New Article published in the Journal of Comparative Law in Africa

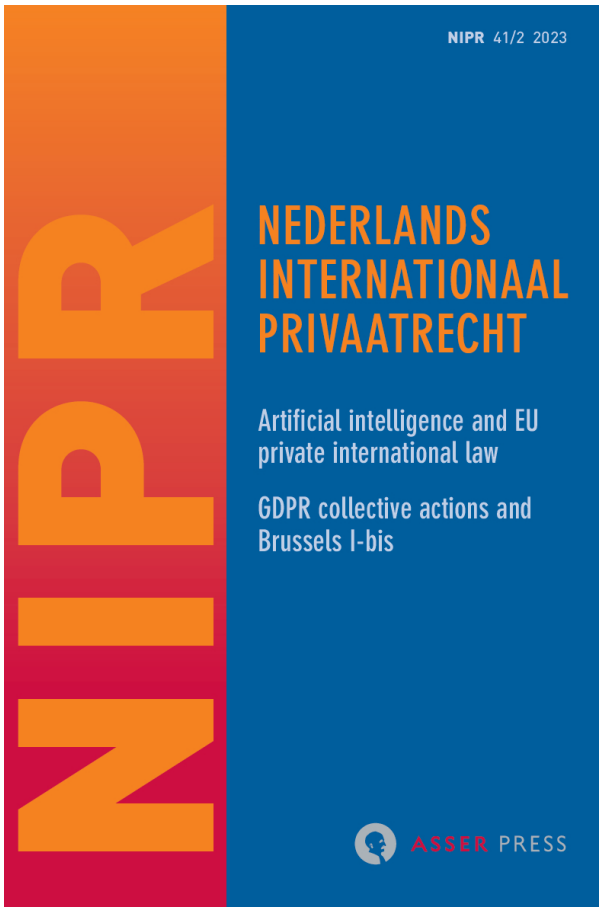
A new private international law article was recently published online in the *Journal of Comparative Law in Africa*. The title is: MK Quartey & TE Coleman, "The Law Applicable to Tortious Liability: A Comparative Analysis of Article 4 of the Rome II Regulation and Private International Law in Ghana"

The abstract reads as follows:

The law applicable to tortious liability involving a foreign element has become one of the most vexed questions in private international law. This can be attributed to technological advancements and the movement of people and goods across state lines. Accidents involving a foreign element are, therefore, reasonably foreseeable. Torts such as online defamation, accidents involving self-driving vehicles, and other technological acts involving a foreign element have heightened the possibility of cross-border torts. Considering the complexities associated with cross-border torts, the European Union (EU) has enacted the Rome II Regulation. The overarching objective of enacting the Rome II Regulation is to promote certainty and predictability when dealing with cross-border disputes, irrespective of the country of the court in which an action is brought in the EU. Conversely, Ghana relies on the broadly drafted section 54 of the Courts Act 459 of 1993 and common law principles of private international law to determine the aspects of choice of law. This has made the position in Ghana very uncertain and unpredictable due to the broad discretion given to courts under section 54 of the Courts Act, particularly in determining the law applicable to cross-border tort cases. Also, Ghanaian courts have applied the much-criticised double actionability rule to determine the rights and obligations of parties in cross-border tort cases. In light of the uncertain and unpredictable nature of Ghanaian law, some academics have suggested that Ghana adopt the traditional rule to determine the applicable law in torts. This article seeks to critically analyse the applicability of article 4 of the Rome II Regulation regarding non-

contractual liabilities. The article compares how courts in EU member states have applied article 4 to determine the applicable law in torts, to how the Ghanaian courts use private international law rules to determine the applicable law in torts. The essence of the comparison is to ascertain whether Ghana can draw some legislative and judicial lessons from the position under article 4. In addition, the significance of the comparison is to determine whether the approach under the Rome II Regulation can serve as a basis for legal reforms in Ghana. Most importantly, the article explores the extent to which the legal approach under the EU law can bolster judicial certainty and predictability in Ghanaian law.

Dutch Journal of PIL (NIPR) – issue 2023/2



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

been published.

NIPR 2023 issue 2

Editorial

C.G. van der Plas / p. 197

Articles

K.C. Henckel, Issues of conflicting laws – a closer look at the EU's approach to artificial intelligence / p. 199-226

Abstract

While newly emerging technologies, such as Artificial intelligence (AI), have a huge potential for improving our daily lives, they also possess the ability to cause harm. As part of its AI approach, the European Union has proposed several legislative acts aiming to accommodate and ensure the trustworthiness of AI. This article discusses the potential private international law impact of these legislative proposals. In doing so, it – inter alia – addresses how the newly proposed legislative acts interact with existing private international law instruments, such as the Rome II Regulation. In addition, it questions whether there is a need for specific rules on the private international law of AI.

Silva de Freitas, The interplay of digital and legal frontiers: analyzing jurisdictional rules in GDPR collective actions and the Brussels I-bis Regulation / p. 227-242

Abstract

The General Data Protection Regulation (GDPR) has provided data subjects with the possibility to mandate representative organizations to enforce rights on their behalf. Furthermore, the GDPR also contains its own jurisdictional scheme for the

enforcement of the rights of data subjects. In this context, judicial and scholarly discussions have arisen as to how the procedural provisions contained in the GDPR should interact for properly assigning jurisdiction in GDPR-related collective actions. In this article, I will address this question to argue that both jurisdictional grounds provided by the GDPR are available for representative organizations to file collective actions: the Member State in which the controller or processor is established and the Member State in which the data subjects reside. Furthermore, in order to exemplify the impact of national law on such interaction, I will also assess how some legal provisions contained in the WAMCA may impinge upon the rules on jurisdiction contained in the GDPR.

RabelsZ: New issue alert

The latest issue of RabelsZ has just been released. It contains the following contributions:

OBITUARY

Eva-Maria Kieninger, Ralf Michaels: Jürgen Basedow * 29.9.1949 † 6.4.2023, pp. 229–235, DOI: 10.1628/rabelsz-2023-0051

ESSAYS

Felix Berner: Implizite Qualifikationsvorgaben im europäischen Kollisionsrecht, pp- 236–263, DOI: 10.1628/rabelsz-2023-0028

Implicit Characterization in European Conflict of Laws. – Most German scholars assume that problems of characterization in European choice of law are to be resolved by means of functional characterization. This essay challenges that assumption. Quite often, European choice-of-law rules themselves require a certain treatment of a characterization problem. This can follow from the rules or recitals of European regulations. In such cases, the required approach is more or less explicitly given. However, the required analysis can also be implicitly established, especially when it is derived from the purpose of certain choice-of-law rules. The approach towards characterization is of both practical and theoretical significance. In practice it determines the outcome of a characterization inquiry. On a theoretical level, the approach towards characterization embodies a conceptual change: The more rules on characterization there are, the more the classic problem of characterization is marginalized. Questions of characterization turn into questions of "simple statutory interpretation".

Frederick Rieländer: Die Anknüpfung der Produkthaftung für autonome Systeme, pp. 264–305, DOI: 10.1628/rabelsz-2023-0032

The Private International Law of Product Liability and AI-related Harm. – As the EU moves ahead with extensive reform in all matters connected to artificial intelligence (AI), including measures to address liability issues regarding AI-related harm, it needs to be considered how European private international law (PIL) could contribute to the EU's objective of becoming a global leader in the development of trust-worthy and ethical AI. To this end, the article examines the role which might be played in this context by the conflict-of-law rule concerning product liability in Article 5 of the Rome II Regulation. It shows that the complex cascade of connecting factors in matters relating to product liability, although providing legal certainty for market players, fails to consistently support the EU's twin aim of promoting the up-take of AI, while ensuring that injured persons enjoy the same level of protection irrespective of the technology employed. Assessing several options for amending the Rome II Regulation, the article calls for the introduction of a new special rule

concerning product liability which allows the claimant to elect the applicable law from among a clearly defined number of substantive laws. Arguably, this proposal offers a more balanced solution, favouring the victim as well as serving the EU's policies.

Tim W. Dornis: Künstliche Intelligenz und internationaler Vertragsschluss, pp. 306–325, DOI: 10.1628/rabelsz-2023-0043

Artificial Intelligence and International Contracting. – Recently, the debate on the law applicable to a contract concluded by means of an AI system has begun to evolve. Until now it has been primarily suggested that the applicable law as regards the "legal capacity", the "capacity to contract" and the "representative capacity" of AI systems should be determined separately and, thus, that these are not issues falling under the lex causae governing the contract. This approach builds upon the conception that AI systems are personally autonomous actors – akin to humans. Yet, as unveiled by a closer look at the techno-philosophical foundations of AI theory and practice, algorithmic systems are only technically autonomous. This means they can act only within the framework and the limitations set by their human users. Therefore, when it comes to concluding a contract, AI systems can fulfill only an instrumental function. They have legal capacity neither to contract nor to act as agents of their users. In terms of private international law, this implies that the utilization of an algorithmic system must be an issue of contract conclusion under art. 10 Rome I Regulation. Since AI utilization is fully subject to the lex causae, there can be no separate determination of the applicable law as regards the legal capacity, the capacity to contract or representative capacity of such systems.

Peter Kutner: Truth in the Law of Defamation, pp. 326–352, DOI: 10.1628/rabelsz-2023-0038

This article identifies and examines important aspects of truth as a defence to defamation liability in common law and "mixed" legal systems. These include the fundamental issue of what must be true to establish the defence, whether the defendant continues to have the burden of proving that a defamatory communication is true, the condition that publication must be for the public benefit or in the public interest, "contextual truth" ("incremental harm"), and the possibility of constitutional law rules on truth that are different than

common law rules. The discussion includes the emergence of differences among national legal systems in the operation of the truth defence and evaluation of the positions that have been adopted.

BOOK REVIEWS

As always, this issue also contains several reviews of literature in the fields of private international law, international civil procedure, transnational law, and comparative law (pp. 353–427).

Lex & Forum Vol. 1/2023

This post has been prepared by Prof. Paris Arvanitakis

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

In particular, the Preafatio of the issue hosts the valuable thoughts of Advocate

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

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

The Greek Supreme Court has decided: Relatives of persons killed in accidents are immediate victims

A groundbreaking judgment was rendered last October by the Greek Supreme Court. Relatives of two Greek crew members killed in Los Llanos Air Base, Spain, initiated proceedings before Athens courts for pain and suffering damages (solatium). Although the action was dismissed by the Athens court of first instance, and the latter decision was confirmed by the Athens court of appeal, the cassation was successful: The Supreme Court held that both the Brussels I bis Regulation and the Lugano Convention are establishing international jurisdiction in the country where the relatives of persons killed are domiciled, because they must be considered as direct victims.

THE FACTS

On 26 January 2015, an F-16D Fighting Falcon jet fighter of the Hellenic Air Force crashed into the flight line at Los Llanos Air Base in Albacete, Spain, killing 11 people: the two crew members and nine on the ground.

The relatives of the Greek crew members filed actions for pain and suffering damages before the Athens court of first instance against a US (manufacturer of the aircraft) and a Swiss (subsidiary of the manufacturer) company. The action was dismissed in 2019 for lack of international jurisdiction. The appeals lodged by the relatives before had the same luck: the Athens court of appeal confirmed in 2020 the first instance ruling. The relatives filed a cassation, which led to the judgment nr. 1658/5.10.2022 of the Supreme Court.

THE JUDGMENT OF THE SUPREME COURT

Out of a number of cassation grounds, the Supreme Court prioritized the examination of the ground referring to the international jurisdiction deriving from

Articles 7(2) Brussels I bis Regulation and 5(3) Lugano Convention 2007. Whereas the analysis of the court was initially following the usual path, established by the CJEU and pertinent legal scholarship, namely, that third persons suffering moral (immaterial) damages are classified as indirect victims of torts committed against their relative, when the accident results in the death of the relative, they have to be considered as direct victims, which leads to their right to file a claim for damages (solatium) in the courts of their domicile.

In particular, the analysis of the Supreme Court is the following:

1. Articles 7(2) Brussels I bis Regulation and 5(3) Lugano Convention 2007

'With regard to the mental suffering caused by the incident as a result of the tort, after his death, the relative can no longer be subject to rights (and obligations) and, therefore, have claims against the wrongdoer.

In this case, the relatives of the deceased have by law a personal claim against the defendants, since the infliction of mental suffering is a primary and direct damage to their person; therefore, the place of its occurrence is important for the establishment of the court's international jurisdiction in the court which this place is located, for the adjudication of their respective claim.

In other words, the infliction of mental suffering is a direct injury to the persons close to the deceased; it is separate and independent from the primary injury suffered by the latter, without this mental suffering being considered, due to the previous injury of the deceased, as indirect damage. The wrongdoer's behavior, considered independently, also constitutes an independent reason for an obligation towards them for monetary satisfaction (and compensation), without the mental suffering caused presupposing any other damage to the above persons, so that it could be characterized as a consequence of it, and, consequently , as indirect with respect to this damage.

The place where the mental suffering comes from is not the place, where by chance the person was informed of the death of his relative and felt the mental pain, but the place of his main residence, where he mainly and permanently suffers this pain, which certainly has a duration of time and, therefore, burdens him not all at once, but for a long, as a rule, period of time.

It should be noted that, according to Greek law, in the case of tortious acts, a

claim for compensation and monetary satisfaction due to moral damage is only available to the person immediately harmed by the act or omission, and not by the third party indirectly injured. Hence, where Article 932 of the Civil Code states that, in the event of the death of a person, monetary compensation may be awarded to the victim's family due to mental distress, it clearly considers the relatives of the deceased as immediately damaged and, in any case, fully equates them with their primary affected relative.

In view of the above, articles 7(2) of Regulation 1215/2012 and 5(3) of the Lugano Convention, have the meaning that the mental suffering, which is connected to the death of a person as a result of a tort committed in a member state, and which is suffered by the relatives of this victim, who reside in another member state, constitutes direct damage in the place of their main residence. Therefore, the court, in whose district the person, who suffered mental anguish due to the death of his relative, has his residence, has territorial competence and international jurisdiction to adjudicate the claim arising from the mental suffering caused for the payment of damages.

The above conclusion also results from the grammatical interpretation of the above provisions, given that they do not make any distinction as to whether the damage concerns the primary sufferer or other persons, but only require that the damage caused to the plaintiff may be characterized as direct.

An opposite opinion would necessarily lead in this case to the international jurisdiction only of the court of the place where the damaging event occurred, a solution, however, that is not in accordance with the interpretation of the above rules by the CJEU, which accepts, without distinction or limitation, equally and simultaneously, the international jurisdiction of the place where the direct damage occurred.

2. The interdependence of Brussels I bis Regulation and Rome II Regulation

It is true that in the interpretation of Article 4(1) Regulation 864/2007 on the law applicable to non-contractual obligations, the CJEU ruled that, damages connected with the death of a person due to such an accident within the Member State of the trial court, suffered by the victim's relatives residing in another Member State, must be characterized as "indirect results" of the said accident,

under the meaning of the provision in question (case Florin Lazar v Allianz SpA, C-350/14).

However, in addition to the fact that this judgment concerned the choice of applicable law, the same court has accepted that, according to recital 7 Regulation 864/2007, the intention of the EU legislator was to ensure consistency between Regulation 44/2001 (already 1215/2012), and the material scope as well as the provisions of Regulation 864/2007; however, "it does not follow in any way that the provisions of Regulation 44/2001 must, for this reason, be interpreted in the light of the provisions of Regulation 864/2007. In no case can the intended consequence result in an interpretation of the provisions of Regulation 44/2001, inconsistent with the system and its purposes.

And the Supreme Court concluded:

According to all of the above, pursuant to the provision of article 35 of the Civil Code, as interpreted in the light of articles 7(2) Regulation 1215/2012 and 5(3) Lugano Convention, the Greek courts have international and local jurisdiction to adjudicate claims for payment of reasonable monetary satisfaction due to mental anguish, as a result of the death of a relative of the claimants, committed in another Member State, if the claimants reside in the court's district.

THE MINORITY OPINION

One member of the Supreme Court distanced himself from the panel, and submitted a minority opinion, which was founded on the prevailing opinion followed by the CJEU and legal scholarship. In particular, according to the minority report, the damage caused to the claimants due to the death of their relative remains an indirect one, given that the damage caused was of a reflective and not of a direct nature. The minority opinion emphasized also on the predictability factor, which was not elaborated by the panel.

COMMENTS

The judgment of the Supreme Court opens the Pandora's box in a matter well settled so far. An earlier judgment rendered by the Italian Supreme Court

followed the prevailing view [*see Corte di Cassazione (IT) 11.02.2003 – 2060 – Staltari e altre ./. GAN IA Compagnie française SA ed altri*, available in: unalex Case law Case IT-19].

In matters where national courts wish to deviate from the prevalent, if not unanimous view taken by the CJEU and European legal scholarship, the most prudent solution would be to address the matter to the Court, by filing a request for a preliminary ruling. The latter applies to both international jurisdiction, and interdependence between the Brussels I bis and the Rome II Regulation.

BNP Paribas sued in France for financing fossil fuel companies

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

On 23 February 2023, one of the biggest commercial banks in the Eurozone, BNP Paribas (BNP) was sued by Oxfam, Friends of the Earth and Notre Affaire à Tous for having allegedly provided loans to oil and gas companies in breach of the vigilance duty enshrined in la Loi de Vigilance (2017) of France. This case constitutes an important hallmark for the business and human rights world as it is the first climate action case against a commercial bank and so timely considering that the European Union (EU) is currently discussing whether or not to include the financial sector within the scope of the proposed Corporate Sustainability Due Diligence Directive (CSDDD) (see here).

Article 1 of la Loi de Vigilance imposes a duty to establish and implement an effective vigilance plan on any company whose head office is located on French territory and complies with the thresholds stated. This vigilance plan is supposed to include vigilance measures for risk identification and prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls, its subcontractors

and suppliers with whom the company has an established commercial relationship. As such, there is no distinction under the French law regarding the sector in which the company is operating which is in line with the United Nations Guiding Principles. Thus, it was surprising to see that France was quite vocal about not including the financial sector within the scope of CSDDD, as France was the first Member State to adopt a law on the duty of vigilance of the multinational companies and la Loi de Vigilance itself does not make distinctions based on the sector in which the company is operating.

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

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

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

that the plaintiffs took Shell to the Dutch courts based on the environmental damage caused in the Netherlands, due to Shell's operations worldwide.

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

In 2021, the Hague District Court ordered Shell to reduce both its own carbon emissions and end-use emissions by 45% by 2030 in relation to the 2019 figures. Naturally, the legal basis in the Dutch case was different than the legal basis in the French case, considering that the Netherlands does not yet have a national law like la Loi de Vigilance. Consequently, the core of the arguments of the applicants lied on the duty of care in Article 6:162 of the Dutch Civil Code and Articles 2 (right to life) and 8 (rights to private life, family life, home and correspondence) of the European Convention on Human Rights.

In contrast, the BNP case has a more preventive nature and aims to force BNP to change and adapt its actions to the changing climate and scientific context. The NGOs primarily request an injunction for BNP to comply with the obligations provided for in the French Vigilance Law, as BNP falls within the scope of the French Law. More specifically, the NGOs request that BNP publishes and implements a new due diligence plan, containing the measures explained in the writ of summons. Therefore, the obligations arising from the French Vigilance Law are of a civil nature. Consequently, the law applicable to this dispute should also be determined by Rome II Regulation on non-contractual obligations. As explained above, Rome II Regulation gives an additional option for the plaintiffs to

choose the applicable law in cases of environmental damage as either the country of damage or the country where the event that gives rise to the damage occurred. In the BNP case, the plaintiffs' claim was based on French law. Applying Rome II Regulation, France can be considered as the country of the event which gives rise to the damage because it is where the corporate policies are prepared. Alternatively, it is also where the environmental damage occurs, as well as the rest of the world. Moreover, the plaintiffs relied on the general obligation of environmental vigilance as enshrined in the Charter of the Environment, which is considered an annex to the French Constitution and thus has the same authoritativeness. Invoking the constitution might bring in an argument on the basis of Article 16 Rome II, namely overriding principles of mandatory law.

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

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

However, the NGOs claim that contrary to these commitments, through various financing and investment activities, BNP becomes one of the main contributors to the fossil fuel sector by supporting the big oil and gas companies (p 4 of the formal notice). In this regard, BNP allegedly provides funds for the companies

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

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

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

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

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

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2/2023: Abstracts

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

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

H.-P. Mansel/K. Thorn/R. Wagner: **Europäisches Kollisionsrecht 2022: Bewegung im internationalen Familienrecht**

This article provides an overview of developments in Brussels in the field of judicial cooperation in civil and commercial matters from January 2022 until December 2022. It presents newly adopted legal instruments and summarizes current projects that are making their way through the EU legislative process. It also refers to the laws enacted at the national level in Germany as a result of new European instruments. Furthermore, the authors look at areas of law where the EU has made use of its external competence. They discuss important decisions and pending cases before the CJEU pertaining to the subject matter of the article. In addition, the article also looks at current projects and the latest developments at the Hague Conference of Private International Law.

N. Elsner/H. Deters: **Of party requested service by post and courts as transmitting agencies under the EU Service Regulation**

On 1 July 2022, the EU Regulation on the Service of Documents No. 1784/20 (Recast) (EU Service Regulation) took effect and changed the law on service by postal services in cross-border proceedings. This calls for a revisiting of the

divergent opinions and ways of interpretation of service by postal services according to Art. 14 EU Service Regulation 2007 and its relation to Art. 15 EU Service Regulation 2007. Against this background, this article discusses a decision of the Higher Regional Court Frankfurt (OLG Frankfurt) holding that service by postal services pursuant to Art. 14 EU Service Regulation 2007 is in principle only open to a court when effecting service in cross-border proceedings. A party shall effect service according to Art. 15 EU Service Regulation 2007 by contacting directly the foreign authorities designated to effect service in the other member state.

Firstly, the reasoning of the court and the opinions in legal scholarship on the admissibility of service by postal services effected by parties are assessed critically. Subsequently, the authors propose a different application of Art. 14 and 15 EU Service Regulation 2007 in Germany. It will be argued that the OLG Frankfurt was indeed correct in stating that service by postal services must be effected through a transmitting agency according to Art. 2 EU Service Regulation 2007. Under German law, only courts are considered transmitting agencies. However, this does not preclude parties from effecting this type of service. When parties are required to effect service themselves under German law, they may send the documents to the court, inform the court of the address of the other party and apply for service in accordance with Art. 14 EU Service Regulation 2007. The court then acts as a mere transmitting agency on behalf of the party, and thus, in its administrative capacity.

S. Schwemmer: **Direct tort claims of the creditors of an insolvent company against the foreign grandparent company**

In its ruling of 10 March 2022 (Case C-498/20 – ZK ./. BMA Nederland), the ECJ had to deal with a so-called Peeters/Gatzen-claim under Dutch law brought by the insolvency administrator. The court had already ruled in an earlier judgement that these claims fall under the Brussels I Regulation (recast). So the main question was now where the harmful event occurred within the meaning of Art. 7 para. 2 of the Regulation. The ECJ opts for the seat of the insolvent company, basing its analysis on the differentiation between primary damage and consequential damage. The same analysis is also used to determine the applicable law under the Rome II Regulation. In this context, however, the ECJ examines

more closely the specific breach of duty of care to determine whether the claim falls under the scope of the Rome II Regulation or under the rules of international company law.

A. Kronenberg: **Disapproved overriding mandatory provisions and factual impossibility**

Two years after the Higher Regional Court (Oberlandesgericht, OLG) of Frankfurt am Main, the OLG Munich also had to rule on a lawsuit filed by an Israeli against Kuwait Airways. The plaintiff had demanded to be flown from Munich to Sri Lanka with a stopover in Kuwait City in accordance with the contract the parties had concluded. The OLG Munich dismissed the claim with regard to a Kuwaiti Israel boycott law, which, although inapplicable, according to the court had the effect that it was factually impossible for the defendant airline to transport Israeli nationals with a stopover in Kuwait. The ruling shows that in cases of substantive law level consideration of disapproved foreign overriding mandatory provisions the legally required result can be undesirable. However, this result depends on the circumstances of the individual case as well as on certain prerequisites that must be observed when taking into consideration overriding mandatory provisions. The article sets out these prerequisites and shows why the OLG Munich probably should have ordered the defendant to perform its obligation. It also explains why, in cases in which factual impossibility indeed exists, the result of the dismissal of the action most likely cannot be changed even by enacting a blocking statute.

C. Thomale/C. Lukas: **The pseudo-foreign British one man-LLC**

The Higher Regional Court of Munich has decided that a Bristish one man-LLC, which has its real seat in Germany, under German conflict of laws and substantive rules lacks legal personality altogether. This case note analyzes this decision’s implications for the conflict of company laws, notably for the interpretation of the TCA and application of the so-called “modified real seat theory”.

M. Brinkmann: **Discharge in England and subsequent declaratory judgement against debtor in Germany – Binding effects of judgement trump recognition of prior bankruptcy proceedings**

The Higher Regional Court Düsseldorf (OLG Düsseldorf) had to decide upon an action for the payment of damages based on a declaratory judgement. The declaratory judgement had established the defendant's liability and was, at the time, not challenged by the defendant. In his defense against the action for payment the defendant now tries to invoke a discharge, which he had already obtained in insolvency proceedings in the UK in March 2012, i.e. prior to the declaratory judgement.

The OLG argued that under the applicable EIR, the English insolvency proceedings were, in principle, subject to automatic recognition. Under Art. 17 EIR 2002, these proceedings produce the same effects in all Member States. The OLG Düsseldorf nevertheless precluded the defendant from invoking the discharge. As the English bankruptcy proceedings were concluded before the action for the declaratory judgement was initiated, the defendant should have invoked the discharge already in the proceedings that led to the declaratory judgement in March 2013.

The OLG correctly found that the declaratory judgement was procedurally binding between the parties and hence barred the defendant from invoking the discharge in subsequent proceedings.

M. Andrae: **Modification or suspension of enforcement of a decision under Article 12 of the Hague Child Abduction Convention?**

The article discusses which procedural options exist if, after a final decision pursuant to 12 Hague Convention on the Civil Aspects of International Child Abduction, circumstances arise which would justify the refusal of an application for the return of the child. A procedure to change the decision is only permissible if the international jurisdiction of the German courts exists. For child abduction from EU Member States, this is determined in principle according to Art. 9 of the Regulation (EU) n 1111/2019 and for child abduction from other Contracting States of The Hague Protection of Children Convention according to Art. 7 of the Convention. As long as jurisdiction thereafter lies with the courts of the state in

which the child was habitually resident immediately before the removal or retention keep, the German courts are limited to ordering the temporary stay of enforcement.

J. Oster: **Facebook dislikes: The taming of a data giant through private international data protection law**

Just as the Data Protection Directive 95/46/EC, the General Data Protection Regulation (GDPR) suffers from a deficit concerning both its public and its private enforcement. