Out now: Hannah Buxbaum/Thibaut Fleury Graff, Extraterritoriality / L'extraterritorialité

The Centre for Studies and Research in International Law and International Relations Series at Brill has just issued its 23rd volume, edited by Hannah Buxbaum and Thibaut Fleury Graff.

The Centre for Studies and Research in International Law and International Relations of the Hague Academy of International Law is designed to bring together highly qualified young international lawyers from all over the world, to undertake original research on a common general theme which is determined annually by the Curatorium of the Academy. The Centre is sub-divided in an English-speaking and French-speaking section. The research undertaken at the Centre is published in a collective volume containing the reports of the Directors and the best contributions from the participants. In 2019, the Directors were Hannah Buxbaum and Thibaut Fleury Graff, and their fascinating cross-over topic was „extraterritoriality".

The blurb reads as follows: „Extraterritoriality is a challenging concept as a matter of international law and policy, raising fundamental questions about the allocation of power among States. It is also a dynamic concept, reflecting and responding to shifts in the global economy, patterns of human behavior, and understandings of state sovereignty."

Following the Reports of the Directors of Studies, no less than 20 chapters explore the notion and implications of extraterritoriality, either in French or in English language, such as e.g. the first Chapter by Buxbaum herself on "The Practice(s) of Extraterritoriality" (for an SSRN preprint see here), "(Il)licéités et (dé)mesures de l'extraterritorialité", several Chapters on historical aspects, "Objects and Subjects of Extraterritorialité", "Extraterritorialité within the Framework of the EU" and other regional organisations, as well as aspects of extraterritoriality in certain areas of law such as in criminal law, cybersecurity,

human rights, environmental law, outer space, data protection etc. “Throughout, the volume recognizes extraterritoriality as an expansive concept used to assess both the actions and the obligations of states within the international arena”, the blurb further explains.

Thus, the volume connects private and public international law perfectly and also includes interdisciplinary input. It thereby represents the spirit of the Hague Academy’s Centre for Studies and Research at its best. Highly recommended!

A similarly promising project is currently ongoing at the Centre: “Climate Change and the Testing of International Law” from 22 August – 9 September 2022.

Virtual Workshop on September 20: Hisashi Harata on Foreign-Corporation Regulations and Private International Law

On Tuesday, September 20, 2022, the Hamburg Max Planck Institute will host its 25th monthly virtual workshop Current Research in Private International Law at 11:00 a.m. -12:30 p.m. (CEST). Prof. Hisashi Harata (University of Tokyo) will speak, **in English**, about the topic

“Foreign-Corporation Regulations and Private International Law: With a Case Study on Derivative Action”.

The globalization of enterprise organization as well as activities causes more serious labour issues, environmental issues, human rights issues and so on. The corporate law rules on duties and responsibilities of corporate directors are regarded as a tool for corporate governance and
compliance.
Based on the current position for the lex incorporationis as well as the internal-affairs doctrine, the breach of duties and responsibilities of directors and the shareholder’s standing for derivative action would be ruled by the lex incorporationis, except for the application of overriding mandatory rules of lex fori.
However, the existence of foreign-company regulations in different jurisdictions like California, New York, Hongkong, Netherland etc. might lead us to a theoretical reflection, as they could impose regulations severer than lex incorporationis on directors and there is no room for such regulations of third countries other than lex incorporationis and lex fori to be applied within the conventional framework of P.I.L.
This presentation will shed lights on this theoretical issue, introducing practical case-study analysis on derivative action, and suggest several problematic points to be tackled in further studies.

The presentation will be followed by open discussion. All are welcome. More information and sign-up here.

If you want to be invited to these events in the future, please write to veranstaltungen@mpipriv.de.

Praxis des Internationalen Privat-

und Verfahrensrechts (IPRax) 5/2022: 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/)

J. Richter: **Cross-border service of writs of summons according to the revised EU Service Regulation**

The service of judicial documents, particularly the service of writs of summons, is of central importance in civil proceedings. In cross-border proceedings, service of legal documents poses particular problems, which are addressed by the European Regulation on the Service of Documents. The revision of this regulation, which will enter into force on 1 July 2022, provides an opportunity to examine the current and future rules by taking the example of the international service of writs of summons.

G. van Calster: **Lex ecologia. On applicable law for environmental pollution (Article 7 Rome II), a pinnacle of business and human rights as well as climate change litigation.**

The European Union rules on the law that applies to liability for environmental damage, are an outlier in the private international law agenda. EU private international law rules are almost always value neutral. Predictability is the core ambition, not a particular outcome in litigation. The rules on applicable law for environmental damage, contained in the Rome II Regulation on the law that applies to non-contractual obligations, are a clear and considered exception. Courts are struggling with the right approach to the relevant rules. This contribution maps the meaning and nature of those articles, their application in case-law, and their impact among others on business and human rights as well as

climate change litigation.

M. Castendiek: **“Contractual” rights of third parties in private international law**

Although contractual rights are usually limited to the parties, almost all jurisdictions in Europe recognize exceptions of this rule. Whereas those “contractual” rights of third parties are strictly limited in common law countries, German and Austrian Law even extend contractual duties of care on third persons related to the parties. Prior to the Rome Regulations, the conflict-of-law judgments on those “contracts with protective effect in favour of third parties” differed between German and Austrian courts.

The article points out that a consistent jurisdiction on this issue needs a clear distinction between contractual and non-contractual rights even between the parties of the contract. It points out that the Regulation Rome I covers only obligations that would not exist without the contract. Those obligations remain contractual even if they entitle a third party.

“Contractual” duties of care corresponding with negligence in tort, on the other hand, fall within the scope of the Regulation Rome II. For the contracting parties as well as for third parties, the conflict-of-laws in claims following the disregard of such duties is determined by the application of Article 4 Regulation Rome II. The article provides criteria to determine whether the close connection rule in Article 4(3) Regulation Rome II can lead to the application of the law governing the contract.

C. von Bary: **News on Procedural Consumer Protection from Luxemburg: Consumer Status and Change of Domicile**

In two recent decisions, the CJEU continues to refine the contours of procedural consumer protection in cross-border disputes. In the case of a person who spent on average nine hours a day playing – and winning at – online poker, the court clarified that factors like the amount involved, special knowledge or the regularity of the activity do not as such lead to this person not being classified as a

consumer. It remains unclear, however, which criteria are relevant to determine whether a contract is concluded for a purpose outside a trade or profession. Further, the CJEU stated that the relevant time to determine the consumer's domicile is when the action is brought before a court. This seems to be true even if the consumer changes domicile to a different member state after the conclusion of the contract and before the action is brought and the seller or supplier has not pursued commercial or professional activities or directed such activities at this member state. This devalues the relevance of this criterion to the detriment of the professional party.

W. Voß: **The Forum Delicti Commissi in Cases of Purely Pecuniary Loss – a Cum-Ex Aftermath**

Localising the place of damage in the context of capital investment cases is a perennial problem both under national and European civil procedural law. With prospectus liability having dominated the case law in the past decades, a new scenario is now increasingly coming into the courts' focus: liability claims resulting from cum-ex-transactions. In its recent decision, the Higher Regional Court of Munich confirms the significance of the place of the claimant's bank account for the localisation of purely financial loss in the context of sec. 32 German Civil Procedure Code but fails to provide any additional, viable reasoning on this notoriously debated issue. The decision does manage, however, to define the notion of principal place of business as delimitation of the scope of application of the Brussels regime convincingly. Incidentally, the text of the judgment also proves an informative lesson for the recently flared-up debate about anonymization of judicial decisions.

