No Recognition in Switzerland of the Removal of Gender Information according to German Law

This note has been kindly provided by Dr. Samuel Vuattoux-Bock, LL.M. (Kiel), University of Freiburg (Germany).

On 8 June 2023, the Swiss Federal Supreme Court (Bundesgericht) pronounced a judgment on the removal of gender markers of a person according to German Law and denied the recognition of this removal in Switzerland.

Background of the judgment is the legal and effective removal 2019 of the gender information of a person with swiss nationality living in Germany. Such removal is possible by a declaration of the affected person (accompanied by a medical certificate) towards the Registry Office in accordance with Sect. 45b para. 1 of the German Civil Status Act (*Personenstandsgesetz*, PStG). The claimant of the present judgment sought to have the removal recognized in Switzerland and made a corresponding application to the competent local Swiss Office of the Canton of Aargau. As the Office refused to grant the recognition, the applicant at the time filed a successful claim to the High Court of the Canton of Aargau, which ordered the removal of the gender markers in the Swiss civil and birth register.

The Swiss Federal Office of Justice contested this decision before the Federal Supreme Court. The highest federal Court of Switzerland revoked the judgment of the High Court of the Canton of Aargau and denied the possibility of removing gender information in Switzerland as it is not compatible with Swiss federal law.

According to Swiss private international law, the modification of the gender indications which has taken place abroad should be registered in Switzerland according to the Swiss principles regarding the civil registry (Art. 32 of the Swiss Federal Act on the Private International Law, IPRG). Article 30b para. 1 of the Swiss Civil Code (ZGB), introduced in 2022, provides the possibility of changing gender. The Federal Supreme Court notes that the legislature explicitly refused to permit a complete removal of gender information and wanted to maintain a binary

alternative (male/female). Furthermore, the Supreme Court notes that the legislature, by the introduction in 2020 of Art. 40a IPRG, neither wanted to permit the recognition of a third gender nor the complete removal of the gender information.

Based on these grounds, the Federal Supreme Court did not see the possibility of the judiciary to issue a judgment *contra legem*. A modification of the current law shall be the sole responsibility of the legislature. Nevertheless, the Supreme Court pointed out that, due to the particular situation of the affected persons, the European Court of Human Rights requires a continual review of the corresponding legal rules, particularly regarding social developments. The Supreme Court, however, left open the question of whether the recognition of the removal of gender information could be a violation of Swiss public policy. The creation of a limping legal relationship (no gender marker in Germany; male or female gender marker in Switzerland) has not been yet addressed in the press release.

Currently, only the press release of the Federal Supreme Court is available to the public (in French, German and Italian). As soon as the written grounds will be accessible, a deeper comment of the implications of this judgment will be made on ConflictOfLaws.

Change of gender in private international law: a problem arises between Scotland and England

Written by Professor Eric Clive

The Secretary of State for Scotland, a Minister of the United Kingdom government, has made an order under section 35 of the Scotland Act 1998 blocking Royal Assent to the Gender Recognition Reform (Scotland) Bill 2022, a Bill passed by the Scottish Parliament by a large majority. The Scottish

government has challenged the order by means of a petition for judicial review. The case is constitutionally important and may well go to the United Kingdom Supreme court. It also raises interesting questions of private international law.

At present the rules on obtaining a gender recognition certificate, which has the effect of changing the applicant's legal gender, are more or less the same in England and Wales, Scotland and Northern Ireland. The Scottish Bill would replace the rules for Scotland by less restrictive, de-medicalised rules. An unfortunate side effect is that Scottish certificates would no longer have automatic effect by statute in other parts of the United Kingdom. The United Kingdom government could remedy this by legislation but there is no indication that it intends to do so. Its position is that it does not like the Scottish Bill.

One of the reasons given by the Secretary of State for making the order is that having two different systems for issuing gender recognition certificates within the United Kingdom would cause serious problems. A person, he assumes, might be legally of one gender in England and another in Scotland. There would therefore be difficulties for some organisations operating at United Kingdom level – for example, in the fields of tax, benefits and pensions. This immediately strikes a private lawyer as odd. Scotland and England have had different systems in the law of persons for centuries – in the laws on marriage, divorce, legitimacy, incapacity and other matters of personal status – and they have not given rise to serious problems. This is because the rules of private international law, even in the absence of statutory provision, did not allow them to.

In a paper on *Recognition in England of change of gender in Scotland: a note on private international law aspects*[1] I suggest that gender is a personal status, that there is authority for a general rule that a personal status validly acquired in one country will, subject to a few qualifications, be recognised in others and that there is no reason why this rule should not apply to a change of gender under the new Scottish rules.

The general rule is referred to at international level. In article 10 of its Resolution of September 2021 on *Human Rights and Private International Law*, the Institute of International Law says that:

> *Respect for the rights to family and private life requires the recognition of personal status established in a foreign State, provided that the person*

> *concerned has had a sufficient connection with the State of origin … as well as with the State whose law has been applied, and that there is no manifest violation of the international public policy of the requested State ….*

So far as the laws of England and Scotland are concerned, there are authoritative decisions and dicta which clearly support such a general rule. Cases can be found in relation to marriage, divorce, nullity of marriage, legitimacy and legitimation. A significant feature is that the judges have often reasoned from status to particular rules. It cannot be said that there are just isolated rules for particular life events. And the rules were developed at common law, before there were any statutory provisions on the subject.

Possible exceptions to the general rule – public policy, no sufficient connection, contrary statutory provision, impediment going to a matter of substance rather than procedure – are likely to be of little if any practical importance in relation to the recognition in England of changes of gender established under the proposed new Scottish rules.

If the above arguments are sound then a major part of the Secretary of State's reasons for blocking the Scottish Bill falls away. There would be no significant problem of people being legally male in Scotland but legally female in England, just as there is no significant problem of people being legally married in Scotland but unmarried in England. Private international law would handle the dual system, as it has handled other dual systems in the past. Whether the Supreme Court will get an opportunity to consider the private international law aspects of the case remains to be seen: both sides have other arguments. It would be extremely interesting if it did.

From the point of view of private international law, it would be a pity if the Secretary of State's blocking order were allowed to stand. The rules in the Scottish Bill are more principled than those in the Gender Recognition Act 2004, which contains the existing law. The Scottish Bill has rational rules on sufficient connection (essentially birth registered in Scotland or ordinary residence in Scotland). The 2004 Act has none. The Scottish Bill has a provision on the recognition of changes of gender under the laws of other parts of the United Kingdom which is drafted in readily understandable form. The corresponding provisions in the 2004 Act are over-specific and opaque. The Scottish Bill has a

rule on the recognition of overseas changes of gender which is in accordance with internationally recognised principles.

The 2004 Act has the reverse. It provides in section 21 that: A person's gender is not to be regarded as having changed by reason only that it has changed under the law of a country or territory outside the United Kingdom. This is alleviated by provisions which allow those who have changed gender under the law of an *approved overseas country* to use a simpler procedure for obtaining a certificate under the Act but still seems, quite apart from any human rights aspects, to be unfriendly, insular and likely to produce avoidable difficulties for individuals.

[1] Clive, Eric, Recognition in England of change of gender in Scotland: A note on private international law aspects (May 30, 2023). Edinburgh School of Law Research Paper No. 2023/06, Available at SSRN: https://ssrn.com/abstract=4463935 or http://dx.doi.org/10.2139/ssrn.4463935

Trade, Law and Development: Call for Submissions

Posted at the request of Shiva Patil, Technical Editor at Trade, Law *and* Development.

Trade, Law and **Development**

Call for Submissions

Special Issue

"**Sustainability and Inclusivity: Evolving Paradigms of the Global Economy**"

Founded in 2009, the philosophy of Trade, Law and Development (TL&D) has been to generate and sustain a constructive and democratic debate on emergent issues in international economic law and to serve as a forum for the discussion and distribution of ideas. Towards these ends, the Journal has published works by noted scholars such as the WTO DDG Yonov F. Agah, Dr. (Prof.) Ernst Ulrich Petersmann, Prof. Steve Charnovitz, Prof. Petros Mavroidis, Prof. Mitsuo Matsuhita, Prof. Raj Bhala, Prof. Joel Trachtman, Dr. (Prof.) Gabrielle Marceau, Prof. Simon Lester, Prof. Bryan Mercurio, and Prof. M. Sornarajah among others. TL&D also has the distinction of being ranked the best journal in India across all fields of law for several years by Washington and Lee University, School of Law.

Pursuant to this philosophy, the Board of Editors of TL&D is pleased to announce "***Sustainability and Inclusivity: Evolving Paradigms of the Global Economy***" as the theme for its next Special Issue.

It is indisputably true that sustainability which comprises the three interdependent pillars of "*economic growth, social equity, and environmental protection*", is increasingly gaining traction among governments, businesses, research organisations, scholars and the general populace. Discussions in international economic law, including those surrounding world trade, cross-border investment, and development, have abundantly focused on this. Economic benefits of trade ultimately decline while the social and environmental costs rise to unbearable levels, if sustainable trade rules are not in place. Whereas, a more sustainable trade strategy would recognise the need for a more varied export mix, invest in technology, and have minimal trade barriers while balancing long-term resilience with short-term ambitions. Since TL&D's objective is to provide a forum of exchange of ideas and constructive debate on legal and policy issues, the above-mentioned factors arguably constitute some of the biggest issues for international economic law discourse this year.

While the theme is broad enough to cover a wide range of issues, an indicative list of specific areas is as follows:

- Trade Rules and Environmental Interactions
- Environmental Protection Clauses in International Investment Agreements
- Trade and Human Rights

- Promoting Entrepreneurship/ Trade Facilitation
- Trade and Gender Justice
- Transparency and Good Governance Obligations
- Sustainable Agriculture
- Sustainable Fisheries
- Indigenous Peoples Interaction with International Trade and Investment
- Sustainable Development Goals

These sub-issues are not exhaustive, and the Journal is open to receiving submissions on all aspects related to sustainability and inclusivity in the global economy.

Accordingly, the Board of Editors of TL&D is pleased to invite original, unpublished manuscripts for publication in the Special Issue of the Journal in the form of 'Articles', 'Notes', 'Comments' and 'Book Reviews', focusing on the theme of "*Sustainability and Inclusivity: Evolving Paradigms of the Global Economy*".

In case of any queries, please feel free to contact us at: editors[at]tradelawdevelopment[dot]com.

Cautio iudicatum solvi in Belgium:

partly unconstitutional but still in existence

The Belgian Court of Cassation found in a judgment of 10 March 2023 (in Dutch) that the Brussels Court of Appeal was wrong to refuse the granting of a *cautio iudicatum solvi* against a US company, with principal seat in Colorado.

As previously reported, the *cautio iudicatum solvi* as stated in the Belgian Code of Civil Procedure (or Judicial Code), Article 851 was declared unconstitutional by the Belgian Constitutional Court in 2018. The Constitutional Court found that the criterion of nationality as basis for the granting of the *cautio* was not relevant to reach the goal pursued by the legislator, namely to ensure payment of procedural costs and possible damages if the plaintiff loses the suit. The Court called on the legislator to amend the article, but this never happened.

The Brussels Court of Appeal refused to issue the *cautio* requested by a Belgian defendant as against the US plaintiff, on the basis of the unconstitutionality of the provision. The Court of Cassation, however, stated that Article 851 does not in general infringe Article 6 of the European Convention on Human Rights; the Constitutional Court's finding of unconstitutionality was based on the principle of non-discrimination, in so far as a Belgian defendant could not use the *cautio* against any plaintiff without property in Belgium, but only against a non-Belgian plaintiff. As long as the legislator has not rectified the provision, it must according to the Court of Cassation be interpreted in line with the Constitution. This means that the *cautio* may be granted against any plaintiff with insufficient property in Belgium, irrespective of the plaintiff's nationality. The Court reiterated that the *cautio* is outlawed by several international conventions, but none of these conventions applied in the present case.

Lex & Forum Vol. 1/2023

This post has been prepared by Prof. Paris Arvanitakis

Corporate cross-border disputes in modern commercial world have taken on a much more complex dimension than in the early years of the EU. Issues such as the relationship between the registered and the real seat (see e.g. CJEU, 27.9.1988, Daily Mail, C-81/87), the possibility of opening a branch in another Member State (e.g. ECJ, 9.3.1999, Centros/Ehrvervs-og, C-212/97), or the safeguarding of the right of free establishment by circumventing contrary national rules not recognizing the legal capacity of certain foreign companies (CJEU, 5.11.2002, Überseering/Nordic Construction, C-208/00), which were dealt with at an early stage by the ECJ/CJEU, now seem obsolete in the face of the onslaught of new transnational corporate forms, cross-border conversions and mergers, the interdependence of groups of companies with scattered parent companies and subsidiaries, or cross-border issues of directors' liability or piercing the corporate veil, which create complex and difficult problems of substantive, procedural and private international law. These contemporary issues of corporate cross-border disputes were examined during an online conference of Lex&Forum on 23.2.2023, and are the main subject of the present issue (Focus.

In particular, the Preafatio of the issue hosts the valuable thoughts of Advocate General of the CJEU, Ms *Laila Medina*, on the human-centered character of the European Court's activity ("People-centered Justice and the European Court of Justice"), while the main issue (Focus) presents the introductory thoughts of the President of the Association of Greek Commercialists, Emeritus Professor *Evangelos Perakis*, Chair of the event, and the studies of Judge *Evangelos Hatzikos* on "Jurisdiction and Applicable Law in Cross-border Corporate Disputes", of Professor at the Aristotle University of Thessaloniki *Rigas Giovannopoulos* on "Cross-border Issues of Lifting the Corporate Veil", of Dr. *Nikolaos Zaprianos* on "Directors Civil Liability towards the Legal Person and its Creditors", of Professor at the University of Thrace *Apostolos Karagounidis* on the "Corporate Duties and Liability of Multinational Business Groups for Human Rights' Violations and Environmental Harm under International and EU Law", and of Professor at the Aristotle University of Thessaloniki *George Psaroudakis*, on "Particularities of cross-border transformations after Directive (EU) 2019/2121".

The case law section of the issue presents the judgments of the CJEU, 7.4.2022, V.A./V.P., on subsidiary jurisdiction under Regulation 650/2012 (comment by *G.-A. Georgiades*), and CJEU, 10.2.2022, Share Wood, on the inclusion of a contract of soil lease and cultivation within the Article 6 § 4 c of Rome II Regulation (comment by *N. Zaprianos*). The present issue also includes judgments of national courts, among which the Cour d' Appel Paris no 14/20 and OLG München 6U 5042/2019, on the adoption of anti-suit injunctions by European courts in order to prevent a contrary anti-suit injunction by US courts (comment by *S. Karameros*), are included, as well as the decision of the Italian CassCivile, Sez.Unite n. 38162/22, on the non-recognition of a foreign judgment establishing parental rights of a child born through surrogacy on the grounds of an offence against public policy (comment by *I. Valmantonis*), as well as the domestic decisions of Thessaloniki Court of First Instance 1201/2022 & 820/2022 on jurisdiction and applicable law in a paternity infringement action (comment by *I. Pisina*). The issue concludes with the study of the doctoral candidate Ms. *Irini Tsikrika*, on the applicable law on a claim for damages for breach of an exclusive choice-of-court agreement, and the presentation of practical issues in European payment order matters, edited by the Judge Ms. *Eleni Tzounakou*.

Polish Constitutional Court about to review the constitutionality of the jurisdictional immunity of a foreign State?

Written by Zuzanna Nowicka, lawyer at the Helsinki Foundation for Human Rights and lecturer at Department of Logic and Legal Argumentation at University of Warsaw

In the aftermath of the judgment of the ICJ of 2012 in the case of the Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening) that

needs no presentation here (for details see, in particular, the post by Burkhard Hess), by its judgment of 2014, the Italian Constitutional Court recognized the duty of Italy to comply with the ICJ judgment of 2012 but subjected that duty to the "fundamental principle of judicial protection of fundamental rights" under Italian constitutional law (for a more detailed account of those developments see this post on EAPIL by Pietro Franzina and further references detailed there). In a nutshell, according to the Italian Constitutional Court, the fundamental human rights cannot be automatically and unconditionally sacrificed in each and every case in order to uphold the jurisdiction immunity of a foreign State allegedly responsible for serious international crimes.

Since then, the Italian courts have reasserted their jurisdiction in such cases, in some even going so far as to decide on the substance and award compensation from Germany. The saga continues, as Germany took Italy to the ICJ again in 2022 (for the status of the case pending before the ICJ see here). It even seems not to end there as it can be provocatively argued that this saga has its spin-off currently taking place before the Polish courts.

A. Setting the scene…

In 2020, a group of members of the Sejm, lower chamber of the Polish Parliament, brought a request for a constitutional review that, in essence, concerns the application of the jurisdictional immunity of the State in the cases pertaining to liability for war crimes, genocide and crimes against humanity. The request has been registered under the case number K 25/20 (for details of the, in Polish, see here; the request is available here). This application is identical to an application previously brought by a group of members of the lower chamber of the Parliament in the case K 12/17. This request led to no outcome due to the principle according to which the proceedings not finalized during a given term of the Sejm shall be closed upon the expiration of that term.

This time, however, the Polish Constitutional Court has even set the date of the hearing in the case K 25/20. It is supposed to take place on May 23, 2023.

The present post is not drafted with the ambition of comprehensively evaluating the request for a constitutional review brought before the Polish Constitutional Court. Nor it is intended to speculate on the future decision of that Court and its ramifications. By contrast, while the case is still pending, it seems interesting to

provide a brief overview of the request for a constitutional review and present the arguments put forward by the applicants.

Under Polish law, a request for a constitutional review, such as the one in the case K 25/20, can be brought before the Polish Constitutional Court by selected privileged applicants, with no connection to a case pending before Polish courts.

Such a request has to identify the legislation that raise concerns as to its conformity with the Polish constitutional law ("subject of the review", see point B below) and the relevant provisions of the Polish Constitution of 1997 against which that legislation is to be benchmarked against ("standard of constitutional review", see point C). Furthermore, the applicant shall identify the issues of constitutional concern that are raised by the said legislation and substantiate its objections by arguments and/or evidence (see point D).

B. Subject of constitutional review in question

By the request for a constitutional review of 2020, the Polish Constitutional Court is asked to benchmark two provisions of Polish Code of Civil Procedure (hereinafter: "PL CCP") against the Polish constitutional law, namely Article 1103[7](2) PL CCP and Article 1113 PL CCP.

i) Article 1103[7](2) PL CCP

The first provision, Article 1103[7] PL CCP lays down rules of direct jurisdiction that, in practice, can be of application solely in the cases not falling within the ambit of the rules of direct jurisdiction of the Brussels I bis Regulation. In particular, pursuant to Article 1103[7](2) PL CCP, the Polish courts have jurisdiction with regard to the cases pertaining to the extra-contractual obligations that arose in Poland.

In the request for a constitutional review of 2020, the applicants argue that, according to the settled case law of the Polish Supreme Court, Article 1103[7](2) PL CCP does not cover the torts committed by a foreign State to the detriment of Poland and its nationals. For the purposes of their request, the applicants do focus on the non-contractual liability of a foreign State resulting from war crimes,

genocide and crimes against humanity. The applicants claim that, according to the case law of the Polish Supreme Court, such a liability is excluded from the scope of Article 1103[7](2) PL CCP.

Against this background, it has to be noted that the account of the case law of the Polish Supreme Court is not too faithful to its original spirit. Contrary to its reading proposed by the applicants, the Polish Supreme Court does not claim that the scope of application of the rule of direct jurisdiction provided for in Article 1103[7](2) PL CPP is, *de lege lata*, circumscribed and does not cover the liability of a foreign State for international crimes. In actuality, this can be only seen as the practical effect of the case law of the Polish Supreme Court quoted in the request for a constitutional review. Pursuant to this case law, also with regard to liability for international crimes, the foreign States enjoy jurisdiction immunity resulting from international customary law, which prevents claimants from suing those States before the Polish courts.

ii) Article 1113 PL CPP

The second provision subject to constitutional review is Article 1113 PL CPP, according to which jurisdictional immunity shall be considered by the court *ex officio* in every phase of the proceedings. If the defendant can rely on the jurisdictional immunity, the court shall reject the claim. According to the applicants, the Polish courts infer from this provision of the PL CPP the right of the foreign States to rely on the jurisdictional immunity with regard to the cases on liability resulting from war crimes, genocide and crimes against humanity.

