5th German Conference for Young Researchers in Private International Law in Heidelberg – Conference Report

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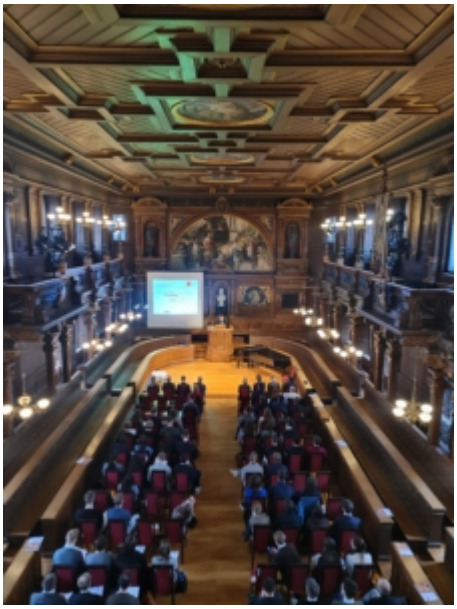


On February 14th and 15th, 2025, more than one hundred young academics gathered at Heidelberg University for the 5th German Conference for Young Researchers in Private International Law to discuss the topic "*Digital Transformation and Private International Law – Local Connections in Boundless Spaces*". The conference was organized by Andreas Engel, Sophia Schwemmer, Felix Berner, Aron Johanson, Markus Lieberknecht, Ann-Kathrin Voß, Charlotte Wendland and Anton Zimmermann.

The first day started with ***Professor Marc-Philippe Weller (Heidelberg University)***, director of the Institute for Comparative Law, Conflict of Laws and International Business Law, illustrating Heidelberg University's Private International Law tradition. For instance, *Max Gutzwiller*, who rejected renvoi as well as party autonomy in Private International Law, was the director of the Institute from 1929 until he was forced to emigrate to Switzerland in 1935. *Weller* ended his remarks with special emphasis on the late *Erik Jayme*, whose impact on Private International Law was vast. For example, *Jayme* advanced the "*two-stage theory of Private International Law*". Further, he introduced postmodern thoughts of mobility, multiculturalism and openness to Private International Law, arguing for every human to have a "*droit à la difference*".

Professor Christiane Wendehorst (University of Vienna) gave the keynote lecture on digital goods in Private International Law. She focused on the Private International Law treatment of digital goods regarding rights with third-party

effects. In her introduction, she differentiated between digital goods based on their level of exclusivity and the ability to duplicate them. Within crypto assets in particular, *Wendehorst* differentiated between tokens with an internal value such as bitcoin ("*intrinsic tokens*") and tokens that represent an asset outside the crypto system ("*extrinsic tokens*"). She deemed this differentiation to be of great importance to assess the applicable law: for extrinsic tokens, the statute of the represented asset must be considered. While some tokens are regulated, *e.g.* by Sec. 32 of the German Electronic Securities Act, *Wendehorst* expressed criticism towards an analogous application of such provisions, doubting the tokens' functional comparability. She then continued with a comparative approach and illustrated different national laws as well as international attempts at a more uniform Private International Law approach to rights *in rem* to digital assets. She emphasized rules under which a choice of law regarding rights with third-party effects is possible. For instance, the rules of the United States' UCC refer to the *lex fori* of the District of Columbia in absence of a choice of law as a fallback. A similar approach, looking first at a choice of law and last at the law of the forum state, was adopted under Principle 5 of the UNIDROIT Principles on Digital Assets and Private Law. *Wendehorst* concluded by explaining the purposes of the different approaches. In the end, *Wendehorst* made the plea for a more comprehensive solution and ideally more uniform conflict of laws rules to solve what she called a "*crisis in International Property Law*".

Johannes Weigl (LMU Munich) presented on data-related European conflict of laws questions. He first showed that the decades-old "*libertarian dream*" of a boundless internet did not come to fruition: data *is* regulated by states. Still, digital and analogous goods cannot be equated, leading to a call for a harmonized digital property law. Such a uniform law would cause the "*silent death*" of conflict of laws provisions regarding digital property. Still, *Weigl* identified four categories in which questions of conflict of laws might nonetheless arise. As to territorial limits of harmonization, he identified as a first category the territorial scope of EU digital regulation and as a second category data protection through the limitation of the free flow of data beyond the EU's borders. Regarding the substantive limits of harmonization, he considered a third category of potential conflict of laws challenges to be explicit references to national law and, as a fourth, substantive gaps of uniform law. *Weigl* went on to discuss limits of boundlessness using the examples of his first and third category. Regarding the territorial scope of EU digital regulations, many do not depend on the provider's

place of establishment but on whether the services are offered to persons in the EU. While *Weigl* classified those as one-sided conflict norms undoubtedly belonging to public law, he argued for their parallel application as public *and* private law conflicts rules. *Weigl* explained this approach to be – above all – teleologically convincing, securing the *effet utile* of EU law as well as international decisional harmony between public and private law. Further, *Weigl* illustrated the substantive limits of unification using the example of the third category, *i.e.* rules explicitly referring to national law. While some see such referential norms as conflict of laws rules, he argued against this classification, maintaining that referential norms are not conflict of laws rules but leave room for general conflicts rules. As this approach leads to the application of general conflict of laws rules, he identified some room for a more general legal policy discussion, *e.g.* about further harmonization of conflict of laws rules or the creation of internet specific conflicts rules.

Loïc Bréhin (Université Panthéon-Assas) addressed the law applicable to determine the illegality of digital content. Pursuant to Art. 3(h) DSA, content is illegal if it is not in compliance with EU law or the law of Member States. *Bréhin* criticized this provision as too generic; it does not determine the applicable law. He identified the root of the problem to be the diversity of legal relationships one could assess: there is a relationship between victim and publisher, victim and platform, as well as publisher and platform. *Bréhin* explained that to all relationships, different rules may apply and thereby cause inconsistencies. *Bréhin* acknowledged that the problem could be mitigated by solutions at the edge of conflict of laws theory such as internal market clauses or through fundamental rights. However, he found the most promising solution to lie at the heart of conflict of laws theory: substantive law consideration. He proposed to assess the legality of content under the law designated by the conflicts rule for torts invokable by the victim, either as applicable law or as law to be taken into consideration at the level of substantive law. *Bréhin* based this proposal on the rationale of Art. 3(h) DSA and Art. 14(4) DSA, maintaining that although digital platforms are often classified as private, they are in fact collective phenomena. He concluded that there is great potential in allowing for adjustments – in particular, when considering the platform's nature as a collective phenomenon.

Christina Lemke (University of Hamburg, Max Planck Institute for Comparative and International Private Law Hamburg) tackled questions

regarding the implementation of the digital euro as a European digital currency from a Private International Law perspective. *Lemke* introduced the topic by differentiating between cash, electronic money and the digital euro. She classified cash, on the one hand, to be a central bank liability to which individuals have property rights. Electronic money, on the other hand, is a means of payment that derives its value from a claim against a private institution. *Lemke* explained that in contrast, the digital euro is to be a central bank liability, aimed at supplementing cash payment. Neither the technological details nor the digital euro's legal nature are certain. *Lemke* maintained that the digital euro should not be classified as a mere claim, since it can be allocated to an individual. *Lemke* determined the most important question in relation to the digital euro to be the function of payment, *i.e.* the evaluation of the satisfaction of payment obligations. The first step in answering this question is the determination of the applicable law. To assess payment, one could look at the *lex causae*. *Lemke* emphasized the importance of the *lex monetae* principle for monetary units: Anchored in sovereignty, every state is entitled to its own currency. Hence, a monetary unit is governed by the sovereign that issued the unit. However, the digital euro is not a monetary *unit*, but a monetary *medium*. *Lemke* argued for the extension of the *lex monetae* principle to the monetary medium. *Lemke* concluded by raising the delicate questions on the EU's competence to develop private law regulations on the digital euro and the conflicts between EU institutions possibly involved.

Naivi Chikoc Barreda (University of Ottawa) elaborated on the rise of remote authentic instruments when notarizing beyond borders through online appearance. While notarial practice is increasingly shaped by digitization, there is potential for conflict when a party is in a different country than the notary. *Chikoc Barreda* started by giving a comparative overview of the three main approaches to deal with remote authentication: first the liberal approach, which allows all relations to be handled remotely, second the intermediate approach, which allows for exceptions in very protected fields of law (*e.g.* wills, divorces) and third the restrictive approach, which generally prohibits remote authentication with few exceptions (*e.g.* the incorporation of companies). *Chikoc Barreda* explained that this fragmentation leads to challenges for Private International Law. One of these challenges is to assess whether the *locus actus* is the state where the notary is located or the state from which the parties appear. While jurisdictions following the liberal approach view the location of the notary as decisive, restrictive jurisdictions tend to prioritize the state from which the parties appear. This leads

to the risk of limping legal relationships. Further, *Chikoc Barreda* showed that questions of equivalence of acts arise. Authenticity relies on a person's assessment by the notary. The classic notion was to reach such an assessment through physical presence. Under a more modern approach, in some jurisdictions, virtual presence suffices. In light of this, *Chikoc Barreda* elaborated on the assessment of the equivalence of notarial acts: while the state of origin will regularly apply the *lex auctoris* to determine equivalence, the receiving state might apply another law to the form. Last, *Chikoc Barreda* addressed the notary's international competence: some view a foreign notary as having unrestricted competence in line with the principle of free choice, while others only accept a restricted competence of the notary, demanding for a significant connection to the notary's state of origin. *Chikoc Barreda* concluded that the rise of remote authentication calls into question the *lex loci actus* rule, authenticity, and the notary's international competence.

Piotr Wilinski (Erasmus University Rotterdam) and ***Marciej Durbas (KKG Legal, Kraków)*** discussed the consequences of the use of AI by arbitral tribunals – in particular, potential challenges of arbitrators and awards. *Wilinski* and *Durbas* first introduced the legal framework, stating that there is no significant transnational law governing the use of AI in arbitration. However, there are emerging legal instruments, *e.g.* in the EU and the US. The EU AI Act governs individuals who rely on AI as deployers. A deployer status causes a duty to disclose. *Wilinski* and *Durbas* argued that arbitrators can be classified as deployers within the meaning of the EU AI Act, causing potential disclosure obligations. At the same time, there is only nascent soft law, namely the Silicon Valley AI guidelines and the SCC guidelines. These rules are quite rudimental. *Wilinski* and *Durbas* agreed that under the guidelines, decision-making may not be delegated to AI. Second, *Wilinski* and *Durbas* turned to potential challenges of arbitrators. They found that AI can be used to assist decision-making. Although most tasks one might delegate to AI do not *directly* affect decision-making, it does seem possible that steps such as AI-generated summaries of cases *indirectly* affect the decision. *Wilinski* and *Durbas* proposed that an improper use of AI could lead to challenges of the tribunal. Third, *Wilinski* and *Durbas* assessed the enforceability of awards rendered with the use of AI. Although AI is a new phenomenon, *Wilinski* and *Durbas* argued that the core of the problem is not. They drew a comparison of the use of AI on the one hand with the use of tribunal secretaries and independent legal research by arbitrators on the other hand.