L. Hornkohl: **International jurisdiction for permission proceedings under the German Telemedia Act (TMG) in cases of suspected abusive customer complaints on online marketplaces**

In its decision of 11 March 2021, the Cologne Higher Regional Court denied the international jurisdiction of the Cologne courts for permission proceedings under the German Telemedia Act (TMG) in cases of suspected abusive customer complaints in online marketplaces. The Cologne court decision combined several

precedents of the German Federal Court and the European Court of Justice. Although the Cologne Higher Regional Court decided that permission proceedings constitute a civil and commercial matter within the meaning of the Brussels I Regulation, international jurisdiction could not be established in Germany. The place of performance according to Art. 7 No. 1 lit. b second indent Brussels Ibis Regulation must, in case of doubt, uniformly be determined at the place of establishment of the online marketplace operator in Luxembourg. Article 7 No. 2 of the Regulation also does not give jurisdiction to German courts. The refusal to provide information per se is not a tort in the sense of Article 7 No. 2. Furthermore, there is no own or attributable possibly defamatory conduct of the platform operator. Contradictory considerations of the German legislator alone cannot establish jurisdiction in Germany.

A. Spickhoff: Contract and Tort in European Jurisdiction – New Developments

The question of qualification as a matter of contract or/and of tort is among others especially relevant in respect to the jurisdiction at place of performance and of forum delicti. The decision of the court of Justice of the European Union in res Brogsitter has initiated a discussion of its relevance and range to this problem. Recent decisions have clarified some issues. The article tries to show which. The starting point is the fraudulent car purchase.

R.A. Schütze: Security for costs for UK plaintiffs in German civil proceedings after the Brexit?

The judgment of the Oberlandesgericht Frankfurt/Main deals with one of the open procedural questions of the Brexit: the obligation of plaintiffs having permanent residence in the United Kingdom to provide security of costs in German civil proceedings. The Court has rightly decided that from January 1st, 2021 plaintiff cannot rely on sect. 110 par. 1 German Code of Civil Procedure (CCP) anymore as the United Kingdom is no longer member of the EU. If the plaintiff has lodged the complaint before January 1st, 2021, the obligation to provide security of costs arises at that date and security can be claimed by respondent according to sect. 110 CCP. However, the Court has not seen two exceptions from the obligation to

provide security for costs according to sect. 110 par. 2 no. 1 and 2 CCP which relieve plaintiff from the obligation to provide security of costs if an international convention so provides (no. 1) or if an international convention grants the recognition and execution of decisions for costs (no. 2). In the instant case the court had to apply art. 9 par. 1 of the European Convention on Establishment of 1955 and the Convention between Germany and the United Kingdom on Recognition and Execution of Foreign Judgments of 1960, both Conventions not having been touched by the Brexit. Facit therefore: claimants having permanent residence in the United Kingdom are not obliged to provide security for costs in German Civil proceedings.

H. Roth: **Qualification Issues relating to § 167 Civil Procedure Code (Zivilprozessordnung, ZPO)**

§ 167 of the Civil Procedure Code (ZPO) aims to relieve the parties of the risk accruing to them through late official notification of legal action over which they have no control. This norm is part of procedural law. It is valid irrespective of whether a German court applies foreign or German substantive law. The higher regional Court (Oberlandesgericht) of Frankfurt a.M. found differently. It holds that § 167 should only be considered when German substantive law and thus German statute of limitations law is applied.

A. Hemler: **Undisclosed agency and construction contract with foreign building site: Which law is applicable?**

Does the term “contract for the provision of services” in Art 4(1)(b) Rome I Regulation include a building contract with a foreign building site? Or should we apply the exception clause in Art 4(3) Rome I Regulation if the building site is abroad? Which law governs the legal consequences of undisclosed agency, i.e. how should we treat cases where a contracting party acts as an agent for an undisclosed principal? Furthermore, what are the legal grounds in German law for a refund of an advance payment surplus in such a building contract? In the case discussed, the Oberlandesgericht (Higher Regional Court) Köln only addressed the latter question in detail. Unfortunately, the court considered the interesting PIL issues only in disappointing brevity. Therefore, based on a

doctrinal examination of the exception clause in Art 4(3) Rome I Regulation, the paper discusses whether the scope of the general conflict of laws rule for contracts for the provision of services should exclude building contracts with a foreign building site by virtue of a teleological limitation. It also sheds light on the dispute around the law governing cases of undisclosed agency. The paper argues that Art 1(2)(g) Rome I Regulation is not applicable in this regard, i.e. the issue is not excluded from the Rome I Regulation's scope. Instead, it is covered by Art 10(1) Rome I Regulation; hence, the law governing the contract remains applicable.

S.L. Gössl: **Uniqueness and subjective components – Some notes on habitual residence in European conflict of laws and procedural law**

The article deals with the case law of the ECJ on the habitual residence of adults, as addressed in a recent decision. The ECJ clarified that there can only ever be one habitual residence. Furthermore, it confirms that each habitual residence has to be determined differently for each legal acts. Finally, in the case of the habitual residence of adults, subjective elements become more paramount than in the case of minors. In autonomous German Private International Law, discrepancies with EU law may arise precisely with regard to the relevance of the subjective and objective elements. German courts should attempt to avoid such a discrepancy.

D. Wiedemann: **Holidays in Europe or relocation to Bordeaux: the habitual residence of a child under the Hague Convention on International Child Abduction**

A man of French nationality and a woman of Chilean nationality got married and had a daughter in Buenos Aires. A few months after the birth of their daughter, the family travelled to Europe, where they first visited relatives and friends and finally stayed with the man's family in Bordeaux. One month and a few days after they arrived in Bordeaux, mother and daughter travelled to Buenos Aires and, despite an agreement between the spouses, never returned to Bordeaux. The father in France asked Argentinean authorities for a return order under the HCA. According to the prevailing view, the HCA only applies, if, before the removal or retention, the child was habitually resident in any contracting state except for the

requested state. The court of first instance (Juzgado Civil) assumed a change of the child's habitual residence from Argentina to France, but, considering that the lack of the mother's consent to move to France results in a violation of the Convention on the Elimination of All Forms of Discrimination against Women, it granted an exception under Art. 20 HCA. The higher court (Cámara Nacional de Apelaciones en lo Civil) and the Argentinian Supreme Court (Corte Suprema de Justicia de la Nación) required the manifestation of both parents' intent for a change of the child's habitual residence. The higher court saw a sufficient manifestation of the mother's intent to move to France in the termination of her employment in Buenos Aires and ordered the return. In contrast, the CSJN refused to give weight to the termination of employment as it happened in connection with the birth of the daughter.

H.J. Snijders: **Enforcement of foreign award (in online arbitration) ex officio refused because of violation of the defendant's right to be heard**

With reference to (inter alia) a judgement of the Amsterdam Court of Appeal, some questions regarding the consideration of requests for recognition and enforcement of foreign arbitral awards in the Netherlands are discussed. Should the State Court ex officio deal with a violation of public order by the arbitral tribunal, in particular the defendant's right to be heard, also in default proceedings like the Amsterdam one? In addition, which public order is relevant in this respect, the international public order or the domestic one? Furthermore, does it matter for the State Court's decision that the arbitral awards dealt with were issued in an online arbitration procedure (regarding a loan in bitcoin)? Which lessons can be derived from the decision of the Amsterdam Court for drafters of Online Arbitration Rules and for arbitral tribunals dealing with online arbitration like the arbitral e-court in the Amsterdam case? The author also points out the relevance of transitional law in the field of arbitration by reference to a recent decision of the Dutch Supreme Court rejecting the view of the Amsterdam Court of Appeal in this matter; transitional law still is dangerous law.

Notifications:

E. Jayme/E. Krist: The War of Aggression on Ukraine: Impact on International Law and Private International Law –Conference, March 31st, 2022 (via Zoom)

C. Budzikiewicz/B. Heiderhoff: „Dialogue International Family Law"- Conference, April 1st-2nd, 2022 in Marburg

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Greek court recognizes UK custody order to the non-biological parent in the context of a married same-sex couple

Greece still forms part of the EU Member States group not recognizing same-sex marriage. Same-sex couples do enjoy however some rights. The latest challenging issue concerned custody rights of a same-sex couple married abroad. The Thessaloniki Court of Appeal reversed the first instance ruling, and recognized an English custody order [Thessaloniki CoA, decision published on January 24, 2022, unreported].