C. Standard of constitutional review (relevant provisions of Polish constitutional law)

In the request for a constitutional review of 2020, four provisions of Polish constitutional law are referred to as the standard of constitutional review, namely:

i) Article 9 of the Polish Constitution of 1997 (“Poland shall respect international law binding upon it”);

according to the applicants, due to the general nature of Article 9, it cannot be deduced thereof that the rules of international customary law are directly binding in Polish domestic legal order. The applicants contend that the Polish Constitution of 1997 lists the sources of law that are binding in Poland. In particular, Article 87 of the Constitution indicates that the sources of law in Poland are the Constitution, statutes, ratified international agreements, and regulations. No mention is made there to the international customary law. Thus, **international customary law does not constitute a binding part of the domestic legal order and is not directly applicable in Poland. Rather, Article 9 of the Polish Constitution of 1997 must be understood as providing for the obligation to respect international customary law exclusively "in the sphere of international law"**;

ii) Article 21(1) of the Polish Constitution of 1997: "Poland shall protect ownership and the right of succession",

here, the applicants contend that Article 21(1) covers not only the property currently owned by the individuals, but also property that was lost as a result of the international crimes committed by a foreign State, which, had it not been lost, would have been the subject of inheritance by Polish nationals;

iii) Article 30 of the Polish Constitution of 1997: "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities",

the applicants infer from Article 30 that the respect and protection of dignity is the duty of public authorities. Such a protection can be guaranteed by creating an institutional and procedural framework, which enables the pursuit of justice against the wrongdoers who have taken actions against human dignity. For the applicants, this is particularly relevant in the case of liability for war crimes, genocide and crimes against humanity;

iv) Article 45(1) of the Polish Constitution of 1997: "Everyone shall have the right to a fair and public hearing of his case, without undue delay,

before a competent, impartial and independent court",

in short, Article 45(1) enshrines to the right to access to a court; this provision conceptualizes this right as a mean by which the protection of other freedoms and rights guaranteed by the Constitution can be realized; the applicants argue that the jurisdictional immunity of a foreign State is a procedural rule that, in its essence, limits the right to a court. They acknowledge that the right to a court is not an absolute right and it can be subject to some limitations. However, the Constitutional Court should examine whether the limitation resulting from the operation of jurisdiction immunity is proportionate.

D. Issues and arguments raised by the request for a constitutional review

After having presented the subject of the request and the relevant provisions of Polish constitutional law, the applicants identify the issues of constitutional concern that, in their view, are raised by the jurisdictional immunity of a foreign State upheld via the operation of Article 1103[7](2) PL CCP and Article 1113 PL CCP in the cases on the liability resulting from international crimes. The applicants then set out their arguments to substantiate the objection of non-constitutionality directed at Article 1103[7](2) PL CCP and Article 1113 PL CCP.

The main issue and arguments put forward boil down to the objection that the upholding of the jurisdictional immunity results in the lack of access to a court and infringes the right guaranteed in the Polish Constitution of 1997, as well as enshrined in the international agreements on human rights, ratified by Poland,

- in this context, first, the applicants reiterate the contention that **while ratified international agreements constitute a part of the domestic legal order, this is not the case of the rules of international customary law**; furthermore, in order to "reinforce" this contention, a recurring statement appears in the request for a constitutional review, according to which the international customary law is not consistently applied with regard to the jurisdictional immunity of a foreign State;

- second, **a foreign State cannot claim immunity from the jurisdiction**

of a court of another State in proceedings which relate to the liability for war crimes, genocide or crimes against humanity, if the facts which occasioned damage occurred in the territory of that another State; there is a link between those international crimes and the territory of the State of the forum and the latter must be authorised to adjudicate on the liability for those acts;

- third, the applicant claim that **a foreign State does not enjoy jurisdictional immunity in the cases involving clear violations of universally accepted rules of international law** – a State committing such a violation implicitly waives its immunity;

- fourth, the applicants acknowledge the ICJ judgment of 2012 but claim that it (i) failed to take into account all the relevant precedent on the scope of jurisdictional immunity; (ii) held that the illegal acts constituted *acta iure imperii*, disregarding the conflict between the jurisdictional immunity and the acts violating fundamental human rights; (iii) preferred not to explicitly address the question as to whether the jurisdictional immunity should be enjoyed by a State that violated human dignity or not – doing so, the ICJ left space for the national courts to step in; (iv) the ICJ judgments are biding only to the parties to the proceedings; with regard to the non-parties they have the same binding force as national decisions; (v) due to the evolving nature of the doctrine of jurisdictional immunity and its scope, a national court can settle the matter differently than the ICJ did in 2012.

Subsequent issues of constitutional concern seem to rely on the same or similar arguments and concern:

- violation of international law binding Poland due to the recognition of jurisdictional immunity of a State with regard to the cases on liability for war crimes, genocide or crimes against humanity;

- violation of the human dignity as there is no procedural pathway for claiming the reparation of damages resulting from those international crimes;

- violation of the protection of ownership and other proprietary rights by barring the actions for damages resulting from those international crimes.

E. The controversies regarding the Constitutional Court

The overview of the request for a constitutional review in the case K 25/20 would not be complete without a brief mention of the current state of affairs in the Polish Constitutional Court itself.

In the 2021 judgement in Xero Flor v. Poland, the European Court of Human Rights held, in essence, that the Constitutional Court panel composed in violation of the national constitution (i.e. election of one of the adjudicating judges "vitiated by grave irregularities that impaired the very essence of the right at issue") does not meet the requirements allowing it to be considered a "tribunal established by law" within the meaning of the Article 6(1) of the European Convention.

One of the judges sitting on the panel adjudicating the case K 25/20 was elected under the same conditions as those considered by the ECHR in its 2021 judgment. The other four were elected during the various stages of the constitutional crisis ongoing since 2015. In practice, and most regretfully, the case K 25/20 that revolves around the alleged violation of the right to a court provided for in Polish constitutional law risks to be deliberated in the circumstances that, on their own, raise concerns as to the respect of an equivalent right enshrined in the European Convention.

BNP Paribas sued in France for financing fossil fuel companies

This post was written bu Begüm Kilimcioglu, PhD candidate at the University of Antwerp

On 23 February 2023, one of the biggest commercial banks in the Eurozone, BNP Paribas (BNP) was sued by Oxfam, Friends of the Earth and Notre Affaire à Tous

for having allegedly provided loans to oil and gas companies in breach of the vigilance duty enshrined in la Loi de Vigilance (2017) of France. This case constitutes an important hallmark for the business and human rights world as it is the first climate action case against a commercial bank and so timely considering that the European Union (EU) is currently discussing whether or not to include the financial sector within the scope of the proposed Corporate Sustainability Due Diligence Directive (CSDDD) (see here).

Article 1 of la Loi de Vigilance imposes a duty to establish and implement an effective vigilance plan on any company whose head office is located on French territory and complies with the thresholds stated. This vigilance plan is supposed to include vigilance measures for risk identification and prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls, its subcontractors and suppliers with whom the company has an established commercial relationship. As such, there is no distinction under the French law regarding the sector in which the company is operating which is in line with the United Nations Guiding Principles. Thus, it was surprising to see that France was quite vocal about not including the financial sector within the scope of CSDDD, as France was the first Member State to adopt a law on the duty of vigilance of the multinational companies and la Loi de Vigilance itself does not make distinctions based on the sector in which the company is operating.

According to la Loi de Vigilance, companies are required to conduct human rights and environmental due diligence which includes the following steps: identification and the analysis of the risks, regular assessment of the situation (in accordance with the previously identified risks) of the subsidiaries, subcontractors or suppliers with whom the company has an established commercial relationship, mitigation and prevention of serious violations through appropriate means, establishment of an alert mechanism which collects reports of existing or actual risks, establishment of a monitoring scheme to follow up on the measures implemented and assessment of their efficiency. This plan must be publicly disclosed.

In case the company does not comply with its vigilance obligations, a court can issue a formal notice, ordering the company to comply with la Loi de Vigilance. Furthermore, la Loi de Vigilance also provides for a civil remedy when a company

does not meet its obligations. If damage caused by non-compliance with la Loi de Vigilance, any person with legitimate interest can seek reparation under tort law. Consequently, as a company headquartered in France and complying with the thresholds in Article 1 of la Loi de Vigilance, BNP has the duty to effectively establish, implement and monitor a vigilance plan to prevent, if not possible mitigate and bring an end to its adverse impacts on human rights and the environment.

The case against BNP before the French courts is a reminiscent of the case against Shell before the Dutch courts in 2019 where the environmental group (Milieudefensie) and co-plaintiffs argued that Shell's business operations and sold energy products worldwide contributes significantly to climate change (and also much more than it has pledges to in its corporate policies and to the levels internationally determined by conventions) was a violation of its duty of care under Dutch law and human rights obligations. It is important here to highlight that the plaintiffs took Shell to the Dutch courts based on the environmental damage caused in the Netherlands, due to Shell's operations worldwide.

In the said case, the applicable law to the dispute was determined by Rome II Regulation on non-contractual obligations, article 7. Article 7 presents an additional venue to the general rule for determining the applicable law (article 4) and grants the victims of environmental damage an opportunity to base their claims on the law of the country in which the event giving rise to the damage occurred. As such, the claimant primarily chose to base its claims on the law of the country in which the even giving rise to the damage occurred, as they claimed that the corporate policies for the Shell group were decided in its headquarters in the Netherlands. The Court considered the adoption of the corporate policy of the Shell group as an independent cause of the damage which may contribute to environmental damage with respect to Dutch residents. Thus, the Court considered that the choice of Dutch law by Milieudefensie was in line with the idea of protection of the victims behind the applicable law clauses in Rome II Regulations and upheld the choice to the extent that the action aimed to protect the interests of the Dutch residents (see paragraphs 4.3-4.4 of the decision).

In 2021, the Hague District Court ordered Shell to reduce both its own carbon emissions and end-use emissions by 45% by 2030 in relation to the 2019 figures. Naturally, the legal basis in the Dutch case was different than the legal basis in the French case, considering that the Netherlands does not yet have a national

law like la Loi de Vigilance. Consequently, the core of the arguments of the applicants lied on the duty of care in Article 6:162 of the Dutch Civil Code and Articles 2 (right to life) and 8 (rights to private life, family life, home and correspondence) of the European Convention on Human Rights.

In contrast, the BNP case has a more preventive nature and aims to force BNP to change and adapt its actions to the changing climate and scientific context. The NGOs primarily request an injunction for BNP to comply with the obligations provided for in the French Vigilance Law, as BNP falls within the scope of the French Law. More specifically, the NGOs request that BNP publishes and implements a new due diligence plan, containing the measures explained in the writ of summons. Therefore, the obligations arising from the French Vigilance Law are of a civil nature. Consequently, the law applicable to this dispute should also be determined by Rome II Regulation on non-contractual obligations. As explained above, Rome II Regulation gives an additional option for the plaintiffs to choose the applicable law in cases of environmental damage as either the country of damage or the country where the event that gives rise to the damage occurred. In the BNP case, the plaintiffs' claim was based on French law. Applying Rome II Regulation, France can be considered as the country of the event which gives rise to the damage because it is where the corporate policies are prepared. Alternatively, it is also where the environmental damage occurs, as well as the rest of the world. Moreover, the plaintiffs relied on the general obligation of environmental vigilance as enshrined in the Charter of the Environment, which is considered an annex to the French Constitution and thus has the same authoritativeness. Invoking the constitution might bring in an argument on the basis of Article 16 Rome II, namely overriding principles of mandatory law.

If we rewind the story a little bit, the non-governmental organizations (NGOs) stated above, firstly, served a formal notice to BNP on 26 October 2022 to stop supporting the development of fossil fuels. In the formal notice, the NGOs state that, to achieve the Paris Agreement trajectories, no more funding or investment should be given to the development of new fossil fuel projects, either directly or to the companies that carry out such operations (see p 3). They also draw attention to the fact that BNP has joined the Race to Zero campaign which aim for the inclusion of the nonstate actors in the race for carbon neutrality (p 3).

Basic research into BNP's publicly available documents reveals that it, indeed, has committed to sustainable investment, acknowledging that air pollution and

climate change deplete many resources. BNP further claims that it only supports companies that contribute to society and the environment and exclude coal, palm oil and nonconventional hydrocarbons. Moreover, as can be seen from its 2021 activity report, BNP presents itself as organizing its portfolios in a way that upholds the aims of the Paris Agreement. Lastly, BNP's code of conduct, states that it commits to limiting any environmental impact indirectly resulting from its financing or investment activities or directly from its own operations (p 31). Furthermore, BNP also presents combatting climate change as its priority while stating that they finance the transition to a zero-carbon economy by 2050 by supporting its customers in energy and ecological transitions (p 31).

However, the NGOs claim that contrary to these commitments, through various financing and investment activities, BNP becomes one of the main contributors to the fossil fuel sector by supporting the big oil and gas companies (p 4 of the formal notice). In this regard, BNP allegedly provides funds for the companies that actually put fossil fuel projects into action rather than financing these projects directly. As such, the NGOs aver that BNP's vigilance plan is not in compliance with la Loi de Vigilance or its obligations to limit the climate risks resulting from its activities (p 6 of the formal notice). In this regard, the report draws attention to BNP's prior public commitments to strengthen its exclusion policies regarding coal, oil and gas sectors (see pp 8-9 of the formal notice). Consequently, claiming that BNP has failed to comply with the notice, NGOs have referred the matter to the court.

In a bid to address the negative allegations on its behalf, BNP stated that it is focused on exiting the fossil fuel market, accelerating financing for renewable energies and supporting its clients in this regard. Furthermore, BNP also stated its regret in the advocacy groups choosing litigation over dialogue and that it was not able to stop all fossil-fuel financing right away.

In the course of these proceedings, the applicants will have to prove that if BNP were able to establish, implement and monitor a vigilance plan, the damage caused by these fossil fuel projects put into motion by different energy companies could have been avoided. In other words, the fact that BNP (or any other provider of the financial means) is the facilitator of these projects and that the damage is indirectly caused by its actions, make it more difficult for it to be held liable. As such, it may be more difficult for the claimants in the BNP case to prove the causality between the action and the damage than the Dutch case.

Consequently, this intricate web of interrelations demonstrates how important it is to include the financial actors within the scope of the CSDDD and explicitly put obligations on them to firstly respect and uphold human rights and environmental standards and then to proactively engage with an effective due diligence mechanism to prevent, mitigate and/or bring an end to actual/potential human rights and environmental impact.

Therefore, I hope that the European Commission and the Parliament will hold strong positions and not cave in to the proposal by the Council to leave it up to the Member States whether or not to include the financial sector within the scope. Such a compromise would significantly hinder the effectiveness of the proposed Directive.

Foreign Child Marriages and Constitutional Law – German Constitutional Court Holds Parts of the German Act to Combat Child Marriages Unconstitutional

CC Rainer Lück 1RL.de, https://commons.wikimedia.org/wiki/File:Bundesverfassungsgericht_IMGP1634.jpg

Update: the Court's press release is now available in English.

I.

Yesterday, on March 29, 2023, the German Constitutional Court published its long-awaited (and also long) decision on the German "Act to Combat Child Marriage" (Gesetz zur Bekämpfung von Kinderehen). Under that law, passed in 2017 in the midst of the so-called "refugee crisis", marriages celebrated under foreign law are voidable if one of the spouses was under 18 at the time of marriage (art. 13 para. 3 no. 2 EGBGB), and null and void if they were under 16 (art. 13 para. 3 no. 1 EGBGB) – regardless of whether the marriage is valid under the normally applicable foreign law. In 2018, the German Federal Court of Justice refused to apply the law in a concrete case and asked the Constitutional Court for a decision on the constitutionality of the provision.

That was a long time ago. The wife in the case had been fourteen when the case started in the first instance courts; she is now 22, and her marriage certainly no longer a child marriage. And as a matter of fact, the Constitutional Court decision itself is already almost two months old; it was rendered on February 1. This and the fact that the decision cites almost no sources published after 2019 except for new editions of commentaries, suggests that it may have existed as a draft for much longer. One reason for the delay may have been internal: the president of the Court, Stephan Harbarth, was one of the law's main drafters. The Court decided in 2019 that he did not have to recuse himself, amongst others for the somewhat questionable reason that his support for the bill was based on political, not constitutional, considerations. (Never mind that members of parliament are obligated by the constitution also in the legislative process, and that a judge at the Constitutional Court may reasonably be expected to be hesitant when judging on the unconstitutionality of his own legislation.)

II.

In the end, the Court decided that the law is, in fact, unconstitutional: it curtails the special protection of marriage, which the German Constitution provides, and this curtailment is not justified. The decision is long (more than sixty pages) but characteristically well structured so a summary may be possible.

Account to the Court, the state's duty to protect marriage (art. 6 para. 1 of the Basic Law, the German Constitution) includes not only marriage as an institution but also discrete, existing marriages, and not only the married status itself but also the whole range of legal rules surrounding it and ensuing from it. Now, the Court has provided a definition of marriage as protected under the Basic Law: it is a union, in principle in perpetuity, freely entered into, equal and autonomously structured, and established by the marriage ceremony as a formalized, outwardly recognizable act. (Early commentators have spotted that "between one man and one woman" is no longer named as a requirement, but it seems far-fetched to view this as a stealthy inclusion of same-sex marriage within the realm of the Constitution.) The stated definition includes marriages celebrated abroad under foreign law. Moreover, it includes marriages celebrated at a very young age as long as the requirement is met that they were entered into freely.

A legislative curtailment of this right could be justified. But the legislator has comparably little discretion where a rule, as is the case here, effectively amounts to an actual impediment to marriage. Whether a curtailment is in fact justified is a matter for the classical test of proportionality: the law must have a proper and legitimate purpose; it must be suitable towards that purpose; it must be necessary towards that purpose; and it must be adequate ("proportional" in the narrow sense) towards the purpose, in that the balance between achieving the purpose and curtailment of the right must not be out of proportion.

Here, the law's purposes themselves – the protection of minors, the public ostracization of child marriage, and legal certainty – isarelegitimate. The worldwide fight against child marriage is a worthy goal. So is the desire for legal certainty regarding the validity of specific marriages.

The law is also suitable to serve these purpose: the minor is protected from the legal and factual burdens arising from the marriage; the law may deter couples abroad from getting married (or so the legislator may legitimately speculate; empirical data substantiating this is not available.) A clear age rule avoids the uncertainty of a case-by-case *ordre public* analysis as the law prior to 2017 had required.

According to the Court, the measures are also necessary towards these purposes, because alternative measures would not be similarly successful. Automatic nullity of the affected marriages is more effective, and potentially less intrusive, than

determining nullity in individual proceedings. It is also more effective than case-by-case determinations under a public policy analysis. And it offers better protection of minors than forcing them to go through a procedure aimed at annulling the marriage would.

Nonetheless, the Court sees in the law a violation of the Constitution: the measure is disproportionate to the curtailment of rights. That curtailment is severe: the law invalidates a marriage that the spouses may have considered valid, may have consummated, and around which they may have built a life. Potentially, they would be barred from living together although they consider themselves to be married.

The Court grants that the protection of minors is an important counterargument in view of the risks that child marriages pose to them. So is legal certainty regarding the question of whether a marriage is or is not valid.

But the legislation is disproportionate for two reasons. First, the law does not regulate the consequences of its verdict on nullity. So, not only does the minor spouse lose the legal protections of marriage, including the right to cohabitation; they also lose the rights arising from a proper dissolution of the marriage, including financial claims against the older, and frequently wealthier, spouse. These consequences run counter to the purpose of protecting the minor. Second, the law does not enable the spouses to carry on their marriage legally after both have reached maturity unless they remarry, and remarriage may well be complicated. This runs counter to the desire to protect free choice.

The court could have simply invalidated the law and thereby have gone back to the situation prior to 2017. Normally, substantive validity of a marriage is determined by the law of each spouse's nationality (art. 13 para. 1 EGBGB). Whether that law can be applied in fact, is then a matter of case-by-case determinations based on the public policy exception (art. 6 EGBGB). That is in fact the solution most private international lawyer (myself included) preferred. The Court refused this simple solution with the speculation that this might have resulted in bigamy for (hypothetical) spouses who had married someone else under the assumption that their marriages were void. (Whether such cases do in fact exist is not clear.) Therefore, the Court has kept the law intact and given the legislator until June 30, 2024 to reform it. In the meantime, the putative spouses of void marriages are also entitled to maintenance on an analogy to the rules on

divorce.

III.

The German Constitutional Court has occasionally ruled on the constitutionality of choice-of-law rules before. Its first important decision – the Spaniard decision of 1971 – dealt with whether the Constitution had anything to say about choice of law at all, given that choice of law was widely considered to be purely technical at the time, with no content of constitutional relevance. That decision, which addressed a Spanish prohibition on remarrying after divorce, already concerned the right to marry. Another, more recent decision held that a limping marriage, invalid under German law though valid under foreign law, must nonetheless be treated as a marriage for purposes of social insurance. Both decisions rear their heads in the current decision, forming a prelude to a constitutional issue that now resurfaces: the court is interested less in the status of marriage itself and more in the actual protections that emerge from a marriage.

The legal consequences of a marriage are, of course, manifold, and the legislator's explicit determination that the child marriage should yield no consequences whatsoever is therefore far-reaching. (Konrad Duden's proposal to interpret the act so as to restrict this statement to consequences that are negative for the minor is not discussed, unfortunately). Interestingly, the Court accords no fewer than one fifth of its decision, thirteen pages, to a textbook exposition of the relevance of marriage in private international law. Its consequences were among the main reasons for near-unanimity in the German conflict-of-laws field in opposition to the legal reform. Indeed, another fifth of the decision addresses the positions of a wide variety of stakeholders and experts –the federal government and several state governments, the Max Planck Institute for Comparative and International Private Law, a variety of associations concerned with the rights of women, children, and human rights as well as psychological associations. Almost all of them urged the Court to rule the law unconstitutional.

These critics will regard the decision as an affirmation, though perhaps not as a full one, because the Court, worried only about consequences, essentially upholds the legislator's decision to void child marriages entered into before the age of sixteen. This is unfortunate not only because the status of marriage itself is often

highly valuable to spouses, as we know from the long struggles for the acceptance of same-sex marriage rather than mere life partnership. Moreover, the result is the acceptance of limping marriages that are however treated as though they were valid. This may be what the Constitution requires. From the perspective of private international law, it seems slightly incoherent to uphold the nullity of a marriage on one hand and then afford its essential protections on the other, both times on the same justification of protecting minors. In this logic, the Court does not question whether the voiding of the marriage is generally beneficial to all minors in question. Moreover, in many foreign cultures, these protections are the exclusive domain of marriage. It must be confusing to tell someone from that culture that the marriage they thought was valid is void, but that it is nonetheless treated as though it were valid for matters of protection.

IV.

An interesting element in the decision concerns the Court's use of comparative law. Germany's law reform was not an outlier: it came among a whole flurry of reforms in Europe that were quite comprehensively compiled and analyzed in a study by the Hamburg Max Planck Institute (it is available, albeit only in German, open access). In recent years, many countries have passed stricter laws vis-à-vis child marriages celebrated under foreign law: France (2006), Switzerland (2012), Spain (2015), the Netherlands (2015), Denmark (2017), Norway (2007/2018), Sweden (2004/2019) and Finland (2019). Such reforms were successful virtue-signaling devices vis-a-vis rising xenophobia (not surprisingly, right-wingers in Germany have already come out again to criticize the Constitutional Court). Substantively, these laws treat foreign child marriages with different degrees of severity – the German law is especially harsh. However, comparative law reveals more than just matters of doctrine. Several empirical reports have demonstrated that foreign laws were not more successful at reducing the number of child marriages than was the German law, which is more a function of economic and social factors elsewhere than of European legislation. Worse, the laws sometimes had harmful consequences, not only for couples separated against their will, but even for politicians: in Denmark, one former immigration minister was impeached after reports by the Danish Red Cross of a suicide attempt, depression, and other negative psychosocial effects of the law on married minors. And surveys have shown that enforcement of the laws has been

spotty in Germany and elsewhere.

The Constitutional Court did not need to pay much attention to these empirical reports. In assessing whether annulling foreign marriages was necessary, the Court did however take guidance from the Max Planck comparative law study, pointing out (nos 182, 189) that the great variety of alternative measures in foreign legislation made it implausible that the German solution – no possibility to validate a marriage at age eighteen – is necessary . This makes for a good example of the usefulness of comparative law – comparative private international law, to be more precise – even for domestic constitutional law. If demonstrating that a measure is necessary requires showing a lack of alternatives, then comparative law can furnish both the alternatives as well as empirical evidence of their effectiveness. That comparative law can be put to such practical use is good news.

V.

The German legislator must now reform its law. What should it do? The Court has hinted at a minimal solution: consider these marriages void without exception, but extend post-divorce maintenance to them, and enable the couple to affirm their marriage, either openly or tacitly, once they are of age. In formulating such rules, comparative analysis of various legal reforms in other countries would certainly be of great help.

But the legislator may also take this admonition from the Constitutional Court as an impetus for a bigger step. Not everything that is constitutionally permissible is also politically and legally sound. The German reform was rushed through in 2017 in the anxiousness of the so-called refugee crisis. The same was true, with some modifications, of other countries' reforms. What the German legislator can learn from them is not only alternative modes of regulation but also that these reforms' limited success is not confined to Germany. This insight could spark legislation that focuses more on the actual situation and needs of minors than on the desire to ostracize child marriage on their backs.

Such legislation may well reintroduce case-by-case analysis, something private international lawyers know not to be afraid of. This holds true especially in view of the fact that the provision does not regulate a mass problem but rather a

relatively small number of cases which is unlikely to create excessive burdens on agencies and the judiciary. If the legislature does not want to go back to the ordre public test, perhaps it could extend the provision of Article 13 para. 3 no. 2 for marriages entered into after the age of 16 to marriages entered into earlier. This would make the marriage merely annullable; in cases of hardship, the sanction could be waived. The legislator could also substitute the place of celebration for the spouses' nationality as the relevant connecting factor for substantive marriage requirements, as the German Council for Private International Law, an advisor to the legislator, has already proposed (Coester-Waltjen, IPRax 2021, 29). This would make it possible to distinguish more clearly between two very different situations: couples wanting to get married in Germany (where the age restriction makes eminent sense) on the one hand, and couples who already got married, validly, in their home countries and find their actually existing marriage to be put in question. Indeed, this might be a good opportunity to move from a system that designates the applicable law to a system that recognizes foreign acts, as is the case already in some other legal systems.

In any case, the Court decision provides Germany with an opportunity to move the fight against child marriage back to where it belongs and where it has a better chance of succeeding – away from private international law, and towards economic and other forms of aid to countries in which child marriage would be less rampant if they were less afflicted with war and poverty.

Available as of next week in Recueil des cours: Mario J. A. Oyarzábal, The Influence of Public International Law upon Private International Law in History and Theory and in the Formation and Application of the Law

The lectures of Mario J. A. Oyarzábal entitled "The influence of public international law upon private international law in history and theory and in the formation and application of the law", which were delivered at The Hague Academy of International Law in 2020, will be published on 22 March 2023 in the Collected Courses of the Academy (*Recueil des cours de l'Académie de droit international de La Haye*, Vol. 428, 2023, pp. 129 *et seq*.).

Mario Oyarzábal is an Argentine diplomat and scholar, currently the Ambassador of the Argentine Republic to the Kingdom of the Netherlands.

The summary below has been provided by the author.

As its title suggests, this course explores the influence of public international law upon private international law, in the history and the theory as well as in the formation and the application of the law.

The course focuses on the biggest transformations that have taken place on the international plane over the course of the last century and assesses how that has affected the legal landscape, raising questions as to the scope and the potential of private international law and the suitability of the traditional sources of international law to address the role of private actors and the incursion of public

law in the private arena.

Chapter I analyses how the concepts of public and private international law have evolved over time, from the *Jus Gentium* and the origins of the conflict of laws to the rise of sovereignty and positivism which led to the exclusion of private disputes connected with more than one State from the domain of international law. Particular attention is given to the developments in international relations and international law that took place since the second half of the 20th century – institutionalization, decolonization, human rights, globalization – which have produced a profound transformation in the sources, the method and ultimately the scope of private international law. The significance for private international law of the human rights movement and the regime for the protection of foreign investors are assessed from both backward and forward-looking perspectives.

Chapter II addresses the public international law sources of private international law in an ever-changing world. Starting with the sources stated in the Statute of the International Court of Justice, it delves into the relevance of other international sources of private international law such as community law, human rights standards and non-legally binding norms (or soft law), party autonomy and reciprocity. The law of treaties – their interpretation and the conflict of treaties – as applied to private international law is explored in certain detail, as well as the role – and potential – of the jurisprudence of the International Court of Justice in the determination of the rules of private international law in certain areas.

The **last Chapter** examines the interaction of public and private international law in selected areas: jurisdictional immunities – of foreign States, diplomats and international organizations – and the right of access to justice; mutual legal assistance – in relation with the 2019 Hague Judgments Convention, and the so-called "MLA initiative" on a convention for the investigation and prosecution of international crimes; sovereign debt restructuring processes in light of Argentina's experience; the international law principle of the best interests of the child as applied to abducted, migrant and refugee children; international sports law with special focus on FIFA and football; international arts law under the 1970 UNESCO Convention and the 1995 UNIDROIT Convention and general international law; cybercrime as well as cryptocurrencies. The private international law issues relating to nationality, deep seabed mining, and sea level rise – which are the subjects of public international law – are also briefly

presented.

Having analyzed the prevailing trends, the lectures survey three areas in which the interconnectivity of actors, activities and norms are present requiring public/private law solutions: international economic law – in relation to climate litigation and the human rights preoccupations present in the investment protection regime, as well as the issue of economic and financial sanctions which have exacerbated with the war in Ukraine; international data flows and the threat they pose to personal data protection in particular; and the protection of vulnerable persons and groups including older adults, tourists and migrants.

This course takes a pragmatic problem-solving approach, which nonetheless is systemic and based on principles, and argues that while public and private international law are and should be kept as separate legal fields, both are needed to address an increasing number of issues.

Below is the table of contents:

The Influence of Public International Law upon Private International Law: In History and Theory and in the Formation and Application of the Law by Mario J. A. Oyarzábal:

Table of Contents

Rivista di diritto internazionale privato e processuale (RDIPP) No 4/2022: Abstracts

The fourth issue of 2022 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released. It features:

Christian Kohler, Honorary Professor at the University of Saarland, **Private International Law Aspects of the European Commission's Proposal for a Directive on SLAPPs ('Strategic Lawsuits Against Public Participation')**

> The Commission's proposal for a Directive on SLAPPs ('Strategic lawsuits against public participation') aims at protecting journalists and human rights defenders who engage in public debates from manifestly unfounded or abusive court proceedings with cross-border implications. *Inter alia*, it protects SLAPP defendants against judgments from third countries that would have been considered manifestly unfounded or abusive if they had been brought before the courts or tribunals of the Member State where recognition or enforcement is sought, and allows SLAPP defendants to seek compensation of the damages and the costs of the third country-proceedings before the courts of the Member State of his or her domicile. This article examines the conflicts rules in question and discusses the broader private international law context of the proposed Directive, in particular the rules of jurisdiction and the mosaic approach of the CJEU for the interpretation of Article 7(2) of Regulation Brussels Ia. In order to limit the forum shopping potential of the present rules on jurisdiction and applicable law in defamation cases, an intervention by the EU legislature should be envisaged.

Pietro Franzina, Professor at the Università Cattolica del Sacro Cuore, **Il contenzioso civile transnazionale sulla corporate accountability** (Cross-Border Civil Litigation on Corporate Accountability) [in Italian]

> Civil proceedings are brought with increasing frequency against corporations for allegedly failing to prevent or mitigate the adverse impact of their activity on the protection of human rights and the environment. Most of these proceedings are initiated by non-governmental organisations whose activity

consists in safeguarding or promoting the collective interests at issue, or otherwise benefit from support provided by such organisations. A cross-border element is almost invariably present in these proceedings, as they often involve persons from different countries and/or relate to facts which occurred in different States. Litigation in matters of corporate accountability is, distinctively, strategic in nature. The aim pursued by those bringing the claim does not consist, or at least does not only or primarily consist, in achieving the practical result that the proceedings in question are meant, as such, to provide, such as compensation for the prejudice suffered. Rather, the goal is to induce a change in the business model or industrial approach of the defendant (and, possibly, of other corporations in the same field or with similar characteristics) and increase the sustainability of their corporate activity at large. The paper gives an account of the factors that determine the impact of the described proceedings, that is, the ability of those proceedings to effectively prompt the pursued change. The analysis focuses, specifically, on the factors associated with the rules of private international law, chiefly the rules that enable the claimant to sue the defendant before the courts of one State instead of another. The purpose of the article is not to examine the latter rules in detail (actually, they vary to a large extent from one State to another), but to assess the strategic opportunities, in the sense explained above, that the rules in question may offer to the claimant, depending on their structure and mode of operation.

The following review and comments are also featured:

Lenka Válková, Researcher at the University of Milan, **The Commission Proposal for a Regulation on the Recognition of Parenthood and Other Legislative Trends Affecting Legal Parenthood**

The developments in science and changing family patterns have given rise to many problems, including those of non-recognition of parenthood, which affects mostly children of same-gender parents and children in cases of surrogacy. The basic drivers of the current difficulties in recognising parenthood lie in the differences of the national rules on the establishment and recognition of parenthood and the lack of the uniform conflict rules and rules on recognition of judgments in the area of parenthood. Despite the copious case law of CJEU and ECtHR, which plays a crucial role in allowing flexibility in law with regard to parenthood, there is still no legal instrument

which provides for a clear framework seeking to outline a consistent and systematic approach in this area. In 2021 and 2022, three important legislative actions have been taken. The Parenthood Proposal for a Regulation on jurisdiction, applicable law, recognition of decisions has been published on 7 December 2022. At the same time, the Final Report of the Experts Group on the Parentage/Surrogacy Project of the HCCH has been issued on 30 November 2022. Moreover, the Report on Review of the Implementation of the European Convention on the Legal Status of Children Born Out of Wedlock has been prepared in November 2021 as a preliminary step to a possible future update of the substantive law provisions of the Convention. All regulatory initiatives are addressed in this article, with a special focus on the Parenthood Proposal. In particular, this article offers a first appraisal of the Parenthood Proposal in light of other two legislative efforts and examines whether the works on international level may eliminate the need for an action concerning recognition of parenthood at EU level.

Stefano Dominelli, Researcher at the University of Genoa, **Emoji and Choice of Court Agreements: A Legal Appraisal of Evolutions in Language Methods through the Prism of Article 25 Brussels Ia Regulation**

Starting from the consideration that emoji and the alike are becoming increasingly common in computer-based communication, this article transposes current debates in material law surrounding emoji and their aptitude to express intent into the field of choice of court agreement through the prism of Art 25 Brussels Ia Regulation. The aim of this article is to develop some hypotheses and methods for the assessment of emoji in the conclusion of choice of court agreements.

Michele Grassi, Research fellow at the University of Milan, **Revocazione della sentenza civile per contrasto con la Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali** (Revocation of a Civil Judgment for Conflict with the European Convention for the Protection of Human Rights and Fundamental Freedoms) [in Italian]

This article comments on the recent reform of the Italian Code of Civil Procedure, with a specific focus on the introduction of the possibility to seek revocation of a civil judgment conflicting with a decision of the ECtHR. The possibility to re-open proceedings in breach of the ECHR was not

contemplated by the previous rules applicable to the matter, and the Italian Constitutional Court had excluded that the obligation of Contracting States to conform to the judgments of the ECtHR could imply the need to review national res judicata in civil or administrative law matters. Against this background, this article examines the new mechanism of review of national decisions introduced by the recent reform, pointing out that such mechanism has been designed to apply in limited circumstances and that, consistently with the reparatory perspective adopted by the Italian Constitutional Court, it gives little to no consideration to the obligation of cessation of international wrongful acts consisting in violations of human rights protected by ECHR.

This issue also features an account by *Silvia Favalli*, Researcher at the University of Milan, **Bellini c. Italia: Il Comitato ONU sui diritti delle persone con disabilità si pronuncia sulla situazione dei *caregiver* familiari in Italia** (*Bellini v. Italy:* The UN Committee on the Rights of Persons with Disabilities on the Situation of Family Caregivers in Italy) [in Italian].

Finally, this issue features the following book review by *Francesca C. Villata*, Professor at the University of Milan: Louise MERRETT, **Employment Contracts in Private International Law**, Oxford University Press, Oxford (2nd ed., 2022) pp. XXXII-329.