of direct and indirect jurisdiction. *Stephen GA Pitel* (Western University) kicked things off with a presentation that was right up my ally: 'The Extraterritorial Impact of Statutory Jurisdiction Provisions'. He considered the example of a jurisdictional provision of a privacy statute of British Columbia in matters with a foreign element. The specific example provoked consideration of a broader question: how should a forum deal with an applicable foreign statute which includes a provision that actions under the statute must be heard in a certain court of that foreign statute's local jurisdiction? See *Douez v Facebook, Inc* [2017] 1 SCR 751. The Canadian approach seems sensible; I wonder if it can neatly transpose to my native Australia, which includes an explicit US-style full faith and credit provision in the Constitution. (Over coffee, my compatriots wondered whether our messy Cross-vesting Scheme would have a role to play.)

The other three presentations of the plenary were also compelling. *Junhyok Jang* (Sungkyunkwan University) spoke on 'Jurisdiction over the Infringement of Personality Rights via the Internet from a Korean Perspective – Effects Test as an Alternative to the Quantitative Dépeçage of *Shevill*'. The Korean perspective was comparative; the presentation compared the South Korean approach to those of

the EU and the US. While the presentation offered a view on how approaches to the topic were converging between jurisdictions, diversity remains. Eg in Australia, the mere occurrence of some of the damage in the jurisdiction—which in the case of defamation, could involve hurt feelings in the forum when present there—could justify exercise of long-arm jurisdiction, no matter how many elements the matter otherwise features. The speech was another reminder of the ongoing challenges that digital subject matter pose for the traditional territorialism of private international law.

Yeo Tiong Min (SMU), a home-town hero whose monograph on choice of law for equity is must-read material for common (private international) lawyers, looked at the *res judicata* effects of foreign judgments for issue estoppel in a presentation on 'Challenging Foreign Judgments for Errors of Law and the Common Law'. (I will have to go away and read *Merck Sharp & Dohme Corp v Merck KGaA* (2021) 1 SLR 1102 properly.) *Louise Ellen Teitz* (Roger Williams University) rounded out the plenary with her speech on 'Judgment Recognition and Parallel Litigation: The Carrot and Stick'. The presentation informed me of how the issue has been playing out in the USA, comparing the situation there to the work done in international fora like the HCCH. All the talk of *lis pendens* got me *lis peckish* for some lunch. Fortunately, it was lunchtime after this plenary.

Choice of Law (Day 3, Panel 3)

Zheng Sophia Tang

The panel focuses on choice of law, chaired by Prof *Sophia Tang*. Assoc Prof Dr *Philippine Blajan* at Sorbonne School of Law, University Paris 1 presented 'The Combination of Party Autonomies in the Private International Law of Contracts: Security, Virtuosity, Tyranny?' She proposed that, in civil and commercial practices, parties of a contract should attach importance to the interactions between choice of jurisdiction and choice of law. Firstly, the effect of choice of law is uncertain until the lex fori is identified. Secondly, even if there is a choice of court clause, one party could still bring a suit in another court in breach of the jurisdiction clause, and evade the mandatory provisions of the forum state. Through combining their choices, the parties enhance their freedom of contract because they escape a mandatory provision. Thirdly, Prof Blajan listed various types of combination between choice of law and choice of court clauses, including choice of state law and choice of state court, choice of state law and choice of non-state court, choice of non-state law and choice of non-state court and so on.

The second speaker is Prof *Saloni Khanderia* at OP Jindal University, who presented 'The Law Applicable to Documentary Letters of Credit in India: A Riddle Wrapped in an Enigma?' Prof Khanderia points out that letters of credit has received negligible attention from Indian lawmakers, regardless of their significance in fostering international trade in India. As there is no specific legislation for letter of credit in India, the UCP might be the only choice for the parties and the court. But there are several exceptions to the application of the UCP, including the agreements that are expressly excluded from the application of the UCP, claims containing allegations of fraud and so on. In such a case, the Indian court would apply lex fori. On the other hand, in lack of any supreme principles of the interpretation of application of law, courts are given great discretion to the application of the UCP and other laws. Prof Khanderia proposed limiting the application of the lex fori to adjudicate claims on fraud, and replacing the lex fori with the lex loci solutions to identify the country with which the contract has the closest and most real connection.

The third speaker Asst Prof *Migliorini* at the Uni of Macau presented 'Contracts for the Transfer of Personal Data in Private International Law — A European Perspective'. In data transactions where the seller established in the EU and the buyer a non-EU jurisdiction, the GDPR would be applied extraterritorially. The GDPR would be applied as overriding mandatory rules under the context of cross-border transaction, which would lead to the conflict with the proper law of the transaction contract. However, could data be treated as 'property' and subject to a commercial contract? Would status of a fundamental right hamper the commercial transfer of personal data? Prof Migliorini suggests that contracts for transfer of personal data should be qualified as transfer of license to use the personal data, so that the complicated issues of personal data trading and human rights shall not arise and mandatory provisions of the law governing the initial license (i.e. the GDPR) should apply.

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Overall, the conference highlighted the range and wealth of current research on PIL. It is no surprise that participants are already looking forward to the next JPIL conference, which will take place at University College London in September 2025.

The EU Sustainability Directive and Jurisdiction

The Draft for a Corporate Sustainable Due Diligence Directive currently contains no rules on jurisdiction. This creates inconsistencies between the scope of application of the Draft Directive and existing jurisdictional law, both on the EU level and on the domestic level, and can lead to an enforcement gap: EU companies may be able to escape the existing EU jurisdiction; non-EU companies may even not be subject to such jurisdiction. Effectivity requires closing that gap, and we propose ways in which this could be achieved.

(authored by Ralf Michaels and Antonia. Sommerfeld and crossposted at https://eapil.org/)

1. **The Proposal for a Directive on Corporate Sustainability Due Diligence**

The process towards an EU Corporate Sustainability Due Diligence Directive is gaining momentum. The EU Commission published a long awaited Proposal for a Directive on Corporate Sustainability Due Diligence (CSDDD), COM(2022) 71 final, on 23 February 2022; the EU Council adopted its negotiation position on 1 December 2022; and now, the EU Parliament has suggested amendments to this Draft Directive on 1 June 2023. The EU Parliament has thereby backed the compromise textreached by its legal affairs committee on 25 April 2023. This sets off the trilogue between representatives of the Parliament, the Council and the Commission.

The current state of the CSDDD already represents a milestone. It not only introduces corporate responsibility for human rights violations and environmental damage – as already found in some national laws (e.g. in France; Germany;

Netherlands; Norway; Switzerland; United Kingdom) – but also and in contrast (with the exception of French law – for more details see *Camy*) introduces civil liability. Art. 22 (1) CSDDD entitles persons who suffer injuries as result of a failure of a company to comply with the obligations set forth in the Directive to claim compensation. It thereby intends to increase the protection of those affected within the value chain, who will now have the prospect of compensation; it also intends to create a deterrent effect by having plaintiffs take over the enforcement of the law as "private attorney generals". Moreover, the Directive requires that Member States implement this civil liability with an overriding mandatory application to ensure its application, Art. 22 (5) CSDDD. This is not unproblematic: the European Union undertakes here the same unilateralism that it used to criticize when previously done by the United States, with the Helms/Burton Act as the most prominent example.

That is not our concern here. Nor do we want to add to the lively discussion on the choice-of-law- aspects regarding civil liability (see, amongst others, *van Calster*, *Ho-Dac*, *Dias* and, before the Proposal, *Rühl*). Instead, we address a gap in the Draft Directive, namely the lack of any provisions on jurisdiction. After all, mandatory application in EU courts is largely irrelevant if courts do not have jurisdiction in the first place. If the remaining alternative is to bring an action in a court outside the EU, the application of the CSDDD civil liability regime is not, however, guaranteed. It will then depend on the foreign court's conflict-of-law rules and whether these consider the CSDDD provisions applicable – an uncertain path.

Nonetheless, no mirroring provisions on international jurisdiction were included in the CSDDD, although such inclusion had been discussed. Suggestions for the inclusion of a new jurisdictional rule establishing a *forum necessitatis* in the Brussels I Regulation Recast existed (see the Study by the European Parliament Policy Department for External Relations from February 2019, the Draft Report of the European Parliament Committee on Legal Affairs with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL) as well as the Recommendation of the European Groupe of Private International Law (GEDIP) communicated to the Commission on 8 October 2021). Further, the creation of a *forum connexitatis* in addition to a *forum necessitatis* had been recommended by both the Policy Department Study and the GEDIP. Nevertheless, the report of the European Parliament finally adopted,

together with the Draft Directive of 10 March 2021, no longer contained such rule on international jurisdiction, without explanation. Likewise, the Commission's CSDDD draft and the Parliament's recent amendments lack such a provision.

2. Enforcement Gap for Actions against Defendants Domiciled within the EU

To assess the enforcement gap, it is useful to distinguish EU companies from non-EU companies as defendants. For EU companies, the Directive applies to companies of a certain size which are formed in accordance with the legislation of a Member State according to Art. 2 (1) CSDDD – the threshold numbers in the Commission's draft and the Parliament amendments differ, ranging between 250–500 employees and EUR 40–150 million annual net worldwide turnover, with questions of special treatment for high-risk sectors.

At first sight, no enforcement gap seems to exist here. The general jurisdiction rule anchored in Art. 4 (1) Brussels I Regulation Recast allows for suits in the defendant's domicile. Art. 63 (1) further specifies this domicile for companies as the statutory seat, the central administration or the principal place of business. (EU-based companies can also be sued at the place where the harmful event occurred according to Art. 7 (2) Brussels I Regulation Recast, but this will provide for access to an EU court only if this harmful event occurred within the EU.) The objection of *forum non conveniens* does not apply in the Brussels I Regulation system (as clarified in the CJEU's *Owusu* decision). Consequently, in cases where jurisdiction within the EU is given, the CSDDD applies, including the civil liability provision with its mandatory application pursuant to Art. 22 (1), (5).

Yet there is potential leeway for EU domiciled companies to escape EU jurisdiction and thus avoid the application of the CSDDD's civil liability. One way to avoid EU jurisdiction is to use an exclusive jurisdiction agreement in favour of a third country, or an arbitration clause. Such agreements concluded in advance of any occurred damage are conceivable between individual links of the value chain, such as between employees and subcontractors (in employment contracts) or between different suppliers along the chain (in purchase and supply agreements). EU law does not expressly prohibit such derogation. Precedent for how such exclusive jurisdiction agreements can be treated can be found in the

case law following the *Ingmar* decision of the CJEU. In *Ingmar*, the CJEU had decided that a commercial agent's compensation claim according to Arts. 17 and 18 of the Commercial Agents Directive (86/653/EEC) could not be avoided through a choice of law in favour of the law of a non-EU country, even though the Directive said nothing about an internationally mandatory nature for the purpose of private international law – as Art. 22 (5) CSDDD in contrast now does. The German Federal Court of Justice (BGH) extended this choice-of-law argument to the law of jurisdiction and held that jurisdiction clauses which could undermine the application of mandatory provisions are invalid, too, as only such a rule would safeguard the internationally mandatory scope of application of the provisions. Other EU Member State courts have shown a similar understanding not only with regard to exclusive jurisdiction agreements but also with regard to arbitration agreements (Austrian Supreme Court of Justice; High Court of Justice Queen's Bench Division).

Common to Arts. 17 and 18 Commercial Agents Directive and Art. 22 CSDDD is their mandatory nature for the purpose of private international law, which established by the ECJ for the former and is legally prescribed for the latter in Art. 22 (5) CSDDD. This suggests a possible transfer of the jurisdictional argument regarding jurisdiction. To extend the internationally mandatory nature of a provision into the law of jurisdiction is not obvious; choice of law and jurisdiction are different areas of law. It also means that the already questionable unilateral nature of the EU regulation is given even more force. Nonetheless, to do so appears justified. Allowing parties to avoid application of the CSDDD would run counter to its effective enforcement and therefore to the *effet utile*. This means that an exclusive jurisdiction agreement in favour of a third country or an arbitration clause will have to be deemed invalid unless it is clear that the CSDDD remains applicable or the applicable law provides for similar protection.

3. Enforcement Gap for Actions against Defendants Domiciled Outside the EU

While the enforcement gap with regard to EU companies can thus be solved under existing law, additional problems arise with regard to non-EU corporations. Notably, the Draft Directive applies also to certain non-EU companies formed in accordance with the legislation of a third country, Art. 2 (2) CSDDD. For these

companies, the scope of application depends upon the net turnover within the territory of the Union, this being the criterion creating a territorial connection between these companies and the EU (recital (24)). The Parliament's amendments lower this threshold and thereby sharpen the scope of application of the Directive.

While application of the CSDDD to these companies before Member State courts is guaranteed due to its mandatory character, jurisdiction over non-EU defendants within the EU is not. International jurisdiction for actions against third-country defendants as brought before EU Member State courts is – with only few exceptions – generally governed by the national provisions of the respective Member State whose courts are seized, Art. 6 (1) Brussels I Regulation Recast. If the relevant national rules do not establish jurisdiction, no access to court is given within the EU.

And most national rules do not establish such jurisdiction. General jurisdiction at the seat of the corporation will usually lie outside the European Union. And the territorial connection of intra-EU turnover used to justify the applicability of the CSDDD does not create a similar basis of general jurisdiction, because jurisdiction at the place of economic activity ("doing business jurisdiction") is alien to European legal systems. Even in the US, where this basis was first introduced, the US Supreme Court now limits general jurisdiction to the state that represents the "home" for the defendant company (*BNSF Railroad Co. v. Tyrrell*, 137 S.Ct. 1549 (2017); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011)); whether the recent decision in *Mallory v. Norfolk Southern Railway Co.,* 600 U.S. (2023) will re-open the door to doing business jurisdiction remains to be seen (see *Gardner*).

Specific jurisdiction will not exist in most cases, either. Specific jurisdiction in matters relating to tort will be of little use, as in value chain civil liability claims the place of the event giving rise to damages and the place of damage are usually outside the EU and within that third state. Some jurisdictional bases otherwise considered exorbitant may be available, such as the plaintiff's nationality (Art. 14 French Civil Code) or the defendant's assets (Section 23 German Code of Civil Procedure). Otherwise, the remaining option to seize a non-EU defendant in a Member State court is through submission by appearance according to Art. 26 Brussels I Regulation Recast.

Whether strategic joint litigation can be brought against an EU anchor defendant in order to drag along a non-EU defendant depends upon the national provisions of the EU Member States. Art. 8 (1) Brussels I Regulation Recast, which allows for connected claims to be heard and determined together, applies only to EU-defendants – for non-EU defendants the provision is inapplicable. In some Member States, the national civil procedure provisions enable jurisdiction over connected claims against co-defendants, e.g. in the Netherlands (Art. 7 (1) Wetboek van Burgerlijke Rechtsvordering), France (Art. 42 (2) Code de procédure civile) and Austria (§ 93 Jurisdiktionsnorm); conversely, such jurisdiction is not available in countries such as Germany.

Various Member State decisions have accepted claims against non-EU companies as co-defendants by means of joinder of parties. These cases have based their jurisdiction on national provisions which were applicable according to Art. 6 (1) Brussels I Recast Regulation: In *Milieudefensie* in December 2015, the Court of Appeal at the Hague held permissible an action against a Dutch anchor defendant that was joined with an action against a Nigerian company as co-defendant based on Dutch national procedural law, on the condition that claims against the anchor defendant were actually possible. The UK Supreme Court ruled similarly in its *Vedanta* decision in April 2019, wherein it found that English private international law, namely the principle of the *necessary or proper party gateway*, created a valid basis for invoking English jurisdiction over a defendant not domiciled in a Member State (with registered office in Zambia) who had been joined with an anchor defendant based in the UK. The claim was accepted on the condition that (i) the claims against the anchor defendant involve a real issue to be tried; (ii) it would be reasonable for the court to try that issue; (iii) the foreign defendant is a necessary or proper party to the claims against the anchor defendant; (iv) the claims against the foreign defendant have a real prospect of success; (v) either England is the proper place in which to bring the combined claims or there is a real risk that the claimants will not obtain substantial justice in the alternative foreign jurisdiction, even if it would otherwise have been the proper place or the convenient or natural forum. The UK Supreme Court confirmed this approach in February 2021 in its *Okpabi* decision (for discussion of possible changes in UK decisions after Brexit, see *Hübner/Lieberknecht*).

In total, these decisions allow for strategic joint litigation against third-country companies together with an EU anchor defendant. Nonetheless, they do not

establish international jurisdiction within the EU for isolated actions against non-EU defendants.

4. How to Close the Enforcement Gap – *forum legis*

The demonstrated lack of access to court weakens the Directive's enforceability and creates an inconsistency between the mandatory nature of the civil liability and the lack of a firm jurisdictional basis. On a substantive level, the Directive stipulates civil liability for non-EU companies (Art. 22 CSDDD) if they are sufficiently economically active within the EU internal market (Art. 2 (2) CSDDD). Yet missing EU rules on international jurisdiction vis-à-vis third-country defendants often render procedural enforcement before an intra-EU forum impossible – even if these defendants generate significant turnover in the Union. Consequently, procedural enforcement of civil liability claims against these non-EU defendants is put at risk. The respective case law discussed does enable strategic joint litigation, but isolated actions against non-EU defendants cannot be based upon these decisions. At the same time, enforceability gaps exist with respect to EU defendants: It remains uncertain whether the courts of Member States will annul exclusive jurisdiction agreements and arbitration agreements if these undermine the application of the CSDDD.

This situation is unsatisfactory. It is inconsistent for the EU lawmaker to make civil liability mandatory in order to ensure civil enforcement but to then not address the access to court necessary for such enforcement. And it is inadequate that the (systemic) question of judicial enforceability of civil liability claims under the Directive is outsourced to the decision of the legal systems of the Member States. National civil procedural law is called upon to decide which third-country companies can be sued within the EU and how the *Ingmar* case law for EU domiciled companies will be further developed. This is a problem of uniformity – different national laws allow for different answers. And it is a problem of competence as Member State courts are asked to render decisions that properly belong to the EU level.

The CSDDD aims to effectively protect human rights and the environment in EU-related value chains and to create a level playing field for companies operating within the EU. This requires comparable enforcement possibilities for actions

based on civil liability claims that are brought pursuant to Art. 22 CSDDD against all corporations operating within the Union. The different regulatory options the EU legislature has to achieve this goal are discussed in what follows.

Doing Business Jurisdiction

A rather theoretical possibility would be to allow actions against third-country companies within the EU in accordance with the former (and perhaps revived) US case law on *doing business jurisdiction* in those cases where these companies are substantially economically active within the EU internal market. This would be consistent with the CSDDD's approach of stretching its scope of application based on the level of economic activity within the EU (Art. 2 (2) CSDDD). However, the fact that such jurisdiction has always been considered exorbitant in Europe and has even been largely abolished in the USA speaks against this development. Moreover, a *doing business jurisdiction* would also go too far: it would establish general jurisdiction, at least according to the US model, and thus also apply to claims that have nothing to do with the CSDDD.

Forum Necessitatis and Universal Jurisdiction

Another possible option would be the implementation of a *forum necessitatis* jurisdiction in order to provide access to justice, as proposed by the European Parliament Policy Department for External Relations, the European Parliament Committee on Legal Affairs and the GEDIP. However, such jurisdiction could create uncertainty because it would apply only exceptionally. Moreover, proving a "lack of access to justice" requires considerable effort in each individual case. Until now, EU law provides for a *forum necessitatis* only in special regulations; the Brussels I Regulation Recast does not contain any general rule for emergency jurisdiction. Member State provisions in this regard generally require a certain connection with the forum to establish such jurisdiction – the exact prerequisites differ, however, and will thus not be easily agreed upon on an EU level (see *Kübler-Wachendorff*).

The proposal to enforce claims under Art. 22 CSDDD by means of universal civil jurisdiction for human rights violations, which could be developed analogously to universal jurisdiction under criminal law, appears similarly unpromising; it would also go further than necessary.

Forum connexitatis

It seems more promising to implement a special case of a *forum connexitatis* so as to allow for litigation of closely connected actions brought against a parent company domiciled within the EU together with a subsidiary or supplier domiciled in a third country, as proposed by the European Parliament Policy Department for External Relations and the GEDIP. This could be implemented by means of a teleological reduction of the requirements of Art. 8 (1) Brussels I Regulation Recast with regard to third-country companies, which would be an approach more compatible with the Brussels Regulation system than the implementation of a *forum necessitatis* provision (such a solution has, for instance, been supported by *Mankowski*, in: Fleischer/Mankowski (Hrsg.), LkSG, Einl., para. 342 and the GEDIP). This would simultaneously foster harmonisation on the EU level given that joint proceedings currently depend upon procedural provisions in the national law of the Member States. Moreover, this could avoid "blame games" between the different players in the value chain (see *Kieninger*, RW 2022, 584, 589). For the implementation of such a *forum connexitatis*, existing Member State regulations and related case law (*Milieudefensie, Vedanta*, and *Okpabi*) can serve as guidance. Such a forum is not yet common practice in all Member States; thus, its political viability remains to be seen. It should also be borne in mind that the implementation of a *forum connexitatis* on its own would only enable harmonised joint actions that were brought against EU domiciled anchor defendants together with non-EU defendants; it would not enable isolated actions against third-country companies – even if they are economically active within the EU and fall within the scope of application of the CSDDD.

Forum legis

The best way to close the CSDDD enforcement gap would be introducing an international jurisdiction basis corresponding to the personal scope of application of the Directive. The EU legislature would need to implement a head of jurisdiction applicable to third-country companies that operate within the EU internal market at the level specified in Art. 2 (2) CSDDD. Effectively, special jurisdiction would be measured on the basis of net turnover achieved within the EU. This would procedurally protect the Directive's substantive regulatory objectives of human rights and environmental protection within EU-related value chains. Moreover, this would ensure a level playing field in the EU internal market.

Other than a forum premised on joint litigation, this solution would allow isolated

actions to be brought – in an EU internal forum – against non-EU companies operating within the EU. The advantage of this solution compared to a forum of necessity is that the connecting factor of net turnover is already defined by Art. 2 (2) CSDDD, thus reducing the burden of proof, legal uncertainty and any unpredictability for the parties. Moreover, this approach would interfere less with the regulatory interests of other states than a *forum necessitatis* rule, which for its part would reach beyond the EU's own regulatory space.

A *forum legis* should not be implemented only as a subsidiary option for cases in which there is a lack of access to justice, because this would create legal uncertainty. The clear-cut requirements of Art. 2 (2) CSDDD are an adequate criterion for jurisdiction via a *forum legis*. On the other hand, it should not serve as an exclusive basis of jurisdiction, because especially plaintiffs should not be barred from the ability to bring suit outside the EU. The risk of strategic declaratory actions brought by companies in a court outside the EU seems rather negligeable, and this can be avoided either by giving preference to actions for performance over negative declaratory actions, as is the law in Germany or through the requirement of recognisability of a foreign judgment, which would not be met by a foreign decision violating domestic public policy by not providing sufficient protection.

This leaves a problem, however: The CSDDD does not designate which Member State's court have jurisdiction. Since a *forum legis* normally establishes adjudicatory jurisdiction correlating with the applicable law, jurisdiction lies with the courts of the country whose law is applied. This is not possible as such for EU law because the EU does not have its own ordinary courts. The competent Member State court within the EU must be determined. Two options exist with regard to the CSDDD: to give jurisdiction to the courts in the country where the highest net turnover is reached, or to allow claimants to choose the relevant court. The first option involves difficult evidentiary issues, the second may give plaintiffs an excessive amount of choice. In either case, non-EU companies will be treated differently from EU companies on the question of the competent court – for non-EU companies, net turnover is decisive in establishing the forum, for EU-companies, the seat of the company is decisive. This difference is an unavoidable consequence resulting from extension of the scope of application of the Directive to third-country companies on the basis of net turnover.

5. Implementation

How could this *forum legis* be achieved? The most straightforward way would be to include a rule on jurisdiction in the CSDDD, which would then oblige the Member States to introduce harmonised rules of jurisdiction into national procedural law. This would be a novelty in the field of European international civil procedure law, but it would correspond to the character of the special provision on value chains as well as to the mechanism of the CSDDD's liability provision. An alternative would be to include in the Brussels I Regulation Recast a sub-category of a special type of jurisdiction under Art. 7 Brussels I Regulation Recast. This as well would be a novelty to the Brussels system, which in principle requires that the defendant be seated in a Member State (see also *Kieninger*, RW 2022, 584, 593, who favours reform of the Brussels I Regulation Recast for the sake of uniformity within the EU). This second option would certainly mesh with current efforts to extend the Brussels system to non-EU defendants (see *Lutzi/Piovesani/Zgrabljic Rotar*).

The implementation of such a *forum legis* is not without problems: It subjects companies, somewhat inconsistently with the EU legal scheme, to *de facto* jurisdiction merely because they generate significant turnover in the EU's internal market. Yet such a rule is a necessary consequence of the extraterritorial extension of the Directive to third-country companies. The unilateral character of the CSDDD is problematic. But if the CSDDD intends to implement such an extension on a substantive level, this must be reflected on a procedural level so as to enable access to court. The best way to do this is by implementing a *forum legis*. The CSDDD demonstrates the great importance of compensation of victims of human rights and environmental damage, by making the cicil liability rule internationally mandatory. Creating a corresponding head of jurisdiction for these substantive civil liability claims is then necessary and consistent in order to achieve access to court and, thus, procedural enforceability.

Podcast series in international and transnational law

Rishi Gulati, Associate Professor in International Law and Barrister, is hosting a new podcast series focusing on hot topics in international and transnational law, as well as domestic law developments with transnational impact. Significant developments impacting the legal profession are also discussed from time to time.

The podcasts are not only designed for a legal audience but also for the broader public using accessible language. They are also intended to be a teaching tool with the 50 or so minute episodes delving systematically on the issues discussed. Each episode invites a highly knowledgeable guest who can bring a unique perspective to the issue. A special attempt is made to include voices from all regions of the world.

Series 1 has now wrapped up and has seven episodes. The first three episodes concern challenges faced by the International Criminal Court, WTO and UN Human Rights Treaty Bodies respectively. The fourth episode discusses the impact of AI on the legal profession, a highly topical issue given the rise of generative AI. The fifth episode discusses the UK's new subsidy control regime and the Levelling Up agenda. The sixth episode discusses animal rights law, with the final episode in Series 1 dealing with AI and international law from a substantive perspective. Series 2 will return after a short break!

You can subscribe to the podcast in various ways, including via SoundCloud, Spotify, and Google Podcasts

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The Arab Yearbook of Public and

Private International Law – Call for Submission

Finally!!! A yearbook dedicated to public and private international law in the Arab world has recently been established by BRILL and is expected to be launched in the fall of 2024 called **"The Arab Yearbook of Public & International Law"** (the Yearbook).

One can only warmly welcome this initiative. It will certainly provide a space for fruitful discussions and a forum where experts from the Arab world and abroad can exchange views, all for the sake of the further development of these areas of law in the Arab region.

The Yearbook's official website provides the following description:

The Arab Yearbook of Public & Private International Law is dedicated to exploring questions of public international law and private international law throughout the Arab World. The Yearbook has a broad intellectual agenda. It publishes high-quality scholarship submitted by authors both from the Arab region and across the world. The Yearbook publishes articles on any questions that relate to general public international law and its sub-fields, such as the law governing the use of force, international humanitarian law, human rights law, international economic law, the law of the sea, environmental law, and the law and practice of international organizations. The Yearbook also welcomes submissions on any topic of private international law, conflicts of laws, investor-state arbitration, and commercial arbitration.

The Yearbook publishes scholarship that applies various jurisprudential and methodological perspectives. In addition to doctrinal scholarship, the Yearbook publishes research that explores legal questions from economic, critical, historical, feminist, and sociological perspectives, or that uses a diverse range of methodologies, such as empirical research and inter-disciplinary approaches that explore intersections between law & political science, law & international relations, and law & religion.

The Yearbook publishes primary materials on international law in the Arab

World. It provides a forum to preserve a permanent record of official positions of Arab governments, Arab inter-governmental and sub-regional organizations, international organizations active in the Arab region, in addition to materials, reports, and documents prepared by civil society and non-governmental organizations on questions of international law. In addition, the Yearbook publishes judicial materials that relate to international law in the region, including judgments of international courts and quasi-judicial bodies, such as human rights monitoring bodies, decisions of arbitral tribunals, including from investor-state and commercial arbitration panels, and judgments of national courts.

For its inaugural volume, the Yearbook has issued a **call for submission**:

Submission Deadline: October 1st.

Word limits: 10,000-15,000 words for articles;

7,000-10,000 words for notes or comments;

2,000-3,000 words for book or case reviews

(all word counts are inclusive of footnotes).

Submission Address: helal.18@osu.edu

For details, please check the Yearbook's website here and here.

Best wishes and good luck to the initiators of this wonderful project.

Seminar Report on Personal identity and status continuity – a focus on name and gender in the conflict of laws

Written by Thalia Kruger (University of Antwerp) and Laura Carpaneto (University of Genoa)

On 1 June 2023 the European Law Institute (ELI) and the Swiss Institute of Comparative Law (SICL) held the third session of a conference on personal identity and status continuity. The focus of this third session was on names and gender in the conflict of laws. The programme included recent amendments to Swiss legislation, the portability and recognition of names, and new gender statuses in private international law.

The conference, including a screening of the film 'The Danish Girl' (Tom Hooper, 2015), illustrated the importance of gender and names as part of people's identity, beyond the law. Names can be essential for people to identify with their religious group. In central and southern Africa, the use of names taken from people's own language instead of English names has been part of the black consciousness movement. The film showed the struggle of a person to change her sex despite the absence of any legal framework. And yet, Lukas Heckendorn Urscheler (director of the SICL) and Martin Föhse (University of St Gallen) showed that the societal issues turn into legal ones. Sharon Shakargy (University of Jerusalem) explained that the law is important when individuals have to use identity cards, credit cards, licences, certificates and the like. The law struggles to provide the most appropriate solutions, respecting the rights of all involved and ensuring portability of gender and names.

When talking about **rights**, there is a blurring, or at least a lack of terminological clarity, between human rights and fundamental rights. The free movement of persons in the EU is also classified as a fundamental right. Giulia Rossolillo (University of Pavia) compared the approaches of the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU) with respect to the

recognition and continuation of names. She showed that the solutions reached by the two courts can be quite different, as a result of their different approaches. The ECtHR uses the (human) right to the respect of private and family life protected by Article 8 of the European Convention of Human Rights (ECHR) while the CJEU uses the (fundamental) right to free movement of EU citizens. Moreover, the ECtHR is not so much concerned with the cross-border aspect, but focuses on the right to a person's identity. The CJEU emphasises continuity of name in cross-border contexts. For instance, the facts in the ECtHR case Künsberg Sarre v. Austria and the CJEU case Sayn-Wittgenstein were quite similar, dealing with the Austrian prohibition on the use of noble titles. The ECtHR found that Austria, but allowing for a long time the use of the noble 'von' and then disallowing it, violated the applicant's rights under Article 8 of the ECHR. The CJEU, on the other hand, found the obstacle to the right to free movement in the EU to be justified.

Different approaches to rights can also result in conflicting rights, i.e. the society's right to equality (no noble titles) versus the individuals' rights to continuity of name. Other rights that come into play, include the LGBTIQ+ rights and rights of women (a gender logic, Ilaria Pretelli SICL), and the rights linked to the free market (economic logic), societal rights, and the right to self-determination and autonomy, such as the right to freely choose and change a name.

Johan Meeusen (University of Antwerp) considered the **specific approach** of the European Commission to matters of gender, drawing lessons from the Commission's Parenthood Proposal, Com(2022) 695. The lessons are that the Commission uses PIL to pursue its political ambition to advance non discrimination and LGBTIQ rights in particular; is on a mission to achieve status continuity; invests in legal certainty and predictability; approaches status continuity first and foremost from a fundamental rights perspective; acts within the limits of the Union's competence but tries to maximize its powers; ambitious with an eye for innovation…but within limits.

Anatol Dutta (Ludwig Maximilians University of Munich) explained the different waves of changes in gender legislation nationally. He indicated that private international law influences people's status differently depending on whether it considers sex registration and sex change as substantive or procedural. This would determine whether the lex fori or lax causae is used. Even when agreeing

on a classification as substantive law, different legal systems use different connecting factors. Nationality is often used, but sometimes the individual is given a choice between the law of the habitual residence and nationality. Yet, public policy can still play a role (bringing back the ideas of human rights, discussed earlier).

All in all, it is becoming increasingly clear that the idea that private international law is a neutral and merely technical field of law is nothing more than a fiction. Besides the different right and approaches at play, as discussed above, feminist approaches (set out by Mirela Zupan, University of Osijek) also influence connecting factors and recognition rules.

Book launch: Brooke Marshall, 'Asymmetric Jurisdiction Clauses'

On behalf of our former editor Brooke Marshall, we are happy to share the invitation to the UNSW Law & Justice Book Forum, which will host the launch of her book on Asymmetric Jurisdiction Clauses.

The event will feature the following speakers:

- **Professor Mary Keyes**, Director of the Law Futures Centre; Professor, Griffith Law School, Griffith University
- **Professor Caroline Kleiner**, Professor, Centre for Business Law and Management (CEDAG), Faculty of Law, Université Paris Cité, Paris, France
- Chaired by **Professor Justine Nolan**, Director, Australian Human Rights Institute; Professor, UNSW Faculty of Law & Justice

It will take place in a hybrid setting on Wednesday, 5 July, at 4:30pm AEST = 8:30am CEST = 7:30am BST. You may register using this link.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2023: Abstracts

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

(These abstracts can also be found at the IPRax-website under the following link: https://www.iprax.de/en/contents/)

B. Heiderhoff: **Care Proceedings under Brussels IIter – Mantras, Compromises and Hopes**

Against the background of the considerable extension of the text of the regulation, the author asks whether this has also led to significant improvements. Concerning jurisdiction, the “best interests of the child” formula is used a lot, while the actual changes are rather limited and the necessary compromises have led to some questions of doubt. This also applies to the extended possibility of choice of court agreements, for which it is still unclear whether exclusive prorogation is possible beyond the cases named in Article 10 section 4 of the Brussels II ter Regulation. Concerning recognition and enforcement, the changes are more significant. The author shows that although it is good that more room has been created for the protection of the best interests of the child in the specific case, the changes bear the risk of prolonging the court proceedings. Only if the rules are interpreted with a sense of proportion the desired improvements can be achieved. All in all, there are many issues where one must hope for reasonable clarifications by the ECJ

G. Ricciardi: **The practical operation of the 2007 Hague Protocol on the law**

applicable to maintenance obligations

Almost two years late due to the COVID-19 pandemic, in May 2022 over 200 delegates representing Members of the Hague Conference on Private International Law, Contracting Parties of the Hague Conventions as well as Observers met for the First Meeting of the Special Commission to review the practical operation of the 2007 Child Support Convention and the 2007 Hague Protocol on Applicable Law. The author focuses on this latter instrument and analyses the difficulties encountered by the Member States in the practical operation of the Hague Protocol, more than ten years after it entered into force at the European Union level. Particular attention is given to the Conclusions and Recommendations of the Applicable Law Working Group, unanimously adopted by the Special Commission which, in light of the challenges encountered in the implementation of the Hague Protocol, provide guidance on the practical operation of this instrument.

R. Freitag: **More Freedom of Choice in Private International Law on the Name of a Person!**

Remarks on the Draft Bill of the German Ministry of Justice on a Reform of German Legislation on the Name of a PersonThe German Ministry of Justice recently published a proposal for a profound reform of German substantive law on the name of a person, which is accompanied by an annex in the form of a separate draft bill aiming at modernizing the relevant conflict of law-rules. An adoption of this bill would bring about a fundamental and overdue liberalization of German law: Current legislation subjects the name to the law of its (most relevant) nationality and only allows for a choice of law by persons with multiple nationalities (they max designate the law of another of their nationalities). In contrast, the proposed rule will order the application of the law of the habitual residence and the law of the nationality will only be relevant if the person so chooses. The following remarks shall give an overview over the proposed rules and will provide an analysis of their positive aspects as well as of some shortcomings.

D. Coester-Waltjen: **Non-Recognition of "Child Marriages" Concluded**

Abroad and Constitutional Standards

The Federal Supreme Court raised the question on the constitutionality of one provision of the new law concerning “child marriages” enacted by the German legislator in 2017. The respective rule invalidated marriages contracted validly according to the national law of the intended spouses if one of them was younger than 16 years of age (Art. 13 ss 3 no 1 EGBGB). The Federal Supreme Court requested a ruling of the Federal Constitutional Court on this issue in November 2018. It took the Federal Constitutional Court nearly five years to answer this question.

The court defines the structural elements principally necessary to attain the constitutional protection of Art. 6 ss 1 Basic Law. The court focuses on the free and independent will of the intended spouses as an indispensable structural element. The court doubts whether, in general, young persons below the age of 16 can form such a free and independent will regarding the formation of marriage. However, as there might be exceptionally mature persons, the protective shield of Art. 6 ss 1 Basic Law is affected (paragraphs 122 ff.) and their “marriage” falls under the protective umbrella of the constitution. At the same time, the requirement of a free and meaning ful will to form a marriage complies with the structural elements of the constitutionally protected marriage. This opens the door for the court to examine whether the restriction on formation of marriage is legitimate and proportionate.

After elaborating on the legitimacy of the goal (especially prevention and proscription of child marriages worldwide) the court finds that the restriction on the right to marry is appropriate and necessary, because comparable effective other means are missing. However, as the German law does not provide for any consequence from the relationship formed lawfully under the respective law and being still a subsisting marital community, the rule is not proportionate. In addition, the court demurs that the law does not provide for transformation into a valid marriage after the time the minor attains majority and wants to stay in this relationship. In so far, Art. 13 ss 3 no 1 affects unconstitutionally Art. 6 ss 1 Basic Law. The rule therefore has to be reformed with regard to those appeals but will remain in force until the legislator remedies those defects, but not later than June 30, 2024.

Beside the constitutional issues, the reasoning of the court raises many questions

on aspects of private international law. The following article focuses on the impact of this decision.

O.L. Knöfel: **Discover Something New: Obtaining Evidence in Germany for Use in US Discovery Proceedings**

The article reviews a decision of the Bavarian Higher Regional Court (101 VA 130/20), dealing with the question whether a letter rogatory for the purpose of obtaining evidence for pre-trial discovery proceedings in the United States District Court for the District of Delaware can be executed in Germany. The Court answered this question in the affirmative. The author analyses the background of the decision and discusses its consequences for the long-standing conflict of procedural laws (Justizkonflikt) between the United States and Germany. The article sheds some light on the newly fashioned sec. 14 of the German Law on the Hague Evidence Convention of 2022 (HBÜ Ausführungsgesetz), which requires a person to produce particular documents specified in the letter of request, which are in his or her possession, provided that such a request is compatible with the fundamental principles of German law and that the General Data Protection Regulation of 2018 (GDPR) is observed.

W. Wurmnest/C. Waterkotte: **Provisional injunctions under unfair competition law**

The Higher Regional Court of Hamburg addressed the delimitation between Art. 7(1) and (2) of the Brussels Ibis Regulation after Wikingerhof v. Book ing.com and held that a dispute based on unfair competition law relating to the termination of an account for an online publishing platform is a contractual dispute under Art. 7(1) of the Brussels Ibis Regulation. More importantly, the court considered the requirement of a “real connecting link” in the context of Art. 35 of the Brussels Ibis Regulation. The court ruled that in unfair competition law disputes of contractual nature the establishment of such a link must be based on the content of the measure sought, not merely its effects. The judgment shows that for decisions on provisional injunctions the contours of the “real connecting link” have still not been conclusively clarified.

I. Bach/M. Nißle: **The role of the last joint habitual residence on post-marital maintenance obligations**

For child maintenance proceedings where one of the parties is domiciled abroad, Article 5 of the EuUnterhVO regulates the – international and local – jurisdiction based on the appearance of the defendant. According to its wording, the provision does not require the court to have previously informed the defendant of the possibility to contest the jurisdiction and the consequences of proceeding without contest – even if the defendant is the dependent minor child. Article 5 of the EuUnterhVO thus not only dispenses with the protection of the structurally weaker party that is usually granted under procedural law by means of a judicial duty to inform (such as Article 26(2) EuGVVO), but is in contradiction even with the other provisions of the EuUnterhVO, which are designed to achieve the greatest possible protection for the minor dependent child. This contradiction could already be resolved, at least to some extent, by a teleological interpretation of Article 5 of the EuUnterhVO, according to which international jurisdiction cannot in any case be established by the appearance of the defendant without prior judicial reference. However, in view of the unambiguous wording of the provision and the lesser negative consequences for the minor of submitting to a local jurisdiction, Article 5 of the EuUnterhVO should apply without restriction in the context of local jurisdiction. De lege ferenda, a positioning of the European legislator is still desirable at this point.

C. Krapfl: **The end of US discovery pursuant to Section 1782 in support of international arbitration**

The US Supreme Court held on 13 June 2022 that discovery in the United States pursuant to 28 U.S.C. § 1782 (a) – which authorizes a district court to order the production of evidence "for use in a proceeding in a foreign or international tribunal" – only applies in cases where the tribunal is a governmental or intergovernmental adjudicative body. Therefore, applications under Section 1782 are not possible in support of a private international commercial arbitration, taking place for example under the Rules of the German Arbitration Institute (DIS). Section 1782 also is not applicable in support of an ad hoc arbitration

initiated by an investor on the basis of a standing arbitration invitation in a bilateral investment treaty. This restrictive reading of Section 1782 is a welcome end to a long-standing circuit split among courts in the United States.

L. Hübner/M. Lieberknecht: **The Okpabi case — Has Human Rights Litigation in England reached its Zenith**

In its Okpabi decision, the UK Supreme Court continues the approach it developed in the Vedanta case regarding the liability of parent companies for human rights infringements committed by their subsidiaries. While the decision is formally a procedural one, its most striking passages address substantive tort law. According to Okpabi, parent companies are subject to a duty of care towards third parties if they factually control the subsidiary's activities or publicly convey the impression that they do. While this decision reinforces the comparatively robust protection English tort law affords to victims of human rights violations perpetrated by corporate actors, the changes to the English law of jurisdiction in the wake of Brexit could make it substantially more challenging to bring human rights suits before English courts in the future.

Notifications:

H. Kronke: Obituary on Jürgen Basedow (1949–2023)

C. Rüsing: Dialogue International Family Law on April 28 and 29, 2023, Münster

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XVI Conference of the American Association of Private

International Law

XVI CONFERENCE OF THE AMERICAN ASSOCIATION OF PRIVATE INTERNATIONAL LAW – ASADIP

The **American Association of Private International Law – ASADIP** is pleased to announce that the registrations for its annual event are now open. The **XVI ASADIP Conferences: "Private international law between the innovation and the disruption"** will take place on **August 10-11, 2023** in the city of **Rio de Janeiro**, at the premises of PUC Rio and University of State of Rio de Janeiro – Uerj.

The ASADIP invites all PIL scholars and community to be able to attend the event and meet again in person this exceptional year in Rio. The XVI Conferences will cover special topics on **PIL and international organizations** – Organization of American States-OAS, Mercosur, the HCCH, Uncitral, Unidroit; perspectives on **PIL, gender and sustainable development**; **PIL legislative trends and (re)codification**; i**nternational legal cooperation** and **new technologies**, **procedural conventions**and **cross-border family affairs**, amongst others.

In addition, as a **warm-up PIL initiative** to engage PIL scholars, travellers and friends coming to Rio, the Brazilian Research Network on Private International Law, the Latin American Network of International Civil Procedural Law, the Open Latin American Chair of Private International Law and ASADIP will jointly convene a preparatory meeting – the **IV Workshop on Research Strategies for Private International Law**.

The Workshop will be generously hosted by **PUC Rio** on **August 9, 2023**, and is coordinated by Professors Nadia de Araujo (PUC Rio), Fabricio Polido (University of Minas Gerais – UFMG); Valesca Borges (University of Espírito Santo – UFES) and Inez Lopes (University of Brasilia – UnB).

A **Call for Papers** has been launched and is currently available on ASADIP´s website and social media. PIL scholars are invited to submit their draft proposals for the Workshop and special meeting of the PIL research networks and projects active in ASADIP region and overseas. Papers and abstracts in **English,**

Portuguese or Spanish are accepted and may be submitted in line with one of the thematic sessions of the Workshop to the e-mail: 4workshop.dipr.pucrio2023@gmail.com. For further information and instructions, participants can follow the updates on relevant submission and feedback deadlines (end of June to mid-July) on ASADIP social media.

The opportunity presented by those activities under the auspices of ASADIP and the gathering of specialists of the highest level from all continents is once again unique. We encourage you to participate.

Relevant links and repercussions on media:

- https://www.asadip.org
- facebook.com/profile.php?id=100057610233127
- https://www.instagram.com/asadip1/?hl=en
- https://www.sympla.com.br/xvi-jornadas-asadip-e-iv-workshop-de-estrategias-de-pesquisa-em-direito-internacional-privado-2023__2027233

– Call for Papers –

The Brazilian Research Network on Private International Law ("Brazilian PIL-RN"), an initiative of the Inter-institutional Research Group "Private International Law in Brazil and International Fora" (CNPq/DGP), the Latin American Network of International Civil Procedural Law, the Open Latin American Chair of Private International Law and the American Association of Private International Law – ASADIP – will jointly host the IV Workshop on Research Strategies for Private International Law on August 9, 2023, on the occasion of the awaited XVI ASADIP Conference 2023 ("PIL between the Innovation and the Disruption") in Rio de Janeiro.

PUC Rio will be our host institution for the IV Workshop on Research Strategies in PIL, in this edition structured in two main clusters:

1. **Joint Meeting of PIL Research Groups and Networks in Brazil, ASADIP Region and global partners**
2. **Thematic panels on IPR research with presentation of scientific**

papers in Working Groups on PIL and Emerging Issues

- WG I: Sustainable Development Goals-SDGs and Private International Law
- WG II: Dialogues between PIL, International Law and International Trade
- WG III – Migrations, human rights and private international law
- WG IV – PIL between data flow, artificial intelligence and new technologies
- WG V – Current developments on International legal cooperation

This Call for Papers invites participants and specialists to submit proposals – articles/papers, expanded abstracts (for Master and Doctoral candidates) and posters (Undergraduate students) for the presentation of scientific pieces at the IV Workshop on PIL Research Strategies. It is open to submissions of unpublished/ongoing works by faculty professors, investigators, as well postgraduate and undergraduate students, on topics of interest for the research agenda of Private International Law, its strategies and potential impacts on society, local/regional spaces, and international organizations. Proposals may be submitted in any of the three official languages for ASADIP: Spanish, English and Portuguese.

A such warm-up academic initiative is a part of the main proceedings of the XVI ASADIP Conference2023 "PIL between Innovation and the Disruption",which will take place between 10-11 August 2023 in Rio de Janeiro (PUC Rio and University of Estado do Rio de Janeiro – UERJ).

Highlight on relevant deadlines:

- 06/28/2023 – 1st deadline for submission of proposals
- 05/07/2023 – 2nd deadline for submission of proposals
- 10/07/2023 – Deadline for the evaluation feedback on the proposals
- 07/17/2023 – Deadline for issuing invitation letters and acceptance of selected proposals
- 24/07/2023 – Confirmation of participation and registration of participating authors
- 09/08/2023 – IV Workshop – PUC Rio – preparation for the XVI ASADIP Conference (2023)

General information and submission rules:

- The proposals of papers – articles, expanded abstracts and posters – in the official languages for ASADIP – Spanish, English and Portuguese – should be submitted and sent within the deadlines to the e-mail: *4workshop.dipr.pucrio2023@gmail.com.*
- There will be no registration fees and the organising committee will issue acceptance letters according to the flow of requests from selected participants.Participants will be solely responsible for arranging financial support in their respective institutions for transportation, accommodation, travel logistics and per diems for the presentation of selected papers at the IV Workshop.
- The papers selected by peer review and approved should be adjusted according to the guidelines for authors and will be published in books/collections and proceedings of the event, with support from Brazilian and international funding agencies.

More information can be found on the ASADIP website, social media of the organizing institutions and updates on Sympla.