FACTS: The appellant (Parent A) is a woman of Greek and American nationality. Her partner was a woman of American national (Parent B). They registered their partnership in the UK on 20 August 2013. Nearly a month later, Parent B gave birth to a child. The partners married in January 2015. Parent A. filed an application for child custody and parenting arrangements order in the UK. The court granted the application, and ordered that the child stays with the psychological (non-biological) mother on the basis of previous decisions concerning parental responsibility rights issued in the same country. In addition, the court ordered that the child reside with Parent A., and it issued an order to remove the child permanently to Greece. Finally, the same court arranged the contact rights of the biological mother. The UK order was issued by the High Court – Family Division in Chelmsford, and it was final. Parent A. filed an

application for the recognition and enforcement of the UK order before the Court of First Instance in Thessaloniki.

The Court refused recognition. It entered into an analysis of the public policy defense, culminating in the conclusion, that the forum judge is obliged to defend national public policy, while at the same time demonstrating respect towards the state's international obligations. To that end, a proportionality test of the domestic public policy with Article 8 ECHR standards is imperative. Following the above introduction, the court declared that same-sex marriage, and any subsequent relations emanating thereof are not allowed in Greece. A detailed presentation of the first instance court reasoning may be found here.

Parent A appealed.

THE DECISION: Unlike the lower instance court, the Thessaloniki CoA primarily underlined the European context of the dispute, citing Articles 21 et seq of the Brussels II bis Regulation. It then referred to a significant number of pertinent provisions, such as: Articles 8, 12 and 14 of the European Convention of Human Rights; articles 23 and 26 of the International Covenant on Civil and Political Rights (ICCPR); articles 7 and 9 of the Charter of Fundamental Rights; the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Greek Civil Union law nr. 4356/2015; article 21 of the Greek Constitution, on the protection of family; directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States; and finally, articles 2 and 3 of the United Nations Convention on the Rights of the Child (UNCRC), ratified in Greece by law nr. 2101/1992.

On the grounds of the above references, the CoA found no violation of the Greek public policy, and reversed the ruling of the first instance court. In particular, the CoA emphasized two points:

- The diversity of views, i.e., the non-recognition of same sex marriage in Greece may not result to the infringement of the child's best interests, reflected in the UK court findings.
- The ruling of the first instance court results to the discrimination of children on the grounds of their parents' sexual orientation.

The battle for full equality is not yet won. A couple of days after the decision of the Thessaloniki CoA was published, the Athens CoA refused recognition to a South African adoption decree issued upon the application of a same-sex (male) couple. Yet again, public policy was the defense hindering recognition. To sum up: Same sex couples may not marry or adopt children in Greece; they may however be appointed as foster parents, and exercise custody rights. Hence, equality evolves in a piecemeal fashion. And last but not least, let us not forget: the Supreme Court has the final word.

"To trust or not to trust – this is the question of private international law". M. Weller on Mutual Trust, Recueil des Cours, vol. 423 (2022)

A. Introduction

During the Summer of 2019, I attended one of the two flagship courses organised by the Hague Academy of International Law – the annual Summer Courses on Private International Law.

I quite vividly recall that, during the opening lectures, one of the Professors welcomed the participants at the premises of the Academy, a few steps from the Peace Palace itself, and made an observation that, at that time, seemed as captivating as remote.

As my precise recollection of his words may be far less accurate than the memory of the impression they made on me, I paraphrase: when it comes to education in general, in years to come – he noted – it will be a privilege to be able to benefit

from a physical presence of a teacher or professor, being there, in front of you, within the reach of your hand and of your questions.

At that time, just a few months prior to the beginning of the worldwide spread pandemics, even the Professor himself most likely did not realize the extent to which his words would soon prove prophetic.

That was, however, not the sole lecture that I recall vividly.

Among others, Professor Matthias Weller (University of Bonn, one of two general editors of CoL.net) presented his course titled 'Mutual Trust': A Suitable Foundation for Private International Law in Regional Integration Communities and Beyond?

The present post is not, however, an account of this Hague experience. It is an account of a different and more recent one that resulted from the lecture of the freshly published Volume 423 of Recueil des Cours of the Hague Academy of International Law and of the Course by M. Weller within its pages.

B. Structure of the Course

The Course, in its just published incarnation, is composed of eight chapters.

Details about the Course and the Volume within which it is contained can be found here, on the website of its publisher, Brill. I can also refer the readers to the post on EAPIL by Elena Alina Otanu who also reported about the publication.

Thus, in this post, I will refrain from detailing the content of every Chapter and rather present and discuss its main and/or most interesting themes. Please be warned though that their selection is highly subjective, as there is far more to uncover within the pages of the Volume.

Chapter I ("Introduction") sets the scene for the analysis provided for in the following Chapters. Here Weller also builds up the main hypothesis of his work (see section C below).

I digress but from a methodological standpoint, the Course is very thoughtful and may serve as an example of how to deal with a matter of comparative private

international law that is highly difficult to conceptualise.

The methodological awareness is most visible in Chapter I, as well as in Chapter III ("Regional integration communities and their private international law"), which furtherly explains how the analysis is conducted through the text.

Between those two, lies Chapter II ("Private international law: a matter of trust management"), where the Author explores one of his core ideas that private international law may be conceived as a matter of "trust management". As this is an innovative paradigm with which the Author approaches his main hypothesis, it calls for some additional exposition and discussion (see section D below).

The Author devotes next four chapters (Chapters IV – VII) to the specific regional integration communities, namely: Association of Southeast Asian Nations (ASEAN), Central African Economic and Monetary Community (OHADA), El Mercado común del sur (MERCOSUR) and EU. Here, I found the Chapter on EU to be highly innovative – at least to my knowledge, this is the first comprehensive attempt to look at the plethora of heavily-discussed private international law mechanics from "trust"-oriented perspective (see section E below).

Chapter VIII ("General conclusions") closes the book, recaps the Author's findings and provides food-for-thought for future research in the field.

C. Hypothesis under scrutiny in the Course

The Course starts off with a series of references showing the relevance of "mutual trust" for various aspects of functioning of the EU and its legal framework, in particular – for its private international law.

Quoting J. Basedow who stated that the EU is the "experimental laboratory of private international law", Weller sets the main hypothesis of his work (para. 5): **there might be a fundamental relevance of mutual trust to the private international law of any regional community**.

To test this hypothesis, the Author delves into analysis of selected "regional integration communities". Doing so, Weller aims to examine **whether and to what extent mutual trust is of relevance for the private international law of those communities, be it as a foundation or guiding principle,**

triggering more intensive cooperation (in presence of mutual trust) or preventing it (in the lack of it).

The Author also hints the possibility to take his main hypothesis even further, although this aspect does not constitute the focal point of the Course: there might even be something fundamental in "mutual trust" for private international law as it is, also where it does not operate within a framework explicitly created for the purposes of regional integration communities (to use the term employed by the Author, also where it comes to "extracommunity efforts on private international law", para. 127). Indeed, I would argue that, at present, no system of private international law should be conceived as operating in isolation, blind to the global reach of the situations that it aims to govern.

Back to the Course itself and the hypothesis:

Weller explores and employs, as he puts it, an EU "product" – the notion of "mutual trust" (para. 8), to verify his main hypothesis in the context of various regional integration communities.

The readers should not be misled though. **The Course is not built around the idea that the EU private international law, with its concept of 'mutual trust', constitutes an ultimate form of private international law system or a pinnacle of achievement of some sorts, and that any other regional integration communities efforts have to be benchmarked against the "EU model"**. Far from that.

In fact, Weller uses the concept of "trust", and its qualified form of "mutual trust" as a tool that allows him to research the main hypothesis of his Course.

Doing so, the Author explicitly refrains from adopting a solely EU-oriented perspective. He goes so far as to state that "not everything that comes from experiments ends up in good results, let alone the best solution for everyone". "Not even 'integration' as such may be considered a priori the most suitable avenue for all states and regions in the world" (para. 8). This becomes even clearer if we read into the Chapter III. Here, the Author goes so far as to call "naive" the belief according to which "progress" boils down to increasing degrees of mutual trust (para. 126).

Also, even where Weller refers to notion of "mutual trust" and calls it at some

instances an EU “product”, he also makes it clear that “mutual trust” is not an EU invention: rather, he roots it in the German regional economic community of the nineteenth century, the German Union (paras. 432 and 482).

D. Paradigm of the Course: Private international law as a matter of “trust management”

In Chapter II (“Private international law: a matter of trust management”) the Author exposes and explores the paradigm that he proposes and researches in the following Chapters, with regards to selected regional integration communities.

In order to do so, he divides the Chapter into two sections.

In the first section of this Chapter, Weller explores the concept of “trust”: what it is and what purpose it serves, not only in the field of private international law.

The Author manages to seamlessly transit from “trust” as a societal phenomenon, deeply researched and explained both by sociological and economic (think: risk management) theory, with its qualified form (“mutual trust”) that became so crucial for the EU and beyond.

Within the first section, Weller also juxtaposes “trust” to “knowledge” arguing, in essence, that the former allows to act (even) where information is deficient. Trust relates, he explains, to the predictability of the actions of another. He builds up another dichotomy on that observation: in the lack of information, there is a choice between “trust” and “control”, and it is the former that appears to be a better candidate for governance of private international law issues.

In the second section Weller exposes the paradigm he proposes: for him, as mentioned above, private international law may be conceived as a matter of “trust management”. In other terms, as he puts it: **to trust or not to trust – this is the question of private international law** (para. 123).

To make his point, the Author looks closely at what J. Basedow called the “ultimate and most far-reaching form of judicial cooperation between States” – the recognition and enforcement of foreign judgments (para. 40).

He elaborates on various tools of “trust management” with regards to foreign

judgments: from “total control” (no effects of foreign judgments at all), through revision au fond, doctrine of obligation, letter rogatory and far-reaching trust with residual control via exequatur proceedings to full faith and credit among federal states and, finally,“full trust”. **He argues that all of them represent a specific amount of “trust” that is given to the judicial system of another State, complemented by “control” mechanics of some sorts.**

Furthermore, Weller does not shy away from exploring other aspects of private international law through the mutual trust-tinted lens. He addresses also, inter alia, authentication of foreign documents and their service or taking evidence abroad (paras. 85 et seq.), as well as application of foreign law (paras. 104 et seq.).

I digress again: reading initially into first section of Chapter II, I had a (false) impression that the views on trust are too one-sided and do not take into account that both “trust” and “mutual trust” are not (and cannot be) blind to the various circumstances that occur within the framework to which the trust applies.

Trust is first and foremost a societal phenomenon and not a religious one. In this perspective, there is something to say about what distinguishes “trust” from “faith” – the latter is not (or at least should not be) undermined by lack of feedback; it can even “fuel” more faith and intensify it. By contrast, when it comes to “trust”, a systematic lack of positive feedback, replaced by feedback that calls for concern, needs to results into reconsideration as to whether the trust must still be given and the control waived.

My initial false impression was, however, quickly dispersed. Weller recognizes the dynamics of trust too. In the paragraphs that follow, he quotes and comments extensively on one of the key elements of this research, building up on the consideration of K. Lenaerts according to which “mutual trust cannot be confused with blind trust” (para. 90). This becomes even clearer when we read into Chapter VII on EU private international law.

E. “Trust management” in EU private international law and beyond

I turn now to aforementioned Chapter VII, devoted to EU private international law

or, if we read into this Chapter more attentively, to EU law in general.

Here, Weller discusses extensively the "mutual trust" and human/fundamental rights dynamics and argues that the balance between the former and the latter is nothing else but trust management (para. 360).

He shows, next, that private international law-inspired mechanics of trust management may apply beyond the field of EU private international law. This may seem as an even more perverse turn if we take into account that, as Weller observes, in the context of EU integration, judicial cooperation in civil matters developed in the shadows of judicial cooperation in criminal matters (para. 377).

Interestingly, Weller recognizes that even within the context of EU integration, the EU legislator does not cap the pre-existing trust with legislative framework within which this trust operates. By contrast, at least in some instances (he cites E-commerce and Service Directives), the EU legislator diagnosed a lack of mutual trust and then imposed an obligation of the Member States for mutual recognition as a cure (para. 371).

Then, he goes through various EU private international law provisions and case law pertaining to them in order to explore how the "trust management" is dealt with under EU law.

I mention just one piece of this exploration on public policy, operating under the Brussels I regime as a ground four refusal of enforcement.

Weller mentions the case that resulted in the German Federal Supreme Court judgment of 2018, which accepted the application of public policy exception with regards to a Polish judgment condemning ZDF to publish an apology on its main webpage after it described two concentration camps as being "Polish". The Supreme Court considered that the obligation for ZDF to publish a preformatted text on its website contradicted freedom of speech and freedom of press as guaranteed under Article 5(1) of the German Basic Law. The enforcement was rejected on the basis of public policy exception.

The case has been extensively discussed in the literature before. However, faithful to the paradigm of the Course, Weller examines the case from trust management perspective.

Adopting this perspective, Weller argues that the German court "could have and would have better enforced just the enforceable parts of the Polish judgment" and "it seems that it would have been under an obligation from EU law to do so in order to maintain the movement of judgment within the EU as far as possible, an obligation that emanates from the effet utile of the Brussels regime (para. 405).

I might add, in line with this contention: if the right of enforcement of a foreign judgment is conceptualized as a right protected under the Charter (and – to be more specific – under its Article 47), then any interference to that right, although "provided for by law" [see: public policy exception of Article 34(1) of the Brussels I Regulation/Article 45(1)(a) of the Brussels I bis Regulation], must respect the requirement resulting from Article 52(1) of the Charter. Thus, if I follow Weller paradigm, also Article 52(1) of the Charter is a "trust management" tool, that calls for proportionate and restricted (only when it is "necessary") refusal of "trust" in the EU.

F. So again, why do I need "mutual trust" when I already have "comity"?

I close this post with another recollection of the Summer Course of 2019: during one of his intervention at the Hague Academy, Weller mentioned that when he had shared with one of his colleagues about this "mutual trust" research, the said colleague had asked: so again, what is the difference between "mutual trust" and "comity"?

According to my account of that conversation, Weller provided, if I recall correctly, an answer that boiled down to the following statement, I paraphrase: **while "comity" allows for cooperation between States, over the heads of individuals, the concept of "mutual trust" enables the cooperation between States but with paying a particular attention to the individual; it elevates the individual and his/hers interests to the attitude, where they become a matter of true concern also to the States**.

The difference between "mutual trust" and "comity" is furtherly explored in the Course, although I might be accused of reading too much in-between the lines.

On the one hand, in Chapter II, commenting on various tools of "trust

management", the Author mentions the concept of "comity" again. He explains that one of it aspects can be seen as "an abstract trust in the administration of justice by the foreign state from where the judgment emerged – it results from the acknowledgment of the sovereignty and such equality of the foreign state is concretized by the presumption that the administration of justice in the foreign state is equally well placed to produce justice in the particular case at hand".

On the other hand, in another part of the book, he makes an interesting point: the individuals push a State towards trust, so the States cooperate on behalf of those individual when they enable and supervise judicial cooperation (paras 35 and 72). In yet another part of the book, pertaining to the application of foreign law, the Author even juxtaposes trust-based mechanics, concerned with the rights of the individuals, with the sovereignty-based ("outdated") concepts of comity (para. 111).

Furthermore, **States are, Weller argues, in obligation to optimize their trust management – doing so, they optimize the chances of the individuals when it comes to the enforcement of their rights in cross-border contexts** (para. 122).

I concur. But why such obligation exists? Under Weller's paradigm, the general concept of "comity" cannot be the justification, at least not the "outdated" one. Besides, if we follow Weller on that point, from the perspective of interest of individual, "comity" may be seen as a construct inferior to "mutual trust".

If we read into text, the Author provides an answer though: **the obligation to optimise trust management results from the imperatives of rule of law and of the fundamental right to effective access to justice; as such, it is a matter of constitution guarantees** (para. 123 and 444). I might add that there is also something to say about effective protection of fundamental/human rights that underlie the substance of specific rights and/or legal situations shaped under foreign law or within foreign territory. In essence, it is necessary to optimise trust management system also because it allows to ensure recognition and enforcement of rights and legal situations that are rooted in fundamental/human rights.

Golan v. Saada – a case on the HCCH Child Abduction Convention: the Opinion of the US Supreme Court is now available

Written by Mayela Celis, UNED

Yesterday (15 June 2022) the US Supreme Court rendered its Opinion in the case of Golan v. Saada regarding the HCCH Child Abduction Convention. The decision was written by Justice Sotomayor, click here. For our previous analysis of the case, click here.

This case dealt with the following question: whether upon finding that return to the country of habitual residence places a child at grave risk, a district court is *required* to consider ameliorative measures that would facilitate the return of the child notwithstanding the grave risk finding. (our emphasis)

In a nutshell, the US Supreme Court answered this question in the negative. The syllabus of the judgment says: "A court is not categorically required to examine all possible ameliorative measures [also known as undertakings] before denying a Hague Convention petition for return of a child to a foreign country once the court has found that return would expose the child to a grave risk of harm." The Court has also wisely concluded that "Nothing in the Convention's text either forbids or requires consideration of ameliorative measures in exercising this discretion" (however, this is different in the European Union context where a EU regulation complements the Child Abduction Convention).

While admittedly not everyone will be satisfied with this Opinion, it is a good and well-thought through decision that will make a great impact on how child abduction cases are decided in the USA; and more broadly, on the way we perceive what the ultimate goal of the treaty is and how to strike a right balance between the different interests at stake and the need to act expeditiously.

In particular, the Court stresses that the Convention "does not pursue return exclusively or at all costs". And while the Court does not make a human rights

analysis, it could be argued that this Opinion is in perfect harmony with the current approaches taken in human rights law.

In my view, this is a good decision and is in line with our detailed analysis of the case in our previous post. In contrast to other decisions (see recent post from Matthias Lehmann), for Child Abduction – and human rights law in general – this is definitely good news from Capitol Hill.

Below I include a few excerpts of the decision (our emphasis, we omit footnotes):

"In addition, the court's consideration of ameliorative measures must be guided by the legal principles and other requirements set forth in the Convention and ICARA. ***The Second Circuit's rule, by instructing district courts to order return "if at all possible," improperly elevated return above the Convention's other objectives***. Blondin I, 189 F. 3d, at 248. ***The Convention does not pursue return exclusively or at all costs***. Rather, the Convention "is designed to protect the interests of children and their parents," Lozano, 572 U. S., at 19 (ALITO , J., concurring), and children's interests may point against return in some circumstances. Courts must remain conscious of this purpose, as well as the Convention's other objectives and requirements, which constrain courts' discretion to consider ameliorative measures
in at least three ways.

"First, ***any consideration of ameliorative measures must prioritize the child's physical and psychological safety***. The Convention explicitly recognizes that the child's interest in avoiding physical or psychological harm, in addition to other interests, "may overcome the return remedy." Id., at 16 (majority opinion) (cataloging interests). ***A court may therefore decline to consider imposing ameliorative measures where it is clear that they would not work because the risk is so grave***. Sexual abuse of a child is one example of an intolerable situation. See 51 Fed. Reg. 10510. Other physical or psychological abuse, serious neglect, and domestic violence in the home may also constitute an obvious grave risk to the child's safety that could not readily be ameliorated***. A court may also decline to consider imposing ameliorative measures where it reasonably expects that they will not be followed***. See, e.g., Walsh v. Walsh, 221 F. 3d 204, 221 (CA1 2000) (providing example of parent with history of violating court orders).

"Second, consideration of ameliorative measures should abide by the Convention's requirement that courts addressing return petitions do not usurp the role of the court that will adjudicate the underlying custody dispute. The Convention and ICARA prohibit courts from resolving any underlying custody dispute in adjudicating a return petition. See Art. 16, Treaty Doc., at 10; 22 U. S. C. §9001(b)(4). Accordingly, ***a court ordering ameliorative measures in making a return determination should limit those measures in time and scope to conditions that would permit safe return***, without purporting to decide subsequent custody matters or weighing in on permanent arrangements.

"Third, any consideration of ameliorative measures must accord with the Convention's requirement that courts "act expeditiously in proceedings for the return of children." Art. 11, Treaty Doc., at 9. Timely resolution of return petitions is important in part because return is a "provisional" remedy to enable final custody determinations to proceed. Monasky, 589 U. S., at ___ (slip op., at 3) (internal quotation marks omitted). The Convention also prioritizes expeditious determinations as being in the best interests of the child because "[e]xpedition will help minimize the extent to which uncertainty adds to the challenges confronting both parents and child." Chafin v. Chafin, 568 U. S. 165, 180 (2013). ***A requirement to "examine the full range of options that might make possible the safe return of a child," Blondin II, 238 F. 3d, at 163, n. 11, is in tension with this focus on expeditious resolution***. In this case, for example, it took the District Court nine months to comply with the Second Circuit's directive on remand. Remember, the Convention requires courts to resolve return petitions "us[ing] the most expeditious procedures available," Art. 2, Treaty Doc., at 7, and to provide parties that request it with an explanation if proceedings extend longer than six weeks, Art. 11, id., at 9. Courts should structure return proceedings with these instructions in mind. Consideration of ameliorative measures should not cause undue delay in resolution of return petitions.

"***To summarize, although nothing in the Convention prohibits a district court from considering ameliorative measures, and such consideration often may be appropriate, a district court reasonably may decline to consider ameliorative measures that have not been raised by the parties, are unworkable, draw the court into determinations properly resolved in custodial proceedings, or risk overly prolonging return proceedings. The***

court may also find the grave risk so unequivocal, or the potential harm so severe, that ameliorative measures would be inappropriate. Ultimately, a district court must exercise its discretion to consider ameliorative measures in a manner consistent with its general obligation to address the parties' substantive arguments and its specific obligations under the Convention. A district court's compliance with these requirements is subject to review under an ordinary abuse-of-discretion standard."

Out now: Zeitschrift für Vergleichende Rechtswissenschaft vol. 121 (2022) no. 2

The most recent issue of the German Journal of Comparative Law (Zeitschrift für Vergleichende Rechtswissenschaft) has just been published. The editors mourn the loss of Professor Peter Mankowski (1966–2022), who served as an editor of the ZVglRWiss from 2009 to his untimely death. This issue contains an obituary written by his academic pupil, Professor Oliver L. Knöfel (Viadrina). In addition, this issue offers several presentations made at the conference "Access – Lessons from Africa" that was held at the University of Bayreuth as well as articles on international tort and corporate law. Here are the abstracts:

Eghosa O. Ekhator: **Multinational Corporations, Accountability and Environmental Justice: The move towards subregional litigation in Africa**

In the absence of an explicit international framework on the regulation of the crossborder activities of multinational corporations (MNCs), coupled with the barriers to accessing environmental justice through litigation in domestic courts, many victims of environmental injustice now institute cases in foreign jurisdictions especially the home states of the MNCs because they believe they will get justice in those courts. On the other hand, there is plethora of sub-

regional institutions that have been relied upon by victims of environmental injustices arising from activities of MNCs in Africa. This article focuses on the reliance on sub-regional judiciaries in Africa by different stakeholders including oil producing communities, individuals, and other relevant stakeholders amongst others. The Economic Community of West African States (ECOWAS) Court of Justice (ECCJ) is used as the case-study in this article. Nongovernmental organisations (NGOs) in Nigeria have also relied on the Economic Community of West African States (ECOWAS) Court of Justice (ECCJ) to seek redress for victims of environmental injustice in Nigeria.

Claudia Maria Hofmann: **Linkages between access to information and access to health care**

Information plays a crucial role when it comes to health care. This article elaborates its enabling function with regard to strengthening the position of patients. To this end, reference is made to the human right to health, which is widely acknowledged in both international and regional human rights instruments. In this article, the interpretation provided by the United Nations Committee on Economic, Social and Cultural Rights in its general comment no. 14 on the right to the highest attainable standard of health serves as a basis for identifying the key elements state and non-state actors should take into account when providing health-related information to the public.

Victoria Miyandazi: **Inequality and Access to Justice: A Focus on the Adjudication of Socio-Economic Rights in Kenya**

Kenya's 2010 Constitution establishes the necessary legal framework for tackling inequalities in the country. The multiple provisions on equality, non-discrimination and socio-economic rights create the impetus for rights-based litigation. Now society wants to claim these rights but there are still many hurdles to do so. Many special interest groups do not have access to lawyers nor the skills to access courts on their own. The growing concern is, therefore, that despite the progressive nature of constitutional provisions that seek to tackle inequalities in the country, they are not by themselves the panacea to the problem of access to justice in the country. Aside from the prohibitive cost of legal representation

being a major concern, there are other access to justice challenges that inhibit the poor and marginalised in Kenya from instituting claims in court, and which also affect their chances of succeeding in their claims. This article discusses how an equality-sensitive approach to adjudicating socio-economic rights can help avoid reinforcing inequality and promote equality. It argues that failure to apply such an approach can exacerbate the inequality and access to justice challenges that vulnerable groups already face, especially in times of a crisis like the COVID-19 pandemic.

Justin Monsenepwo: **Decolonial Comparative Law and Legal Transplants in Africa**

On the occasion of a communication made in the aftermath of independence, many African scholars wondered whether African law would continue to be influenced by French law. More than five decades after, the mark of the considerable influence European law has in African former colonies is still perceptible. Yet, in a decolonized context, it should not be implied that European nations rank higher than African nations and that the laws of the former colonizers provide better solutions to African problems. To decolonize legal thinking in Africa, this contribution suggests improving the training of African lawyers and rediscovering customary law to take it into account in the development of legal rules in Africa. This would offer several practical benefits; however, the chief benefit is that it would remarkably boost the ability of lawyers and lawmakers in Africa to innovate.

Aron Johanson, Andreas Rapp and Anna Vatter: **Mosaiktheorie ad absurdum – Örtliche Zuständigkeit im Rahmen des Art. 7 Nr. 2 EuGVVO bei Persönlichkeitsrechtsverletzungen**

The article deals with the case law developed by the ECJ on the question of jurisdiction according to article 7(2) of the Brussels Ia Regulation in cases of infringement of personality rights. In particular, the so-called “mosaic approach“ is examined, which the ECJ has consistently applied to solve the problem of such multiple locality cases. The article pays particular attention to the hitherto little-discussed problem of local jurisdiction. It is first shown that the predominant

German legal practice in this regard is regularly incompatible with article 7(2) of the Brussels Ia Regulation. At the same time, the consistent application of the mosaic approach in the area of local jurisdiction also leads to completely absurd and thus equally unacceptable results. Therefore, the article is rounded off with brief considerations on how local jurisdiction can be determined sensibly and in conformity with European law.

Luca Della Tommasina: **Genossenschaften und nachrangige Mitgliederdarlehen**

The essay deals with Italian cooperative companies and the possibility to extend some sort of *equitable subordination rule* to the loans granted by their members. The article 2467 of the Italian civil code provides that the loans granted to limited liability companies (*società a responsabilità limitata* – „S.r.l.") by any member shall be subordinated to the other creditors of the company if at the time the loan is advanced: (i) there is an excessive imbalance between the company's indebtedness and the net assets; (ii) or the company's financial situation would require an equity contribution instead of a loan. In the cooperative companies' field the problem arises from the convergence of two circumstances. On the one hand the argument that article 2467 is compatible with cooperative firms has been rejected in the Italian case law. On the other hand, in 2017 a reform of cooperative law has excluded the subordination (and more precisely the *subordination according to the article 2467*) for the amounts that a cooperative company receives from its members as "*prestito sociale*". The essay is intended to demonstrate that: (i) the (equitable) subordination is consistent with cooperative firms; (ii) the 2017 reform must therefore be interpreted in a restrictive way. The need to find balanced solutions to the problem seems to be confirmed by the recent developments of the German legal framework.

The *Zeitschrift für Vergleichende Rechtswissenschaft* was founded in 1878 and is Germany's oldest continuously published periodical on comparative and private international law. Its current editor-in-chief is Professor Dörte Poelzig, M.jur. (Oxon), University of Hamburg. Content is available online either through the website of the Deutscher Fachverlag or via beck online.

Conference Report: Private International Law Festival 2022 Edinburgh

Private International Law Festival

16 to 17 May 2022

Edinburgh, United Kingdom

by *Michael Cremer* and *Samuel Zeh**

After two years of living through a global pandemic, the very first Private International Law Festival from 16 to 17 May 2022, held in Edinburgh, was the first opportunity for many to finally meet other scholars and exchange ideas in person again. The event was hosted by the University of Edinburgh in cooperation with the Max Planck Institute for Comparative and International Private Law (Hamburg) and organized primarily by *Verónica Ruiz Abou-Nigm* (Edinburgh).

As its name implies, the Festival was meant as an opportunity for scholars from all around the world to celebrate the many facets of the discipline. This was

reflected in the broad range of presentations, which featured both traditional and novel approaches to Private International Law (PIL). The two-day Festival included seven panels, the Forum Conveniens Annual Lecture at Edinburgh Law School and a book launch. Thematically, it encompassed not only sustainable development, decolonial theory and migration governance, but also Private International Law in Scotland, same-sex relationships and many other topics.

After a welcome by the host *Verónica Ruiz Abou-Nigm* who emphasized the overarching goal to celebrate the discipline, the first cluster of the event focused on *Private International Law and Sustainable Development*. *Hans van Loon* (Institut de Droit International) gave an overview of the relationship between Private International Law and the UN Sustainable Development Goals 2030. He outlined the challenge of reconciling economic development with sustainability and the contribution PIL can make towards this goal. In the previous year, he had, together with *Ralf Michaels* and *Verónica Ruiz Abou-Nigm,* worked on the project "The Private Side of Transforming our World – UN Sustainable Development Goals 2030 and the Role of Private International Law" which culminated in a Conference and an open-access book publication. As the coordinator of that project, *Samuel Zeh* (Max Planck Institute for Comparative and International Private Law, Hamburg) elaborated on the lessons learned and insights gained in the process. Afterwards, *María Mercedes Albornoz* (MacCormick Fellow, Edinburgh Law School / CIDE, México) offered a Global South perspective on Sustainable Development and Private International Law. The first thematic panel concluded with *Ralf Michaels* discussing whether facilitation and regulation as key objectives of PIL can be reconciled with the quest for sustainability.

Ralf Michaels then switched to chair the second panel of the day on *Decolonising Law and Private International Law*. It was started off by *Roxana Banu* (Queen Mary University of London) with *Reflections on Private International Law's Colonial History*. She made the case for expanding the intellectual history of Private International Law both geographically and in terms of actors, while at the same time situating PIL theories and techniques in a colonial context. Subsequently, *Nicole Štýbnarová* (University of Helsinki / University of Oxford) elaborated on how Private International Law has transitioned from arguing about transnational marriages from relativist arguments in the 19th century to universalist language and how this transition was sparked by the changing imperial economy. *María Julia Ochoa Jiménez* (Universidad de Antioquia)

addressed PIL in Latin America and explained its neo-colonial character by tracing its historical development. Finally, *Sandrine Brachotte* (Sciences Po Paris) laid out a method for decolonizing PIL with non-secular worldviews. She suggested a pragmatic approach that goes from specific cases to theory, thereby altering the concepts of Private International Law.

After the lunch break, two panels – chaired by *Gerry Maher* (University of Edinburgh) and *Verónica Ruiz Abou-Nigm* – were dedicated to *Private International Law in Scotland* in accordance with the location of the Festival. Scholars from several Scottish universities gave an overview of their respective Private International Law curricula and their current topics of research. This included *Paul Beaumont* and *Jayne Holliday* (University of Stirling), *Justin Borg-Barthet* and *Patricia Živkovi?* (University of Aberdeen), *Verónica Ruiz Abou-Nigm* (Edinburgh Law School), *Janeen Carruthers* and *Bobby Lindsay* (University of Glasgow). Additionally, *Kirsty Hood* (The Faculty of Advocates) and *Michael Clancy* (Law Society of Scotland) emphasized the importance of Private International Law for legal practitioners in Scotland.

Like every grand festival the Private International Law Festival also took place on different stages: The main stage in the Usha Kasera Lecture Theatre at Edinburgh Law School was reserved for the *Forum Conveniens Annual Lecture*. It was delivered by *Máire Ní Shúilleabháin* (University College Dublin) on *Same-Sex Couples in the Cross-Border Context: Closing the Gaps in the Conflict of Laws*. Living up to this title the lecture was a true *tour de force* as it covered virtually all aspects of the topic. It brought together common law perspectives from Irish, Canadian and UK law with the European regulations and requirements of negative integration and cross-border recognition as established by the judgments of the CJEU. Thus, the lecture sparked an animated debate which was chaired by *Carlos Esplugues Mota* (Universitat de València) and continued well into the subsequent *Forum Conveniens Reception*.

The second day of the Festival opened with a cluster on a new project that the panelists are working on: *Private International Law and Sustainable Migration Governance*. *Verónica Ruiz Abou-Nigm*, *Jinske Verhellen* (Ghent University), *Gülüm Özçelik* (Bilkent University), *Laura Carballo Piñeiro* (University of Vigo), *Ulla Liukkunen* (University of Helsinki) and *Hans van Loon* presented their findings up until now and future plans for this project. This includes issues such as migrants' right to legal identity, access to social security schemes in a cross-

border context and circular migration.

The topic of migration was also a focus of the second panel of the day, which was chaired by *Kasey McCall-Smith* (Edinburgh Law School) and offered *Interdisciplinary Latin American Perspectives on Coloniality and Migration*. *Isadora Dutra Badra Bellati* (Max Planck Institute for Comparative and International Private Law, Hamburg) analyzed a Brazilian Supreme Court decision on the legality of the outsourcing of labor through the lens of decolonial theory. This was followed by *Valentina Rioseco* (University of Edinburgh) discussing whether the obligation of states to allow entry and stay in international and inter-American human rights law can pave pathways for regular migration. Afterwards, *Gabriela García García* (University of Aberdeen) spoke about *The Latin American Landscape of Migrant Integration and Inclusion* and proposed a baseline framework for domains and indicators of integration in Latin America. Next, *Nuni Vieira Jorgensen* (Queen Mary University of London) shed light on the effects that the closure of land borders has on transnational family arrangements and family reunifications: "protected borders" tend to interrupt care arrangements to the detriment of transborder families. As last speaker on the panel, *Marilda Rosado* (Universidade do Estado do Rio de Janeiro) gave an overview of initiatives that support migrants in Brazil and foster cooperation.

The next highlight of the Festival was the book launch of the much awaited "*Guide to Global Private International Law*" (Hart Publishing). The editors, *Paul Beaumont* and *Jayne Holliday*, presented the book, which not only provides an overview of PIL from a global perspective, but also offers many suggestions for its further unification. They were joined by multiple contributors, some in the room and some connected virtually, who gave short insights into their chapters and their workflow. Keeping in the spirit of the Festival, this was a true celebration of the hard work and dedication that have gone into compiling this guide.

The last panel of the Festival was chaired by *Alex Mills* (University College London) and covered *New Horizons for Private International Law.* First, *Nicolas Rennuy* (University of York) analyzed the Law of Social Security Coordination and showed how there are multiple links between the field and Private International Law, including the type of conflict rules, the connecting factors, the scope of the rules and conceptions of indirect choice of law. Afterwards, *Michael Cremer* (Max Planck Institute for Comparative and International Private Law, Hamburg) made the case for Private International Law perspectives in patent law, illustrating this

through a conflict of laws reconstruction of the right of priority stemming from the 1883 Paris Convention on the Protection of Industrial Property. Next, *Rosario Espinosa* (Universitat de València) presented her work on *Sorority, Equality and Private International Law* explaining how Private International Law can be used as a tool to promote equality and solidarity between women. The last contribution was made by *Toni Marzal* (University of Glasgow) who proposed *A Relations-First Approach to Choice of Law* and criticized the established positivist perspective that dominates the current understanding of PIL.

Sadly, every celebration must come to an end. The last words of the Festival belonged to the driving force behind it: *Verónica Ruiz Abou-Nigm*. It was not before a big applause for her work and effort in organizing the event so quickly and perfectly, that everybody bid farewell.

The Private International Law Festival in Edinburgh was a resounding success. It was itself the perfect example of the multiple facets of Private International Law, that it set out to celebrate. The presentations not only covered an extensive number of different topics, but also displayed both traditional and novel methodologies. They put new topics on the agenda of the discipline, while also shedding new light on existing debates. In addition, the Festival combined truly global projects like the launch of the *Guide to Global PIL* with the focus on the Scottish perspectives on PIL. At the same time, it also provided the opportunity for intergenerational exchange, with many younger researchers presenting their work and joining the debate.

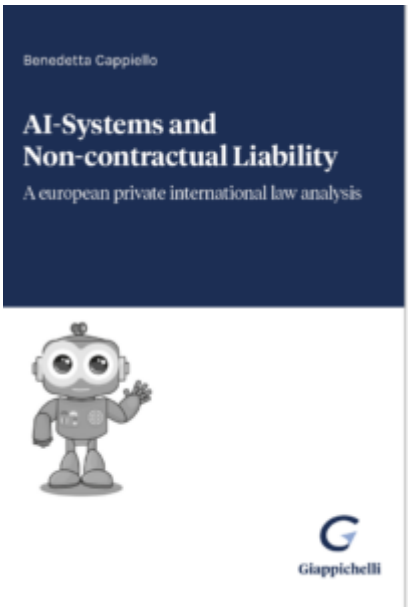
For many it was the first in person meeting with fellow scholars after the pandemic. The Festival provided a worthy setting for this return. Hopefully, it will become a regular event.

* *Michael Cremer and Samuel Zeh* are both research associates and PhD studens under Ralf Michaels at the Max Planck Institute for Comparative and International Private Law, Hamburg

AI systems and non-contractual liability: A European Private International law analysis

Benedetta Cappiello from the University of Milan has recently published a book on European private international law and non-contractual liability for AI systems (AI Systems and Non-contractual Liability: A European Private International Law Analysis, Giappichelli 2022: https://www.giappichelli.it/media/catalog/product/excerpt/9788892143289.pdf). She has kindly provided us with the following abstract:

The advent of AI-systems has fundamentally altered the whole of society and is about to change our daily lives as well as relationships between private parties.



The current challenge for the legislator is to determine a clear legal framework able to firstly, guarantee continued technological development and secondly, to be integrated with already binding sources of law. Whether the said framework will correspond to an already existing one, adapted to AI-systems, or whether it will be an ad hoc framework is still to be scrutinized. What is certain is that the challenge to determine a legal framework assumes a cross-border connotation: only common and shared choices at the supranational level will guarantee the definition of a coherent and effective discipline.

Within the said framework, the present book focuses on the non-contractual obligations which arise within the European Union out of the development and use of AI-systems; more precisely, as for the civil liability regime the advent of

AI is about to lead to a paradigm shift in the allocation of liability throughout the "production chain". Namely, the question has become how to ascertain who is liable for what; the opacity of AI-systems – especially those engaging with machine learning techniques – can make it extremely difficult to identify who is in control and therefore responsible.

Both EU substantive and private international law ("PIL") provisions on civil liability, in general, and on product liability in particular, are scrutinized, following an approach de lege lata and de lege ferenda.

The concluding remarks integrates the results reached in the analysis and ethical considerations. Both substantive and PIL provisions should be ethically oriented and abide, and ensure, the protection of fundamental rights; private international law shall be an effective instrument for reaching the results pursued by the corresponding substantive provisions. Accordingly, this book will conclude suggesting anew direction of European private international law provisions; as per AI-systems field, it might be time the European legislator accepts connecting factors oriented more towards human rights protection.

Tort Litigation against Transnational Companies in England

This post is an abridged adaptation of my recent article, *Private International Law and Substantive Liability Issues in Tort Litigation against Multinational Companies in the English Courts: Recent UK Supreme Court Decisions and Post-Brexit Implications* in the *Journal of Private International Law*. The article can be accessed at no cost by anyone, anywhere on the journal's website. The wider post-Brexit implications for private international law in England are considered at length in my recent OUP monograph, *Brexit and the Future of Private International Law in English Courts*.

According to a foundational precept of company law, companies have separate legal personality and limited liability. Lord Templeman referred to the principle in *Salomon v Salomon & co Ltd* [1896] UKHL 1, as the 'unyielding rock' on which company law is constructed. (See Lord Templeman, 'Forty Years On' (1990) 11 *Company Lawyer* 10) The distinct legal personality and limited liability of each entity within a corporate group is also recognized. In *Adams v Cape Industries plc* [1990] Ch 433 the court rejected the single economic unit argument made in the *DHN Ltd v Tower Hamlets LBC* [1976] 1 WLR 852 decision, and also the approach that the court will pierce the corporate veil if it is necessary to achieve justice. In taking the same approach as the one taken in *Salomon v Salomon & co Ltd* [1896] UKHL 1, the court powerfully reasserted the application of limited liability and the separate legal entity doctrine in regard to corporate groups, leaving hundreds of current and future victims uncompensated, whilst assisting those who seek to minimize their losses and liabilities through manipulation of the corporate form, particularly in relation to groups of companies. A parent company is normally not liable for the legal infractions and unpaid debts of its subsidiaries. However, the direct imposition of duty of care on parent companies for torts committed by foreign subsidiaries has emerged as an exception to the bedrock company law principles of separate legal personality and limited liability. In *Chandler v Cape plc* [2012] EWCA Civ 525, [69], Arden LJ '……emphatically reject[ed] any suggestion that this court [was] in any way concerned with what is usually referred to as piercing the corporate veil.'

Arguments drawn from private international law's largely untapped global governance function inform the analysis in the article and the methodological pluralism manifested in the jurisdictional and choice of law solutions proposed. It is through the postulation of territoriality as a governing principle that private international law has been complicit in thwarting the ascendance of transnational corporate social responsibility. (See H Muir-Watt, 'Private International Law Beyond the Schism' (2011) 2 *Transnational Legal Theory* 347, 386) Private international law has kept corporate liability within the limits of local law through *forum non conveniens* and the *lex loci delicti commissi*. It is only recently that a challenge of territoriality has emerged in connection with corporate social responsibility.

Extraterritoriality is employed in this context as a method of framing a private international law problem rather than as an expression of outer limits. Therefore,

there is nothing pejorative about regulating companies at the place of their seat, and there is no reason why the state where a corporate group is based should not (and indeed should not be obliged to) sanction that group's international industrial misconduct on the same terms as similar domestic misconduct, in tort claims for harm suffered by third parties or stakeholders. (Muir-Watt (ibid) 386)

The idea of methodological pluralism, driven by the demands of global governance, can result in jurisdictional and choice of law rules that adapt to the needs of disadvantaged litigants from developing countries, and hold multinational companies to account. The tort-based parental duty of care approach has been utilized by English courts for holding a parent company accountable for the actions of its subsidiary. The limited liability and separate legal entity principles, as applied to corporate groups, are circumvented by the imposition of direct tortious liability on the parent company.

The UK Supreme Court's landmark decisions in *Vedanta v Lungowe* [2019] UKSC 20 and *Okpabi v Shell* [2021] UKSC 3 have granted jurisdiction and allowed such claims to proceed on the merits in English courts. The decisions facilitate victims of corporate human rights and environmental abuse by providing clarity on significant issues. Parent companies may assume a duty of care for the actions of their subsidiaries by issuing group-wide policies. Formal control is not necessarily the determining factor for liability, and any entity that is involved with the management of a particular function risks being held responsible for any damage flowing from the performance of that function. When evaluating whether a claimant can access substantial justice in another forum, English courts may consider the claimants lack of financial and litigation strength. The UK Supreme Court decisions are in alignment with the ethos of the UN Guiding Principles on Business and Human Rights ("Ruggie Principles"), particularly the pillar focusing on greater access by victims to an effective remedy. (The United Nations Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31 (2011))

Post-Brexit, the broader availability of the doctrine of *forum non conveniens* may help the English courts to ward off jurisdictional challenges against parent companies for damage caused by their subsidiaries at the outset. However, in exceptional cases, the claimant's lack of financial and litigation strength in the natural forum may be considered under the interests of justice limb of *The Spiliada* test, which motivate an English court not to stay proceedings. (*Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada)* [1987] AC 460) It has been argued

that if the Australian "clearly inappropriate forum" test for *forum non conveniens* is adopted, (*Voth v Manildra Flour Mills Pty Ltd* (1991) 65 A.L.J.R. 83 (HC); *Regie National des Usines Renault SA v Zhang* [2002] HCA 10 (HC)) it is unlikely that a foreign claimant seeking compensation from a parent company in an English court would see the case dismissed on *forum non conveniens* grounds. As a result, it is more likely that a disadvantaged foreign litigant will succeed in overcoming the jurisdictional hurdle when suing the parent company. From a comparative law standpoint, the adoption of the Australian common law variant of *forum non conveniens* will effectively synthesize *The Spiliada's* wide-ranging evaluative enquiry with the certainty and efficiency inherent in the mandatory rules of direct jurisdiction of the Brussels-Lugano regime.

In relation to choice of law for cross-border torts, the UK has wisely decided to adopt the Rome II Regulation as retained EU law. (See The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019) Article 4(1) of the Rome II Regulation will continue to lead to the application of the law of the country where the damage occurred. Post-Brexit, it remains to be seen whether the English courts would be more willing to displace the applicable law under Article 4(1) by applying Article 4(3) of Rome II more flexibly. The territorial limitations of the *lex loci damni* might be overcome by applying the principle of closest connection to select a more favorable law. The result-selectivism inherent in the idea of a favorable law is reminiscent of the regulatory approach of governmental interest analysis. (See SC Symeonides, *Codifying Choice of Law Around the World* (OUP 2014) 287) Article 7 of the Rome II Regulation provides the claimant in an environmental damage claim a choice of applicable law either pursuant to Article 4(1) or the law of the country in which the event giving rise to the damage occurred. Alternatively, any regulatory provisions in English law may be classified as overriding mandatory provisions of the law of the forum under Article 16 of the Rome II Regulation. The Rome II Regulation, under the guise of retained EU law, constitutes a unique category of law that is neither EU law nor English law *per se*. The interpretation of retained EU law will give rise to its own set of challenges. Ultimately, fidelity to EU law will have to be balanced with the ability of UK appellate courts to depart from retained EU law and develop their own jurisprudence.

Any future amendments to EU private international law will not affect the course of international civil litigation before English courts. (Cf A Dickinson, 'Walking

Solo – A New Path for the Conflict of Laws in England' Conflictoflaws.net, suggests engagement with the EU's reviews of the Rome I and II Regulations will provide a useful trigger for the UK to re-assess its own choice of law rules with a view to making appropriate changes) However, recent developments in the UK and Europe are a testament to the realization that the avenue for access to justice for aggrieved litigants may lead to parent companies that are now subject to greater accountability and due diligence.