Based on this comparison, they deduced that as long as AI is merely used for assistance with the award's drafting (even if its use was undisclosed), the award will likely stand. When it comes to decision-making, AI may be used for support in reasoning, but they found that to secure enforcement, the decision itself must stay with the tribunal. *Wilinski* and *Durbas* concluded that for now, as long as AI does not render the final decision, arbitrators can "*sleep safely*". However, they found a common standard to be preferrable, perhaps in the form of a traffic light approach.

The last speaker of the first day was ***Agatha Brandão (University of Luzern)***, who presented on the development of a large language model for Swiss cases on choice of law (available at https://www.choiceoflawdataverse.com). The project's goal was to use an open AI GPT to generate high-quality case law analysis comparable to Private International Law experts. Using a data set of 33 cases, the AI was to perform six tasks: to extract an abstract, to extract and summarize relevant facts, to extract the relevant Private International Law provisions, to classify and interpret the choice of law issue and to extract and interpret the court's position. *Brandão* maintained that the AI case analyzer succeeded in the extraction and classification of information. However, challenges arose when the AI case analyzer provided information that was secondary or irrelevant and when it produced lengthy responses. *Brandão* explained that in working on fixing these problems, the research team focused on phrasing prompts as precisely as possible: if the output did not match the researchers' expectations, the instructions were most likely not sufficiently comprehensive. At the end of the experiment, each category of tasks was evaluated based on specific criteria in a peer-reviewed process. Overall, the AI case analyzer had a success rate of 92 %. While there were still roughly 10 % of outcomes one might want to modify, *Brandão* emphasized that the AI case analyzer saves valuable time – in particular, for the extraction and classification of information and when given sufficiently precise instructions. *Brandão* concluded that large language models can indeed be a valuable support – not unlike real-life Private International Law experts.

The second day of the conference started with parallel panel discussions. In the first panel, ***Christoph König (BSP Berlin)*** gave an impulse rooted in legal history on the decentralization of blockchain technology and delegalization. *König* drew parallels from discussions surrounding the creation of a *lex mercatoria* in the past century. The second panel focused on the pioneering role of arbitration

in the use of digital tools in contrast to the use of digital means in German and Swiss courts. First, ***Cedric Schad (University of St. Gallen)*** gave an overview over the advanced, but not boundless use of digital instruments in arbitration. In particular, he illustrated the option of conducting proceedings via video conference and the use of case management platforms. Second, ***Marco Andjic (Osnabrück University)*** presented on attempts at digitization in German courts: he found that the main obstacle of remote proceedings is not German law, but the equipment of courts. Third, ***Nadine Boss (University of St. Gallen)*** elaborated on the Swiss approach. While there is no option of virtual court proceedings yet, there are attempts at reform. It is possible to use digital tools such as e-mail, but uncommon due to perceived risks regarding service. In the third panel, ***Raffael Müller (Heidelberg University)*** presented on international product liability and AI. *Müller* considered the applicability of Art. 5 of the Rome II Regulation to Artificial Intelligence. He emphasized the importance of placing AI on the market and its interplay with the AI Act, in particular regarding the AI Act's territorial scope. Fourth, ***Peter Moser (LMU Munich)*** addressed connecting factors for declarations of intent made by AI. *Moser* differentiated between an "*ePerson*" and an "*AI agent*". An "*ePerson*", on the one hand, can be legally competent and capable. As Art. 7 of the Introductory Act to the German Civil Code concerns natural persons, *Moser* found that a corporate law connecting factor might be more appropriate. An "*AI agent*", on the other hand, is no proper legal entity. Hence, the attribution of its actions is critical. *Moser* found it most appropriate to apply Art. 10 Rome I Regulation, as the exclusion in Art. 1(2)(g) Rome I Regulation concerns natural persons – not an "*AI agent*". In the fifth panel, ***Leon Marcel Kahl (University of Vienna)*** illustrated how the special construction of the Unified Patent Court leads to conflict of laws questions. Which conflict of laws rules the Unified Patent Court applies is determined by a "*ladder*" in Art. 24(2) UPCA. According to its lit. c, the applicable national conflicts rules are to be determined by the court. However, since the Court of First Instance comprises a central chamber as well as local and regional chambers, it is not clear which national provisions are to be applied.

After the panel discussions, ***Linda Kuschel (Bucerius Law School)*** elaborated on whether cross-border electronic service is a sovereign act on foreign territory. In Germany, regular e-mails do not suffice for proper service, but the use of a special electronic attorney mailbox ("*beA*") does. Internationally, there are cases of service through e-mail and even social media platforms. First, *Kuschel*

identified the European Service Regulation and the Hague Service Convention as the relevant rules for cross-border service. Next, she discussed the Public International Law qualification of service. The prevailing opinion considers the service of court documents to be an exercise of state authority. This is where *Kuschel* differentiated: while she qualified the legal consequences of service as an exercise of state authority, she did not find the same to apply to the mere act of gaining knowledge of a document and its content, *e.g.* through service by private means. She then tackled the question of localization of electronic service. First, one could see electronic service as a type of fictional service. But while fictional service is a mere last resort, electronic service could become the norm – therefore, *Kuschel* negated a comparability. Second, one could view the internet as an exterritorial space that cannot be attributed to any sovereign state, but the internet is not truly boundless. Third, one could draw an analogy to analogous life and treat electronic service parallel to analogous service, as territorial borders are emulated in the digital space. However, equating analogous and electronic service would lead to a fiction. *Kuschel* assessed this to be particularly problematic if one – in line with the prevailing opinion – classifies service in a foreign state as an act of sovereignty on foreign territory. In light of these shortcomings, *Kuschel* deemed it necessary to assess electronic service by its own metrics. She concluded that only service on foreign territory through means of sovereign power leads to a violation of the principle of territoriality while in contrast, service by means of communication accessible to private persons should not violate Public International Law.

The last presentation was delivered by ***Adrian Hemler (University of Konstanz)***, who illustrated options and boundaries of a fully digital judicial activity from abroad. *Hemler* reported a trend towards virtual and digital proceedings, asserting that these developments can only be expected to accelerate. The advantages in virtual proceedings lie in more efficiency, lower costs as well as in making the profession of judge more flexible and, hence, more attractive. While *Hemler* found possibly affected principles of German procedural law to be publicity, immediacy and orality, he assessed that their violation can be avoided. However, *Hemler* explained the currently prevailing opinion to be that

working from abroad as a judge violates the foreign country's sovereignty. *Hemler* went on to reference *Kelsen*, who understood what *ought* to be at the core of law – not what *is*. Building on this, *Hemler* differentiated between on the one hand the scope of application of legal norms, which operates on the level of what *ought* to be. This category does not violate foreign sovereignty, even when it extends beyond a state's territorial borders. On the other hand, *Hemler* allocated the practical implementation and enforcement of legal rules on the level of what *is*. *Hemler* argued that this latter category should only be allowed with the other country's permission – otherwise, Public International Law violations can arise. Within this grid, according to *Hemler*, rendering judgements from abroad does not interfere in the foreign state's sovereignty.

A conference volume will be published by Mohr Siebeck later this year. The 6th German Conference for Young Researchers in Private International Law will take place at LMU Munich in 2027.

Trending Topics in German PIL 2024 (Part 1 – Illegal Gambling and "Volkswagen")

At the end of each year I publish an article (in German) about the Conflict of Laws developments in Germany of the last twelve months, covering more or less the year 2024 and the last months of 2023. I thought it would be interesting for the readers of this blog to get an overview over those topics that seem to be most trending.

The article focuses on the following topics:

1. Restitution of Money lost in Illegal Gambling
2. Applicable Law in the Dieselgate litigation
3. The (Non-)Valitidy of Online Marriages

4. New German conflict-of-law rules regarding gender afiliation / identity
5. Reforms in international name law

I will start in this post with the two first areas that are mainly dealing with questions of Rome I and Rome II while in my follow-up post I will focus on the three areas that are not harmonized by EU law (yet) and are mainly questions of family law.

This is not a resumen of the original article as it contains a very detailed analysis of sometimes very specific questions of German PIL. I do not want to bore the readers of this blog with those specificities. Those interested in knowing those details can find the article here (no free access).

I would be really curious to hear whether these or similar cases are also moving courts in other jurisdictions and how courts deal with them. So, please write me via mail or in the comments to the post if you have similar or very different experiences on those cases.

Part 1 – Illegal Gambling and "Volkswagen"

I will start with the two areas that are mainly questions of Rome I and Rome II while in my follow-up post I will focus on the three areas that are not harmonized by EU law (yet) and are mainly questions of family law.

1. Restitution of Money lost in Illegal Gambling

Cases involving the recovery of money lost to illegal online gambling are being heard in courts across Germany and probably across Europe. Usually the cases are as follows: A German consumer visits a website offering online gambling. These websites are in German and offer German support by phone or email with German phone numbers etc. However, the provider is based in Malta or – mainly before Brexit – Gibraltar. After becoming a member, the consumer has to open a bank account with the provider. He transfers money from his (German) account to the account in Malta and uses money from the latter account to buy coins to

gamble. In Germany, in order to offer online gambling, you need a licence under German law. The operators in these cases are usually licensed under Maltese law but not under German law.

- In terms of **applicable law**, Rome I and Rome II are fairly straightforward. Since the question in this case is whether the plaintiff can claim the return of money lost on the basis of an illegal and therefore void contract, Rome I is applicable as it also governs claims arising from contracts that are ineffective or of doubtful validity. It is therefore irrelevant that German law would provide for restitution on the basis of unjust enrichment (*Leistungskondiktion*), which generally is a non-contractual obligation that falls within the scope of Rome II. As we have a consumer and a professional, **Article 6 Rome I** has to be applied. As I described the case above, there are also little doubts that the website is (also) directed to Germany and therefore German law as the country of the habitual residence of the consumer applies. To this conclusion came, e.g. the German BGH, but also the Austrian OGH.
- The application of German law leads to the invalidity of the contract pursuant to sec. 134 BGB, which **declares a contract null and void if it violates a law that prohibits that contract**. In order to determine whether the law prohibits this concrete gaming contract, the question arises as to the **geographical scope of the prohibition on offering gambling/casino contracts without a German licence**. As this prohibition is based on German public law, it is limited to gambling/casino games that take place on German territory. So far, German courts have applied the German prohibition in cases where the consumer was in Germany when playing. One court (LG Stuttgart, 11.9.2024 – 27 O 137/23, 18.09.2024 – 27 O 176/23) even considered it sufficient if the consumer was in Germany when opening the bank account with the gaming provider from which the money was then transferred to the games. The court ruled that it did not matter whether the consumer played from Germany, whether the provider was located abroad or whether the bank account from which the money was finally transferred to the game was located in another country. It appears that Austrian courts have similar cases to decide, but see this point differently, the Austrian OGH decided that the Austrian rules prohibiting unlicensed gambling are limited to providers based in Austria.

- As you probably know, the Austrian OGH made a request to the CJEU to determine the place of the damage (**Article 4 para. 1 Rome II**) in a case where the consumer/player transfers the money from the local bank account to the account of the Bank in Malta and then makes payments from this second bank account. So far, German courts were hesitant to take this road. The way over unjust enrichment resulting from a invalid contract has the charming effect that you do not have to apply Rome II's general tort rule (Article 4 para. 1 Rome II) and dive into the discussion how to determine the place of economic damages. Under German law, however, Rome II may be relevant in cases where the claim is not based on unjust enrichment but on **intentional damage inflicted in a manner offending common decency** (*vorsätzliche sittenwidrige Schädigung*), a special offence which is more difficult to prove (sec. 826 BGB). In some few cases, where sec. 826 was in question, courts still did try to avoid the discussion how to locate this economic loss. One simply applied the law of the place of the habitual residence of the consumer/gamer as the play from which the transfer from the first bank account was effected (OLG Karlsruhe 22.12.2023 – 19 U 7/23; 19.12.2023 – 19 U 14/23). Other courts avoided the discussion altogether by applying Article 4 para. 3 Rome II directly – leading to an accessory connection to the law applied to the gambling contract (LG Hagen, 5.10.2023).

One footnote to the whole scenario: There is a case pending at the CJEU that might make the whole discussion superfluous (Case C-440/23). The German practice of distributing gambling licences might be classified as unlawful under EU law at least for some older cases. The question by the CJEU to be decided is whether this results in a ban on reclaiming losses from this gambling.

2. Place of Damage in Volkswagen Cases

The Volkswagen emission scandal cases, in German dubbed "Dieselgate", are about claims for damages that end customers are asserting against Volkswagen (or other vehicle manufacturers). The damage is that they bought a car with a manipulated defeat device which, under certain conditions of the type-approval test, resulted in lower emissions than in normal operation. As a result, vehicles with higher emissions than permitted were registered and marketed. Volkswagen

is currently being sued throughout Europe. Most cases are initiated by consumers who did not buy directly from the manufacturer but through a local dealer, so there is no direct contractual link. As German law is in some respects restrictive in awarding damages to final consumers, it seems to be a strategy of Volkswagen to come to German law.

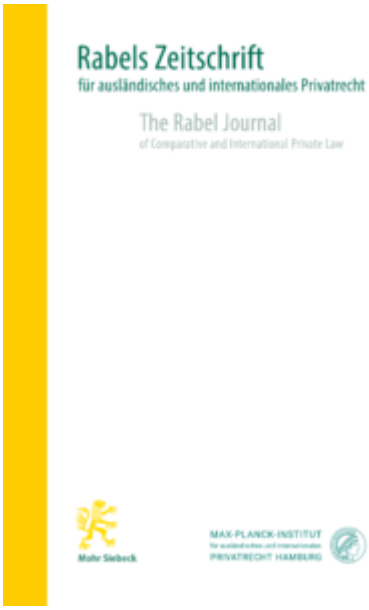
- **Rome I**: As far as Volkswagen argued that there is an implicit contract between Volkswagen and the end consumer resulting from a warranty contract in case with a Spanish end buyer, a German court did not follow that argument or at least came to the conclusion that this is a question of Spanish law as such a warranty contract would have to be characterized as a consumer contract in the sense of Article 6 para. 1 Rome I Regulation (LG Ingolstadt 27.10.2023 – 81 O 3625/19)
- In general German courts apply Article 4 para. 1 Rome II and determine the law of the damage following the CJEU decision in VKI and MA v FCA Italy SpA: The place of damage is where the damaging contract is concluded or, in case the places are different, where the vehicle in question is handed over. The BGH (and lower instance courts, e.g. OLG Dresden, 07.11.2023 – 4 U 1712/22 – not free available online) followed that reasoning. One court had to consider whether, instead, Article 7 Rome II Regulation (**environmental damages**) would be applicable, as the increased emissions would also damage the environment. The LG Ingolstadt did not follow that line of argument, as the damage claimed in the concrete case was a pure economic loss, not an environmental damage.

What are your thoughts? How do courts treat these cases in your jurisdictions (I guess there are many cases as well)? Do you have different or similar issues in discussion?

Stay tuned for the second part of this article which will move to trending topics in family law…

Out now: Issue 4/2024 of RabelsZ

The last issue of RabelsZ 2024 has just been released. It contains the following contributions (which are all available Open Access: CC BY 4.0):



Holger Fleischer & Simon Horn, Unternehmensskandale und skandalgetriebene Regulierung: Die Stavisky-Affäre als Prüfstein (Corporate Scandals and Scandal-Driven Regulation: The Stavisky Affair as Touchstone), pp. 648–693, https://doi.org/10.1628/rabelsz-2024-0062

> *This article is an opening contribution to a new research program on corporate scandals and their legal treatment around the world. In addition to addressing civil and criminal sanctions, the main focus lies on the widespread but under-researched phenomenon of scandal-driven reform legislation. Selected case studies from the past and the present will help to create a better picture of the connections between business scandals and legal regulation. A first touchstone for such systematic comparative scandal-based research is found in early 1930s France with the Stavisky affair – a case that not only kept the business and financial world in suspense, but one that also shook the political foundations of the Third Republic.*

Chukwuma Samuel Adesina Okoli & Richard Frimpong Oppong, Enhancing the Draft African Principles on the Law Applicable to International Commercial

Contracts – Innovations for the African Context, pp. 694–733, https://doi.org/10.1628/rabelsz-2024-0050

This article examines the draft African Principles on the Law Applicable to International Commercial Contracts, evaluating current and proposed choice of law rules in numerous African countries and incorporating global comparative perspectives. It argues that the African Principles should not only largely echo regional/supranational and international instruments like the Rome I Regulation and the Hague Principles on the Law Applicable to Commercial Contracts but should innovate to address the specific needs of the African context. The article suggests reforms in several areas: the scope of the African Principles, protection of weaker parties such as consumers and employees, government contracts, non-state law, and in provisions for the law applicable in the absence of choice.

Béligh Elbalti, The Applicable Law in Succession Matters in the MENA Arab Jurisdictions – Special Focus on Interfaith Successions and Difference of Religion as an Impediment to Inheritance, pp. 734–759, https://doi.org/10.1628/rabelsz-2024-0057

This article examines the question of the law applicable in cross-border successions in the MENA Arab region, with a particular focus on the issue of interfaith succession. It shows that the private international law treatment of succession matters depends largely on derogative factors, in particular the involvement of Islam as the religion of one of the parties. In cases where all the parties are foreign non-Muslims, the conflict of laws approach is usually observed, and the foreign law is applied. However, if one of the parties is a Muslim, nationality as the connecting factor is effectively supplanted by the religion of the parties, and the lex fori is applied. Unlike the usual perspective, which typically examines this approach through the lens of public policy, this article argues that the practice, of substituting the lex fori for the ordinarily applicable law in disputes involving Muslims, is based on an »unwritten principle of private international law« that effectively designates the Islamic religion as a de facto connecting factor under the cover of public policy.

Martin Lutschounig, Eingeschränkte Anwendung des lex fori-Prinzips bei internationalen Verkehrsunfällen (Limited Application of the lex fori Principle for Cross-border Traffic Accidents), pp. 760–786, https://doi.org/10.1628/rabelsz-2024-0061

According to the principle of forum regit processum, a court deciding a dispute applies its own national procedural law even in cases which are substantively governed by foreign law. It is therefore crucial how the individual legal question is categorized, namely whether it is classified as substantive or procedural. According to the prevailing opinion, this decision is made applying the lex fori. The situation is different, however, under the Rome II Regulation, as also the scope of the applicable law (lex causae) is subject to an autonomous interpretation. The article argues that the question of whether a foreign rule is to be classified as procedural or substantive is, therefore, not a question of national but of autonomous European law. A classification according to the lex fori would, by contrast, bear the danger of leading to different scopes of application of the lex causae depending on the place of jurisdiction. These problems are illustrated with reference to traffic accident cases in which a litigant seeks recovery of a supplementary claim, such as the pretrial costs of an expert opinion, an out-of-court settlement, or lump-sum costs.

As always, this issue also contains several reviews of literature in the fields of private international law, international civil procedure and comparative law (pp. 787–828). The issue closes with an index covering all contributions of the year 2024 (pp. 829–854).

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 6/2024: Abstracts

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

S. Deuring: **Gender and International Private Law – Comments on the New Article 7a of the German Introductory Act to the Civil Code**

Although the attribution of a specific gender to a person has become less important in the German legal order, it can still be relevant. Thus, the rules of descent set out in Sections 1591 et seqq. of the Civil Code provide that a mother is a woman and a father a man. The legislature has therefore done well to address private international law issues of gender attribution in a new specific gender conflict rule, Art. 7a of the Introductory Act to the Civil Code. In doing so, it primarily opted for a nationality-based approach: According to Art. 7a para. 1, a person’s birth gender is determined by the law of the state of whom the person is a citizen. This is remarkable because, in other areas, conflict rules increasingly hold a person’s habitual residence determinative. At the same time, Art. 7a para. 2 provides that a person who habitually resides in Germany can opt for the application of German law to the change of their gender or first name later in life. The following article will outline and discuss these legislative decisions and other questions regarding the scope of Art. 7a.

P. Wittum: **No conflict of laws fit for the digital age? Law applicable to contracts for the supply of digital content and digital services**

This article shows that Directive (EU) 2019/770 on contracts for digital content and services does not harmonise perfectly with the existing EU conflict of laws. Regarding consumer contracts, Art. 6(1) of the Rome I Regulation convinces through its contract type neutrality; however, the service exception of para. 4(a)

does not fit to digital products. Correctly viewed, the Geoblocking Regulation does not affect the directing criterion of para. 1(b). If Member States made use of the option to extend the consumer concept under Directive (EU) 2019/770, conflict of laws would in most cases defeat such an implementation. On the other hand, the trader's recourse pursuant to Art. 20 of the Directive (EU) 2019/770 is defective. The chain of recourse (implementation variant 1) can be broken if the CISG or a third-country legal system apply. In comparison, the direct claim (implementation variant 2) is superior as the loss cannot be taken by someone halfway up the chain of recourse. The eCommerce Directive, which would also render the direct claim meaningless, is not applicable. If both implementation variants collide, the redress system breaks down entirely. In terms of legal policy, the trader's recourse should be abolished.

P. Vollrath: **Protection of EU Member States' Treaties with Third Countries in European Private International Law**

In a decision from 2020, the Supreme Court of the United Kingdom authorised the enforcement of an ICSID-award in the United Kingdom. This arbitral award being incompatible with primary European Union law, the Supreme Court applied Art. 351(1) TFEU to the ICSID Convention, a multilateral treaty signed by both member states and non-member states. Although all the relevant facts of the case were located inside the EU, the Supreme Court held that "rights" of non-member states were affected and therefore a derogation from primary law was permitted. The Supreme Court reached this conclusion characterising the obligations under the ICSID Convention as obligations *erga omnes partes*. Following an infringement procedure initiated by the European Commission, the CJEU rejected this reasoning in its judgment of 14 March 2024. For the first time, the CJEU affirms its authority to interpret (at least certain aspects of) member states' international agreements with non-member states also in proceedings under Art. 267 TFEU. The case note proposes criteria in order to determine whether such agreements in the field of private international law fall within the scope of Art. 351(1) TFEU and analyses the decision's consequences for the court's *TNT Express Nederland* case law.

C. Rüsing: **International jurisdiction and applicable law for holiday letting agreements**

According to Art. 24(1) of the Brussels Ibis Regulation, in proceedings which have as their object tenancies of immovable property, the courts of the Member State in which the property is situated have exclusive jurisdiction. In *Roompot Service* (C-497/22), the CJEU held that this provision does not apply in a case, in which a tourism professional lets holiday accommodation situated in a holiday park and offers other services in return for a lump sum. The court based its reasoning on a very broad understanding of the concept of "complex contracts" and on a case-by-case assessment leading to considerable legal uncertainty. The article criticises this and proposes an alternative justification that would generally exempt contracts with tourism professionals from exclusive jurisdiction.

P. Huber/M. Boussihmad: **Recognition of a Member State decision to establish a liability limitation fund under maritime law and its effects on obligation claims**

In this case, the Bundesgerichtshof dealt with the procedural effects of a Member State decision to establish a maritime liability limitation fund. In the past, the CJEU had already classified such decisions as recognisable under the Brussels?I Regulation. The Bundesgerichtshof now drew the consequences and strictly adhered to the extension of the effect to other Member States in accordance with Art. 36(1) Brussels I Regulation. In addition, the Bundesgerichtshof commented on disputed questions of private international law concerning the limitation of liability under maritime law.

J. O. Flindt: **Lugano Convention VS national procedural law: How to classify a cause of action between a spouse and a third party**

The international jurisdiction of courts is being increasingly harmonised within the European Union and also among the EFTA states. However, the relevant provisions are scattered across various legal acts. Thus, delimitation problems arise. To delineate the scope of the application of the various regulations, a precise qualification of the legal dispute is required. The Higher Regional Court of

Karlsruhe had to decide on a claim for restitution under property law, which a spouse asserted against a third party by exercising a special right of asserting the ineffectiveness of the other spouses' disposition (Section 1368 of the German Civil Code). The question arose as to whether this was a general civil matter subject to the Lugano Convention or whether it was a matrimonial property law matter for which there was an exception under Art. 1 para. 2 lit. a) var. 5 Lugano Convention. The Higher Regional Court of Karlsruhe makes a distinction according to whether the matrimonial property regime aspect is the main issue of the dispute or merely a preliminary issue. The court concludes that it is only a preliminary issue. The legal dispute should therefore be categorised under property law, which means that the Lugano Convention applies. The author retraces this decision and shows that the question of delimitation is also relevant to the Brussels I Regulation and the EU Regulation on Matrimonial Property. He comes to another solution and argues in favour of a differentiated approach.

F. Berner: **Restitution of Wrongs in the Conflict of Laws – a critical evaluation of OLG München, 23.3.2023 – 29 U 3365/17**

The classification of restitutionary claims within the Conflict of Laws remains difficult. In particular, the classification of the German "Eingriffskondiktion" is unclear. The Higher Regional Court in Munich *(Oberlandesgericht München)* held that under both the European and the national jurisdictional regimes, "Eingriffskondiktion" were to be understood as tort claims. Under the Rome II Regulation, however, the court classified such claims not as tort claims but as claims falling under Art. 10 ("unjust enrichment"). The case note argues that the court was correct in its classification under European Conflict of Laws but wrong in its classification regarding the German rules of jurisdiction. Furthermore, the case note challenges the court's assumption that German national law governs the question of whether one of the defendants had sufficiently contested the court's jurisdiction.

G. Cuniberti: **French Supreme Court Excludes Insolvency Proceedings from Scope of Nationality Based Jurisdiction (Art. 14, C. civ.)**

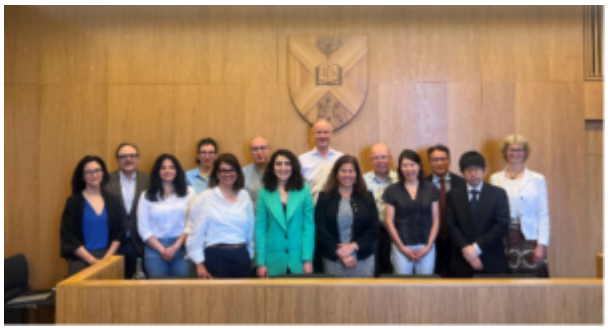
In a judgement of 12 June 2024, the French Supreme Court limited the material

scope of nationality-based jurisdiction (Article 14 of the Civil Code) by excluding from its scope insolvency proceedings. The judgment is remarkable as it is the first time in years that the court limits the operation of this exorbitant rule of jurisdiction. The reasons given by the court, however, are substance specific, which makes it unlikely that the judgment announces a more far reaching reconsideration of the rule, in particular on the ground of fairness to foreigners.

M. Klein: **Spanish default interest between insurance law and procedure**

In Spanish insurance law, there is a provision (Art. 20 para. 4 subpara. 1 LCS) that mandates courts to sentence insurance company defendants to pay default interest without petition by the claimant. The Spanish law is intended to penalise insurance companies for their default. As the provision relates to procedural as well as to substantive law, the question of characterisation arises. This paper argues to characterise it as substantive (insurance) law. Furthermore, it discusses criteria that the CJEU has recently used to differentiate between procedural and substantive law. Finally, this paper suggests liberal construction of the Rome Regulations with respect to Art. 20 para. 4 subpara. 1 LCS and similar provisions that relate to both procedural and substantive law.

Global Value Chains and Transnational Private Law Workshop at Edinburgh Law School – Report



By Zihao Fan (Ph.D. Candidate in Law, Peking University Law School)

The 'Global Value Chains and Transnational Private Law' workshop was successfully held at Edinburgh Law School in a hybrid format from June 23 to 25, 2024. This project is funded by the Law Schools Global League (LSGL), convened by Prof. Verónica Ruiz Abou-Nigm (Edinburgh Law School) and Prof. Michael Nietsch (EBS Law School). The workshop attracted scholars and researchers from 15 universities and institutions worldwide. Over two days, participants shared inspiring work in progress and engaged in discussions on how transnational private law influences and shapes global supply chains. During the workshop plans for the upcoming publication and dissemination were discussed. This overview aims to briefly summarise the research outcomes presented during the workshop (following the sequence of the presentations).

Morning Session on 24 June

Dr. Catherine Pedamon (Westminster Law School) and Dr. Simone Lamont-Black (Edinburgh Law School) first introduced a previous related workshop held in Edinburgh Law School on 'Sustainability in the Food Supply Chain: Challenges and the Role of Law & Policy'. This project consists of contributions from a variety of legal and policy areas at the UK, EU, and international levels, focusing on the role of law (including commercial law, contract law, competition law, and corporate law) in resolving regulatory difficulties and opportunities in food supply chains, with a particular emphasis on sustainability and food security, therefore highly connected to the current project.

Afterwards, Dr. Pedamon and Dr. Lamont-Black also presented their research titled 'Responsible Contracting in Agri-Food Supply Chains: Mitigating Power Asymmetries on the Road Towards Sustainability'. They pointed out that recent events like the Covid-19 pandemic, the war in Ukraine, climate-related price

instability, and inflation have severely impacted the global economy, creating an unprecedented food crisis. Complex food supply chains reveal power imbalances, with larger trading partners often imposing unfair practices on less powerful suppliers. This research aims to shed light on the issues surrounding governance gaps and the various challenges and opportunities that arise from private international law, examining UK domestic law pertaining to food supply relationships, taking the EU level regulation into account, and providing potential examples of its implementation.

Dr. Francesca Farrington (School of Law, University of Aberdeen) and Dr. Nevena Jevremovic (School of Law, University of Aberdeen) then presented their work titled 'Private International Law and the Race to the Bottom in Labour Standards: The Case of *Begum v Maran*', discussed the recent Court of Appeal case, *Begum v Maran*. They noted that the literature has generally focused on the unique arguments relating to duty of care, and the Court of Appeal's conclusion that the claim was not fanciful – it illustrates that the Rome II Regulation does little to prevent a 'race to the bottom' in labour standards especially given that corporate liability was a rapidly expanding field of law. They also discussed the different results when courts adopting different characterization methods on business-related human rights (BHR) claims.

Dr. Sara Sanchez Fernandez (IE Law School, Spain) shared her research on 'Civil Liability under the CS3D: International Jurisdiction Rules and Access to an Effective Legal Remedy'. She first introduced the background: the EU recently enacted the Corporate Sustainability Due Diligence Directive (CS3D), which establishes due diligence responsibilities and civil consequences for violations of such obligations. The CS3D establishes rules for organizations' risk-based due diligence requirements across their entire value chain. Her research centred on the assurance of access to Member State courts for CS3D-related issues, scrutinizing the interaction between CS3D, international jurisdiction in the Brussels I bis Regulation, and the foreign jurisdiction rules of Member States. She also explored the potential solutions for cases where entities are non-EU domiciled.

First Afternoon Session on 24 June

Prof. Toshiyuki Kono (Faculty of Law, Kyushu University) and Prof. Ren Yatsunami (Faculty of Law, Kyushu University) presented their work on 'The

Global Value Chain & Network Responsibility: The New Possibilities of Private Ordering'. They pointed it out that in recent years, policymakers and scholars from numerous disciplines have concentrated on mapping the outlines of the modern global value chain, with the concept of 'network' emerging as a repeating theme. They investigate the relevance of viewing networks as lenses through which better understand the GVC and its regulation, particularly in terms of human rights and environmental issues. Besides, they also examine the failure of the network and related legal responses, suggesting that a mixture of public and private norms, hard laws and soft laws should be considered as alternatives.

Prof. Carlos Vasquez (Georgetown Law School, US) then discussed his research on 'Applicable Law in BHR Cases'. He focused on the applicable substantive law in BHR suits brought in developed countries (usually the home state of the defendant corporation) for injuries suffered in developing countries (the host state). He centred on both vertical and horizontal choice-of-law inquiries: 'vertical' refers to the decision-making process that involves choosing between international law and national (or subnational) law as the primary source of relevant law, while 'horizontal' refers to the decision between applying the legal system of the host country or the legal system of the home State.

Dr. David Capper (School of Law, Queen's University Belfast) presented his research next, on 'Procedural Aspects of Transnational BHR-Litigation'. Continuing with BHR cases he discussed how victims of tortious conduct by multinational corporations are seeking remedy against the latter in a Global North jurisdiction, with a focus on the UK. He illustrated the procedural mechanisms in the UK that are available for mass tort litigation of this kind and suggested that the Group Litigation Order (GLO) would be the appropriate mechanism in the majority of cases of mass tort litigation. Then he elaborated on several aspects of GLO, including group registers, case management, and costs. Finally, he suggested examining the *Okpabi* case to see how GLOs work.

Second Afternoon Session on 24 June

Prof. Irene-Marie Esser (School of Law, University of Glasgow) and Dr. Christopher Riley (Durham Law School) presented their research on 'Groups and Outsiders in the Context of Tort and Human Rights Violations', examining the challenges that arise in protecting the interests of 'outsiders' from corporate groups' misbehaviour. They argued that regulations applied to individual 'stand-

alone' companies suffer weaknesses when applied to corporate groups. By using the UK's experience of enforcing human rights norms against groups and of applying tort law, they demonstrate the implications of an 'enterprise approach' for regulation.

Dr. Catherine Pedamon (Westminster Law School) shared her work in progress on the French duty of vigilance. The French *Loi de Vigilance* has been enacted for seven years, yet its first decision was rendered on 5th December 2023. It still appears to be in the initial stages of development, not only due to its groundbreaking nature but also the obstacles to enforcement. She then shared some key preconditions on the applicability, the public availability of a vigilance liability plan, compensation for damages due to the companies' failure to comply, etc. She also introduced the recent developments in the related cases in France.

Prof. Michael Nietsch discussed his research, 'Corporate Accountability of Multinational Enterprises for Human Rights Abuses – Navigating Separate Legal Entity and Attribution under Delict', elaborating the growing interest in corporate accountability for human rights violations in the German judicial system. In contrast to the UK, Germany has seen few incidents of damages lawsuit with the implementation of statutory due diligence procedures under the Supply Chain Due Diligence Act 2021 (*Lieferkettensorgfaltspflichtengesetz*, LkSG). Nonetheless, legal academics continue to discuss the basis for corporate liability for human rights violations under German private law, as well as the proper standards of care that arise as a result. This is a fundamental issue in German delict law and the separation of legal entities. He argued that the LkSG has ruled out private liability based on a violation of the Act's due diligence criteria while allowing such liability on other grounds, which adds to the complexity.

At the end of the day, Dr. Juan Manuel Amaya Castro (Faculty of Law, University of the Andes, Colombia) presented his work on 'Global Value Chains with a Human Face'. He discussed the definition of social traceability from a legal perspective and its requirements, purpose, and reasons for tracing a particular good in the supply chain. He then explained how traceability is mandated in due diligence and reporting legislation, pointing out that practices including auditing and certification, feedback loops, administrative guidelines, and civil liability standards should be considered.

Morning Session on 25 June

Dr. Biset Sena Güne? (Max Planck Institute for Comparative and International Private Law, Hamburg, Germany) started the day with her research, 'Harmonisation of Private International Law Rules to Promote Sustainability in Global Value Chains?'. She elaborated that the role of private international law is frequently constrained concerning sustainability. In most cases, the ability to reach a truly sustainable outcome is dependent on the applicable private legislation. When this is the case, it is difficult to justify the need for harmonisation of current private international law standards without simultaneously focusing on uniform private law regulatory remedies. Nonetheless, she suggested that the need for harmonisation of private international law standards governing corporate social responsibility should be explored further and proposed a comparative approach for that further research.

The morning session on 25 June also discussed the plans for the upcoming publication and the dissemination conference to be held in Germany in 2025.

In summary, the workshop enabled fruitful discussion of work-in-progress and shared insights on the complexities of global value chains and the role of transnational private law. Key topics included sustainability, corporate accountability, and legal frameworks affecting global supply chains. The project successfully fosters international collaboration amongst and beyond LSGL researchers, nurturing comparative and interdisciplinary approaches. Participants gained a deeper understanding and ideas to take the research forward to address regulatory and coordination challenges in furthering sustainability in global commerce.

The Corporate Sustainability Due Diligence Directive: PIL and Litigation Aspects

Written by Eduardo Silva de Freitas (Erasmus University Rotterdam) and Xandra

Kramer (Erasmus University Rotterdam/Utrecht University), members of the Vici project Affordable Access to Justice, financed by the Dutch Research Council (NWO), www.euciviljustice.eu.

Introduction

After extensive negotiations, on 24 April 2024, the European Parliament approved the Corporate Sustainability Due Diligence Directive (CSDDD or CS3D) as part of the EU Green Deal. Considering the intensive discussions, multiple changes, and the upcoming elections in view, the fate of the Commission's proposal has been uncertain. The Directive marks an important step in human rights and environmental protection, aiming to foster sustainable and responsible corporate behaviour throughout global value chains. Some Member States have incorporated similar acts already, and the Directive will expand this to the other Member States, which will also ensure a level playing field for companies operating in the EU. It mandates that companies, along with their associated partners in the supply chain, manufacturing, and distribution, must take steps to avoid, halt, or reduce any negative effects they may have on human rights and the environment. The Directive will apply to big EU companies (generally those with more than 1,000 employees and a worldwide turnover of more than EUR 450 000 000) but also to companies established under the law of a third country that meet the Directive's criteria (Article 2 CSDDD).

Among the CSDDD's key provisions is the rule on civil liability enshrined in Article 29. This rule states that companies shall be held liable for damages caused in breach of the Directive's provisions. Accompanying such a rule are also some provisions that deal with matters of civil procedure and conflict of laws, though as has been pointed out earlier on this blog by Kilimcioglu, Kruger, and Van Hof, the CSDDD is mostly silent on PIL. When the Commission proposal was adopted in 2022, Michaels and Sommerfeld elaborated earlier on this blog on the consequences of the absence of rules on jurisdiction in the CSDDD and referred to the Recommendation of GEDIP in this regard. The limited attention for PIL aspects in the CSDDD is does not mean that the importance of corporate sustainability and human rights is not on the radar of the European policy maker and legislator. In the context of both the ongoing evaluation of the Rome II Regulation and Brussels I-bis Regulation this has been flagged as a topic of interest.

This blog post briefly discusses the CSDDD rules on conflict of laws and (international) civil procedure, which underscore the growing importance of both in corporate sustainability and human rights agendas.

Conflict of laws and overriding mandatory provisions

The role of PIL in the agenda of business and human rights has increasingly received scholarly attention. Noteworthy works addressing this intersection include recent contributions by Lehmann (2020), as well as volumes 380 (Van Loon, 2016) and 385 (Marrella, 2017) of the *Collected Courses of The Hague Academy of International Law*. Additionally, pertinent insights can be found in the collaborative effort of Van Loon, Michaels, and Ruiz Abou-Nigm (eds) in their comprehensive publication, The Private Side of Transforming our World (2021). From an older date is a 2014 special issue of Erasmus Law Review, co-edited by Kramer and Carballo Piñeiro on the role of PIL in contemporary society.

While the CSDDD contains only a singular rule on PIL, specifically concerning overriding mandatory provisions, it should be viewed in the broader EU discourse. The relevance of PIL for the interaction between business and human rights extends beyond this single provision, as evidenced by the Commission's active role in shaping this development. As indicated earlier, this is further indicated by studies on both the Rome II and Brussels I-bis Regulations, both of which delve into the complexities of PIL within the business and human rights debate. Thus, the CSDDD's rule should not be viewed in isolation, but as part of a larger, dynamic conversation on PIL in the EU.

The mentioned Rome II Evaluation Study (2021) commissioned by the Commission, summarised on this blog here, assessed Rome II's applicability to matters pertaining to business and human rights in detail. With regards to overriding mandatory provisions, the study outlines several initiatives at national level in the Member States that were discussed or approved to enact a mandatory corporate duty of care regarding human rights and the environment. Likewise, the Brussels I-bis Evaluation Study (2023) also examined how the Brussels I-bis applies to business and human rights disputes. Within the EU, establishing jurisdiction over EU-domiciled companies is straightforward under the Regulation, but it becomes complex for third-country domiciled defendants. Claims against such defendants are not covered by the Regulation, leaving jurisdiction to national laws, resulting in varied rules among Member States.

Forum necessitatis and co-defendants rules may help assert jurisdiction, but lack harmonization across Europe. In this context, as explained by Michaels and Sommerfeld, while the CSDDD applies to certain non-EU firms based on their turnover in the EU (Article 2(2)), jurisdictional issues persist for actions against non-EU defendants in EU courts, with jurisdiction typically governed by national provisions. This could result in limited access to justice within the EU if relevant national rules do not establish jurisdiction.

As was mentioned above, the CSDDD is mostly silent on PIL. However, it does include a rule on overriding mandatory provisions enshrined in Article 29(7) and accompanying Recital 90. This rule aims to ensure the application of the (implemented) rules of the CSSDD regardless of the *lex causae*. Under EU private international law rules, the application of overriding mandatory provisions is also enabled by Article 9 Rome I Regulation and Article 16 Rome II Regulation.

Article 29(7) CSDDD states that 'Member States shall ensure that the provisions of national law transposing' Article 29 CSDDD 'are of overriding mandatory application in cases where the law applicable to claims to that effect is not the national law of a Member State'. A similar provision to that effect can be found in the draft UN Legally Binding Instrument on business and human rights.

This means that the national laws transposing Article 29 CSDDD in their liability systems are applicable irrespective of any other conflict of law provisions in force. This rule also extends to the matters of civil procedure addressed below, as explicitly stated by Recital 90 CSDDD. On this matter, the potential for the CSDDD to become a dominant global regulatory force and overshadow existing and future national regulations, which is only beneficial if effectively prevents and remedies corporate abuses, has been highlighted. However, there is concern that it might mitigate the development of stronger regulatory frameworks in other countries (see FIDH, 2022).

Matters of civil procedure

The rules contained in the CSDDD that pertain to civil procedure are essentially laid down in Article 29(3). These rules on civil procedure naturally apply to both domestic cases and cross-border situations.

Firstly, Article 29(3)(b) CSDDD states that the costs of judicial proceedings seeking to establish the civil liability of companies under the Directive shall not

be prohibitively expensive. A report published in 2020 by the EU Agency for Fundamental Rights (FRA) on 'Business and human rights – access to remedy' stressed that private individuals face significant financial risks when resorting to courts due to high costs such as lawyer fees, expert opinions, and potential liability for the opposing party's costs, particularly daunting in cases involving large companies. Suggestions for improvement include making litigation costs proportionate to damages, providing free legal representation through state bodies, and setting thresholds for the losing party's financial obligations, along with supporting civil society organizations offering financial and legal aid to victims of business-related human rights abuses. Secondly, Article 29(3)(c) CSDDD provides the possibility for claimants to seek definitive and provisional injunctive measures, including summarily, of both a restorative or enforcing nature, to ensure compliance with the Directive. Lastly, Article 29(3)(d) and (e) CSDDD, respectively, outline rules on collective actions and disclosure of evidence, the latter two explained below.

Collective actions

The FRA report mentioned above emphasized that many legal systems in the EU lack effective collective redress mechanisms, leading to limited opportunities for claimants to seek financial compensation for business-related human rights abuses. Existing options often apply only to specific types of cases, such as consumer and environmental protection, with procedural complexities further restricting their scope. Article 29(3)(d) CSDDD ensures that collective action mechanisms are put in place to enforce the rights of claimants injured by infringements of the Directive's rules. This provision states that 'Member States shall ensure that […] reasonable conditions are provided for under which any alleged injured party may *authorise*' the initiation of such proceedings. In our view, if this provision is interpreted in a similar way as the alike-rule on private enforcement contained in Article 80(1) GDPR (which uses the synonym 'mandate'), then this collective action mechanism shall operate on an opt-in basis (see Pato & Rodriguez-Pineau, 2021). The wording of both provisions points to a necessity of explicit consent from those wishing to be bound by such actions. Recital 84 CSDDD further underscores this interpretation by stating that this authorisation should be 'based on the explicit consent of the alleged injured party'. Importantly, this is unrelated to the collective enforcement of other obligations, outside the scope of the CSDDD, that may impinge upon the types of

companies listed in Article 3(1)(a) CSDDD, like those stemming from financial law and insurance law (e.g. UCITS Directive, EMD, Solvency II, AIFMD, MiFID II, and PSD2). All the latter are included in Annex I Representative Actions Directive (RAD) and therefore may be collectively enforced on an opt-out basis pursuant to Article 9(2) RAD (see Recital 84 CSDDD).

Furthermore, Article 29(3)(d) CSDDD grants the Member States the power to set conditions under which 'a trade union, non-governmental human rights or environmental organisation or other non-governmental organisation, and, in accordance with national law, national human rights' institutions' may be authorized to bring such collective actions. The Directive exemplifies these conditions by mentioning a minimum period of actual public activity and a non-profit status akin to, respectively, Article 4(3)(a) and (c) RAD, as well as Article 80(1) GDPR.

In our view, the most relevant aspect of the collective action mechanism set by the CSDDD is that it provides for the ability to claim damages. Indeed, Article 29(3)(d) CSDDD allows the entities referred therein to 'enforce the rights of the alleged injured party', without making any exceptions as to which rights. This is an important recognition of the potentially pervasive procedural imbalance that can affect claimants' abilities to pursue damages against multinational corporations in cases of widespread harm (see Kramer & Carballo Piñeiro, 2014; Biard & Kramer, 2018; Buxbaum, *Collected Courses of The Hague Academy of International Law* 399, 2019).

Disclosure of evidence

Finally, Article 29(3)(e) CSDDD enacts a regime of disclosure of evidence in claims seeking to establish the civil liability of companies under the Directive. This provision, similar to Article 6 IP Enforcement Directive, Article 5 Antitrust Damages Directive, and Article 18 RAD, seeks to remedy the procedural imbalance of evidentiary deficiency, existent when there is economic disparity between the parties and unequal access to factual materials (see Vandenbussche, 2019).

When a claim is filed and the claimant provides a reasoned justification along with reasonably available facts and evidence supporting their claim for damages, courts can order the disclosure of evidence held by the company. This disclosure

must adhere to national procedural laws. If such a disclosure is requested in a cross-border setting within the EU, the Taking of Evidence Regulation also applies.

Courts must limit the disclosure of evidence to what is necessary and proportionate to support the potential claim for damages and the preservation of evidence. Factors considered in determining proportionality include the extent to which the claim or defense is supported by available evidence, the scope and cost of disclosure, the legitimate interests of all parties (including third parties), and the need to prevent irrelevant searches for information.

If the evidence contains confidential information, especially regarding third parties, Member States must ensure that national courts have the authority to order its disclosure if relevant to the claim for damages. Effective measures must be in place to protect this confidential information when disclosed.

Outlook

The CSDDD regime on civil procedure described above largely follows the EU's 'silo mentality' (Voet, 2018) of enacting sectoral-based and uncoordinated collective action mechanisms tied to a specific area of substantive law, such as consumer law, non-discrimination law, and environmental law (e.g. UCTD, RED, UCPD, IED, EIAD, etc.). An important difference being, however, that this time the RAD is already in force and being implemented. On this matter, Recital 84 CSDDD states that Article 29(3)(d) CSDDD 'should not be interpreted as requiring the Member States to extend the provisions of their national law' implementing the RAD.

However, being the first EU-wide collective action mechanism and prompting historically collective action-sceptic Member States to adapt accordingly, it is conceptually challenging to posit that the RAD would not potentially influence regimes on collective actions beyond consumer law, including the CSDDD. In this context, it would not deviate significantly from current developments if some Member States opted for a straightforward extension of their existing and RAD-adapted collective action regimes to the CSDDD, though that demands caution to the latter's specificities and is not legally required.

Another aspect worthy of attention is how these collective actions would be funded. Since such actions may seek damages compensation for widespread harm

under Article 29 CSDDD, they can become notably complex and, consequently, expensive. At the same time, a large number of injured persons can mean that these collective actions will ask for high sums in damages. These two factors combined make these collective actions an enticing investment opportunity for the commercial third-party litigation funding (TPF) industry. The CSDDD does not make any reservations in this regard, leaving ample room for Member States to regulate, or not, the involvement of commercial TPF. A report published in mid last year by Kramer, Tzankova, Hoevenaars, and Van Doorn by request of the Dutch Ministry of Justice and Security found that nearly all collective actions seeking damages in the Netherlands make use of commercial TPF. This underscores the crucial role commercial TPF plays in financing such actions, significantly impacting access to justice.

Moreover, the complexities surrounding the integration of PIL into specialized legislation such as the CSDDD, the GDPR, and the anti-SLAPPs Directive reflect a tension between the European Parliament and the Commission. This tension revolves around the extent to which PIL should be addressed within specialized frameworks versus traditional EU legislation on PIL. So far, a clear direction in this regard is lacking, which will trigger further discussions and potential shifts in approach within the EU legislative landscape.

International tech litigation reaches the next level: collective actions against TikTok and Google

Written by Xandra Kramer (Erasmus University Rotterdam/Utrecht University) & Eduardo Silva de Freitas (Erasmus University Rotterdam), members of the Vici project Affordable Access to Justice, financed by the Dutch Research Council (NWO), www.euciviljustice.eu.

Introduction

We have reported on the Dutch WAMCA procedure for collective actions in a number of previous blogposts. This collective action procedure was introduced on 1 January 2020, enabling claims for damages, and has since resulted in a stream of (interim) judgments addressing different aspects in the preliminary stages of the procedure. This includes questions on the admissibility and funding requirements, some of which are also of importance as examples for the rolling out of the Representative Action Directive for consumers in other Member States. It also poses very interesting questions of private international law, as in particular the collective actions for damages against tech giants are usually international cases. We refer in particular to earlier blogposts on international jurisdiction in the privacy case against *TikTok* and the referral to the CJEU regarding international jurisdiction under the Brussels I-bis Regulation in the competition case against *Apple.*

In this blogpost we focus on two follow-up interim judgments: one in the collective action against TikTok entities and the other against Google. The latter case is being discussed due to its striking similarity to the case against Apple.

The next steps in the *TikTok* collective action

The collective action against *TikTok* that was brought before the Amsterdam District Court under the Dutch WAMCA in 2021. Three representative organisations brought the claim against seven *TikTok* entities located in different countries, on the basis of violation of the Code of Conduct of the Dutch Media Act and the EU General Data Protection Regulation (GDPR). The series of claims include, among others, the destruction of unlawfully obtained personal data, the implementation of an effective system for age registration, parental permission and control, measures to ensure compliance with the Dutch Media Act and the GDPR as well as the compensation of material and immaterial damages.

In an earlier blogpost we reported that the Amsterdam District Court ruled that it had international jurisdiction under the Brussels I-bis Regulation and the GDPR. In the follow-up of this case, the court reviewed the admissibility requirements, one of which concerns the funding and securing that there is not conflict of interest (see Tzankova and Kramer, 2021). This has led to another interim judgment focusing on the assessment of the third party funding agreement as two out of the three claimant organisations had concluded such agreement, as reported on this blog here. In short, the court conditioned the admissibility of the

representative claimant organisations on amendments of the agreement with the commercial funder due to concerns related to the control of the procedure and the potential excessiveness of the fee. The court provided as a guideline that the percentage should be determined in such a way that it is expected that, in total, the financers can receive a maximum of five times the amount invested.

On 10 January 2024 the latest interim judgment was rendered. Without providing further details the Amsterdam District Court concluded that the required adjustments to the funding agreement had been made and that the clauses that had raised concern had been deleted or amended. It considered that the independence of the claimants in taking procedural decisions was sufficiently guaranteed. The court declared the representative organisations admissible, appointing two of them as Exclusive Representative (one for minors and the other for adults) based on their experience, the number of represented people they represent, their collaboration and support. The court confirmed its statement made in a previous interim judgment that the claim for immaterial damages is inadmissible as that would require an assessment per victim, which it considered impossible in a collective action. This is admittedly a setback for the collective protection of privacy rights, notably similar to the one following the 2021 United Kingdom Supreme Court ruling in *Lloyd* v *Google*.

With this last interim judgment the preliminary hurdles have been overcome, and the court proceeded to provide further guidelines as to the opt-out and opt-in as the next step. The WAMCA is an opt-out procedure, but to foreign parties in principle an opt-in regime applies. The collective action was aimed representing people in the Netherlands, but was extended to people who have moved abroad during the procedure, and these are under the opt-in rule. The information on opt-out and opt-in will be widely published.

It remains to be seen how the case will progress considering the further procedural decisions and the assessment on the merits.

The claim against Google and its private international law implications

Another case with an international dimension is the collective action for damages against Google that was filed under the WAMCA, alleging anticompetitive practices concerning the handling of the app store (DC Amsterdam, 27 December 2023, ECLI:NL:RBAMS:2023:8425; in Dutch). This development comes amidst a

landscape marked by high-profile antitrust collective actions with international dimensions, such as the one filed against Apple, in which there is an ongoing legal battle regarding Apple's alleged anticompetitive behavior in the market for app distribution and in-app products on iOS devices. Cases like these are either pending before courts or under investigation by competition authorities worldwide, reflecting a broader global trend towards increased scrutiny of antitrust practices in the digital marketplace.

In the present case, the claimant organisation argues that the anticompetitive nature of Google's business stems from a collection of practices rather than an isolated practice. Such a collection of practices would shield Google from nearly all possible competition and allow it to charge excessive fees due to its dominance in the market. The practices that, taken together, form this anticompetitive behaviour are essentially:

(i) The bundling of pre-installed apps, including Google's Play Store, with the licensing of the Android operating system to the manufacturers of smartphones;

(ii) The imposition that transactions related to the Play Store be undertaken only within Google's own payment system;

(iii) The charging of a fee of 30% from the app's developer, which the claimant organisation deems abusive and only possible due to Google's dominant position created by the abovementioned practices.

Based on these allegations, the claimant organisation accuses Google of engaging in mutually exclusive and exploitative practices, thereby abusing a dominant position in a manner contrary to Article 102 TFEU. This case unfolds within a broader global context where antitrust actions against Google's Play Store, its payment system, and the bundling with the Android operating system have gained significant momentum. Just last December, Google reached a settlement in a multidistrict litigation involving all 50 states of the United States, the District of Columbia, Puerto Rico, and the Virgin Islands. The settlement addressed issues very similar to those raised in this case, as explicitly outlined in the agreement. The Competition and Markets Authority in the United Kingdom is also conducting an antitrust investigation into these aspects of Google's operations. Furthermore, the practice of pre-installing Google apps as a requirement for obtaining a license to use their app store is under investigation by the Brazilian Competition

Authority.

From a private international law perspective, this case closely resembles another one against Apple referred to the CJEU by the District Court of Amsterdam and discussed earlier in this blog, in which similar antitrust claims were raised due to the handling of the app store and the exclusionary design of the respective payment system. However, unlike the collective action against Apple, in this case the District Court of Amsterdam clearly did not refer the case to the CJEU and instead decided by itself whether it had jurisdiction to hear the claim. And again, like the Apple case, the court was called upon to decide on both international jurisdiction and its territorial jurisdiction within the Netherlands.

International jurisdiction

The collective action under the Dutch WAMCA in the Google case was filed against a total of eight defendants. Two of the defendants (Google Netherlands B.V. and Google Netherlands Holdings B.V.) against whom the claim was filed are established in the Netherlands, and for them the standard rule of Article 4 Brussels I-bis Regulation applies. There are also three other defendants (Google Ireland Limited, Google Commerce Limited, and Google Payment Ireland Limited) established in another EU Member State, namely Ireland. With regards to these defendants, the court also assessed whether it had jurisdiction based on the Brussels I-bis Regulation. Finally, there are three defendants based outside of the EU – Alphabet Inc. and Google LLC in the United States and Google Payment Limited in the United Kingdom. Jurisdiction with regards to these defendants based outside of the EU was established under the pertinent rules contained in the Dutch Code of Civil Procedure (DCCP).

The court initiated its assessment by recognizing that, due to the lack of jurisdiction rules specifically addressing collective actions in both the Brussels I-bis Regulation and the Dutch Code of Civil Procedure, the standard rules within these frameworks should be applied. The court's reasoning was based on the established principle that no differentiation exists between individual and collective actions when determining jurisdiction. The court primarily conducted its assessment regarding whether the Netherlands could be considered the *Erfolgsort* under Article 7(2) of the Brussels I-bis Regulation, mostly *ex officio*, as this was not a point of contention between the parties.

The court's view is that the criteria from Case C-27/17 *flyLAL-Lithuanian Airlines* (ECLI:EU:C:2018:533) should be applied, according to which the location of the market affected by the anticompetitive practice is the *Erfolgsort*. The location of the damage is where the initial and direct harm occurred, which primarily involves users overpaying for purchases made on the Play Store. In the present case the court, applying such criteria, decided that the Netherlands can be considered the *Erfolgsort*, given that the claimant organisation represents users that make purchases and reside in the Netherlands. This reasoning is very similar to the one used by the District Court of Amsterdam in deciding to refer the Apple case to the CJEU.

Territorial jurisdiction within the Netherlands

With regards to the jurisdiction of the District Court of Amsterdam to hear this collective action in which the claimant organisation sues on behalf of all the users residing in the Netherlands, the decision contains an assessment starting from the CJEU ruling in Case C-30/20 *Volvo* (ECLI:EU:C:2021:604). Such ruling states that Article 7(2) Brussels I-bis Regulation grants jurisdiction over claims for damages due to infringement of Article 101 TFEU to the court where the goods were purchased. If purchases were made in multiple locations, jurisdiction lies with the court where the alleged victim's registered office is located.

In the case at hand, given the mobile nature of the purchases, it is not possible to pinpoint a specific location. However, under the criteria just mentioned, the District Court of Amsterdam has jurisdiction over the victims' registered offices for those residing in Amsterdam in accordance with both Article 7(2) Brussels I-bis Regulation (Google Ireland Limited, Google Commerce Limited, and Google Payment Ireland Limited) and the similar provision in Article 102 DCCP (Alphabet Inc., Google LLC, and Google Payment Limited).

For users residing elsewhere in the Netherlands, the parties agreed that the District Court of Amsterdam would serve as the chosen forum for users who are not based in Amsterdam. The court decided that, with regards to Alphabet Inc., Google LLC, and Google Payment Limited, this is possible under Article 108(1) DCCP on choice of court. As to Google Ireland Limited, Google Commerce Limited, and Google Payment Ireland Limited, the court interpreted Article 7(2) Brussels I-bis Regulation in light of the principle of party autonomy (see Kramer and Themeli, 2016) as enshrined in Recitals 15 and 19, as well as Article 25

Brussels I-bis Regulation. The court also noted that no issues concerning exclusive jurisdiction arise in the present case and made a reference to the rule contained in Article 19(1) Brussels I-bis Regulation according to which the protective rule of Article 18 Brussels I-bis Regulation can be set aside by mutual agreement during pending proceedings.

Finally, the court decided that centralising this claim under its jurisdiction is justified under the principle of sound administration of justice and the prevention of parallel proceedings. In the court's understanding, the goal of Article 7 Brussels I-bis Regulation is to place the claim before the court that is better suited to process it given the connection between the two and, given that the mobile nature of the purchases gives rise to damages all over the Netherlands, such a court would be difficult to designate. Hence the need for respecting the choice of court agreement.

Applicable law

The court established the law applicable to the present dispute under Article 6(3)(a) Rome II Regulation. The court used the same reasoning it had laid out to establish jurisdiction in the Netherlands as the *Erfolgsort*, since it is the market affected by the alleged anticompetitive practices where the users concerned reside and made their purchases. The court also considered the claimant organization's argument that, according to Article 10(1) of the Rome II Regulation, the Dutch law of unjust enrichment could govern the claim. Although the court did not provide extensive elaboration, it agreed with this view.

Funding aspects of the claim against Google

Lastly, in a naturally similar way as regarding the TikTok claim explained above, the court assessed the funding arrangements of the claim against Google under the requirements set by the WAMCA. The court took issue with the fact that the funding arrangement entered by the claimant organisation is somewhat indirect, since it is apparent that the funder itself relies on another funder which is not a part of the agreement presented to the court. Under these circumstances, the court deems itself unable to properly assess the claimant organisation's independence from the "actual" funder and its relationship with the remuneration structure.

For this reason, the court ordered the claimant organisation to resubmit the

agreement, which it is allowed to do in two versions. One version of the agreement will be presented in full and will be available to the court only, to assess it in its entirety. The other version, also available to Google, will have the parts concerning the overall budget for the claim concealed. However, the parts concerning the funder's compensation share must remain legible for discussion around the organisation's independence from the funder, and confirmation that such agreement reflects the whole funding arrangement of the claim was also required.

Third Issue of Journal of Private International Law for 2023

The third issue of the Journal of Private International Law for 2023 has just been published. It contains the following articles:

Chukwuma Samuel Adesina Okoli & Abubakri Yekini, "Implied jurisdiction agreements in international commercial contracts: a global comparative perspective"

This article examines the principles of implied jurisdiction agreements and their validity on a global scale. While the existing scholarly literature primarily focuses on express jurisdiction agreements, this study addresses the evident lack of scholarly research works on implied jurisdiction agreements. As such, it contributes to an understanding of implied jurisdiction agreements, providing valuable insights into their practical implications for international commercial contracts. The paper's central question is whether implied jurisdiction agreements are globally valid and should be enforced. To answer this question, the article explores primary and secondary sources from various jurisdictions around the world, including common law, civil law, and mixed legal systems, together with insights from experts in commercial conflict of laws. The paper argues for a cautious approach to the validity of implied jurisdiction agreements, highlighting their potential complexities and uncertainties. It contends that such

agreements may lead to needless jurisdictional controversies and distract from the emerging global consensus on international jurisdiction grounds. Given these considerations, the paper concludes that promoting clear and explicit jurisdiction agreements, as supported by the extant international legal frameworks, such as the Hague Conventions of 2005 and 2019, the EU Brussels Ia Regulation, and the Lugano Convention, would provide a more predictable basis for resolving cross-border disputes.

Veena Srirangam, "The governing law of contribution claims: looking beyond *Roberts v SSAFA*"

The governing law of claims for contribution, where the applicable law of the underlying claim is a foreign law, has long posed a knotty problem in English private international law. The Supreme Court's decision in Roberts v Soldiers, Sailors, Airmen and Families Association considered this issue in the context of the common law choice of law rules. This article considers the decision in Roberts and claims for contribution falling within the scope of the Rome II Regulation, the Rome I Regulation as well as the Hague Trusts Convention. It is argued here that claims for contribution arising out of the same liability should be considered as "parasitic" on the underlying claim and should prima facie be governed by the applicable law of the underlying claim.

Weitao Wong, "A principled conflict of laws characterisation of fraud in letters of credit"

This article examines how the issue of fraud in letters of credit (which constitutes a critical exception to the autonomy principle) should be characterised in a conflict of laws analysis; and consequently, which law should apply to determine if fraud has been established. It argues that the fraud issue has thus far been incorrectly subsumed within the letter of credit contract, rather than being correctly characterised as a separate and independent issue. On the basis of fundamental conflict of laws principles and policies, this article advocates that the fraud issue should be characterised separately as a tortious/delictual issue. It then discusses how some of the difficulties of such a conflicts characterisation may be adequately addressed.

Zlatan Meški, Anita Durakovi, Jasmina Alihodži, Shafiqul Hassan & Šejla Handali, “Recognition of talaq in European states – in search of a uniform approach”

The paper aims to answer the question if and under which conditions a talaq performed in an Islamic state may be recognised in European states. The authors provide an analysis of various forms of talaq performed in different Islamic states and reach conclusions on the effects that may be recognised in Europe, with an outlook towards a possible uniform approach. The recognition of talaqs in England and Wales, Germany and Bosnia and Herzegovina are used as examples for different solutions to similar problems before European courts. The EU legislator has not adopted a uniform approach to the application and recognition of talaqs in the EU. The CJEU got it wrong in Sahyouni II and missed the opportunity to contribute to a uniform EU policy but its subsequent decision in TB opens the door for the CJEU to overturn Sahyouni II if another case concerning a non-EU talaq divorce comes before them. The Hague Divorce Convention of 1970 is an international instrument that provides for appropriate solutions. Ratification by more states in which a talaq is a legally effective form of divorce and by more European states would provide the much-needed security for families moving from Islamic states to Europe.

Sharon Shakargy, “Capacitating personal capacity: cross-border regulation of guardianship alternatives for adults”

Increasing global mobility of people with disabilities, changes in the measures employed to protect them, and growing awareness of their human rights significantly challenge the existing cross-border protection of adults around the world. National legislations are slow to react to this challenge, and the existing solutions are often insufficient. While the Hague Convention on the Protection of Adults (2000) is imperfect, it offers a solution to this problem. This article discusses the changing approach towards people with disabilities and their rights and demonstrates the incompatibility of the local protection of adults with their cross-border protection. The article further explores possible solutions to this problem. It then explains why the Hague Adults Convention is the best solution to this problem and what changes should and could be made in order to improve the

solution offered by the Convention even further.

Anna Natalia Schulz, "The principle of the best interests of the child and the principle of mutual trust in the justice systems of EU Member States – Return of a child in cross-border cases within the EU in the light of EU Council Regulation 2019/1111 and the situation in Poland"

The suspension of the enforcement of a return order under the Hague Convention on the Civil Aspects of International Child Abduction and EU law, as well as the admissibility of modifying such an order, remains one of the most sensitive matters in cross-border family disputes. The article analyses EU Council Regulations 2201/2003 (Brussels IIa) and 2019/1111 (Brussels IIb) in terms of the objectives set by the EU legislator: strengthening the protection of the interests of the child and mutual trust of Member States in their justice systems. The text also refers to Polish law as an example of the evolution of the approach to the analysed issues. It presents its development, highlights the solutions concerning the competences of the Ombudsman for Children, and provides an assessment of the current legal situation in the context of Brussels IIb.

Bich Ngoc Du, "Practical application of the reciprocity principle in the recognition and enforcement of foreign judgments in civil and commercial matters in Vietnam"

The reciprocity principle was first introduced in Vietnam by Decree 83/1998 to allow for the recognition of foreign non-executionary judgments, decisions on family and marriage matters in Vietnam. It was then adapted in the first Civil Procedure Code in 2004 and was later modified in the current Civil Procedure Code for the purpose of recognition and enforcement of foreign judgments from non-treaty countries. This article examines the practical application of this reciprocity principle in Vietnamese courts by analysing cases in which they have recognised or denied recognition to foreign judgments in civil and commercial matters (that is, non-family matters), as well as a recent development in the Supreme Court's Resolution Draft on guidance on the recognition and enforcement of foreign judgments, which adopts a presumed reciprocity approach. The article concludes that the courts have not applied the reciprocity

principle in a consistent manner. The resolution for this current problem is for the presumed reciprocity approach to be promulgated soon to facilitate a uniform application in the local courts.

Meltem Ece Oba, "Procedural issues in international bankruptcy under Turkish law"

This article examines the procedural issues in a bankruptcy lawsuit with a foreign element from a Turkish private international law perspective. The article begins with a brief overview of the bankruptcy procedure under Turkish domestic law. It then explores the jurisdiction of Turkish courts in an international bankruptcy lawsuit in detail. The effects of a foreign choice of court agreement and parallel proceedings are also addressed in discussing the international jurisdiction of Turkish courts. The article also touches upon the debates on the possible legal grounds for the inclusion of assets located abroad to the bankruptcy estate established before Turkish courts considering the approaches of universalism and territorialism. Finally, problems related to the recognition of foreign bankruptcy decisions are examined.

Review Article:

Uglješa Grušic, "Transboundary pollution at the intersection of private and public international law"

This article reviews Guillaume Laganière's *Liability for Transboundary Pollution at the Intersection of Public and Private International Law* (Bloomsbury Publishing, 2022). This book makes a valuable contribution to private international law scholarship by exploring the relationship between public and private international law and the regulatory function of private international law in relation to transboundary pollution. The book's focus on transboundary pollution, however, is narrow. A comprehensive and nuanced regulatory response to contemporary environmental challenges in private international law must also address cases where transnational corporations and global value chains are sued in their home states for environmental damage caused in developing states

Van Calster on European Private International Law (4th Edition)

The fourth edition of Geert van Calster's (KU Leuven) *European Private International Law* has just been published by Hart/Bloomsbury. It focuses on those instruments and developments that are most significant in commercial litigation. I had the privilege to review the first edition of the book in the *Law Quarterly Review* and I am certain that the latest edition will live up to the expectations.

The blurb reads as follows:

This classic textbook provides a thorough overview of European private international law. It is essential reading for both practitioners and students of private international law and transnational litigation, wherever they may be located: the European rules extend beyond European shores.

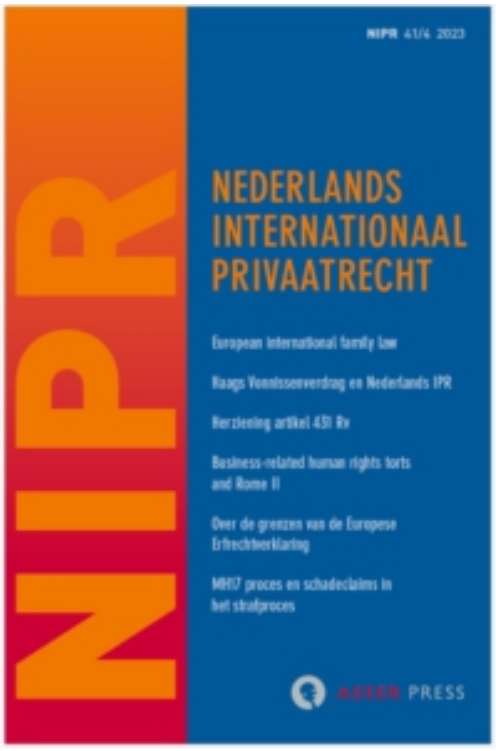
Opening with foundational questions, the book clearly explains the subject's central tenets: the Brussels I, Rome I and Rome II Regulations (jurisdiction, applicable law for contracts and tort). Additional chapters explore private international law and insolvency, freedom of establishment, and the impact of private international law on corporate social responsibility. The relevant Hague instruments, and the impact of Brexit, are fully integrated in the various chapters.

Drawing on the author's rich experience, the new edition retains the book's hallmarks of insight and clarity of expression ensuring it maintains its position as the leading textbook in the field.

Dutch Journal of PIL (NIPR) – issue 2023/4

The latest issue of the Dutch Journal on Private International Law (NIPR) has just been published

NIPR 2023 issue 4



EDITORIAL

I. Sumner, The next stops on the European international family law train / p. 569-571

Abstract
The European legislature is not yet finished with the Europeanisation of private international family law. This editorial briefly introduces two new proposals, namely the Proposal for a European Parentage Regulation and the Proposal for a European Adult Protection Regulation.

ARTICLES

B. van Houtert, Het Haags Vonnissenverdrag: een game changer in Nederland? Een rechtsvergelijkende analyse tussen het verdrag en het commune IPR / p. 573-596

Abstract
On 1 September 2023, the 2019 Hague Judgments Convention (HJC) entered into force in the Netherlands. This article examines whether the HJC can be considered as a game changer in the Netherlands. Therefore, a legal comparison has been made between the HJC and Dutch Private International Law (PIL) on the recognition and enforcement of non-EU judgments in civil and commercial matters. This article shows that the HJC can promote the recognition and enforcement of judgments rendered by non-EU countries in the Netherlands mainly because of the facultative nature of the grounds for refusal in Article 7 HJC. Furthermore, the complementary effect of Dutch PIL on the basis of Article 15 HJC facilitates recognition as some indirect grounds of jurisdiction are broader or less stringent, and some grounds are lacking in Article 5(1) HJC. Compared to the uncodified Dutch PIL, the HJC provides procedural advantages as well as legal certainty that is beneficial to cross-border trade, mobility and dispute resolution. Moreover, preserving the foreign judgment, instead of replacement by a Dutch judgment, serves to respect the sovereignty of states as well as international comity. Despite the limited scope of application, there is an added value of the HJC in the Netherlands because of its possible application by analogy in the Dutch courts, as a Supreme Court's ruling shows. The Convention can also be an inspiration for the future codification of the Dutch PIL on the recognition and enforcement of foreign judgments regarding civil matters. Furthermore, the application of the Convention by analogy will contribute to international legal harmony. Based on the aforementioned (potential) benefits and added value of the HJC, this article concludes that this Convention can be considered as a game changer in the Netherlands.

K.J. Krzeminski, Te goed van vertrouwen? Een kanttekening bij het advies van de Staatscommissie voor het Internationaal Privaatrecht tot herziening van artikel 431 Rv / p. 597-618

Abstract
In February 2023, the Dutch Standing Government Committee for Private International Law rendered its advice on the possible revision of Article 431 Dutch Code of Civil Proceedings (DCCP). This statutory provision concerns the

recognition and enforcement of foreign court judgments in civil matters to which no enforcement treaty or EU regulation applies. While paragraph 1 of Article 431 DCCP prohibits the enforcement of such foreign court judgments absent an exequatur regime, paragraph 2 opens up the possibility for new proceedings before the Dutch courts. In such proceedings, the Dutch Courts are free to grant authority to the foreign court's substantive findings, provided that the foreign judgment meets four universal recognition requirements. The Standing Government Committee proposes to fundamentally alter the system under Article 431 DCCP, by inter alia introducing automatic recognition of all foreign court judgments in the Netherlands. In this article, the concept of and the justification for such an automatic recognition are critically reviewed.

B.P.B. Sequeira, The applicable law to business-related human rights torts under the Rome II Regulation / p. 619-640

Abstract
As the momentum for corporate liability for human rights abuses grows, and as corporations are being increasingly brought to justice for human rights harms that they have caused or contributed to in their global value chains through civil legal action based on the law of torts, access to a remedy remains challenging. Indeed, accountability and proper redress rarely occur, namely due to hurdles such as establishing the law that is applicable law to the proceedings. This article aims to analyse the conflict-of-laws rules provided for under the Rome II Regulation, which determines the applicable law to business and human rights tort actions brought before EU Courts against European parent or lead corporations. In particular, we will focus on their solutions and impact on access to a remedy for victims of corporate human rights abuses, reflecting on the need to adapt these conflict rules or to come up with new solutions to ensure that European corporations are held liable for human rights harms taking place in their value chains in a third country territory.

CASE LAW

M.H. ten Wolde, Over de grenzen van de Europese Erfrechtverklaring. HvJ EU 9 maart 2023, ECLI:EU:C:2023:184, NIPR 2023-753 (R. J. R./Registr? centras V?) / p. 641-648

Abstract

A European Certificate of Succession issued in one Member State proves in another Member State that the person named therein as heir possesses that capacity and may exercise the rights and powers listed in the certificate. On the basis of the European Certificate of Succession, inter alia, foreign property can be registered in the name of the relevant heir. In the Lithuanian case C-354/21 R. J. R. v Registr? centras V?, the question arose whether the receiving country may impose additional requirements for such registration when there is only one heir. The Advocate General answered this question differently from the European Court of Justice. Which view is to be preferred?

SYMPOSIUM REPORT

K. de Bel, Verslag symposium 'Grootschalige (internationale) schadeclaims in het strafproces: beste praktijken en lessen uit het MH 17 proces' / p. 649-662

Abstract
On 17 November 2022, the District Court of The Hague delivered its final verdict in the criminal case against those involved in the downing of flight MH17 over Ukraine. This case was unique in many ways: because of its political and social implications, the large number of victims and its international aspects. The huge number and the international nature of the civil claims for damages exposed several practical bottlenecks and legal obstacles that arise when civil claims are joined to criminal proceedings. These obstacles and bottlenecks, which all process actors had to address, were the focus of the symposium 'Large-scale (international) civil claims for damages in the criminal process: best practices and questions for the legislator based on the MH17 trial' that took place on 10 October 2023. A summary of the presentations and discussions is provided in this article.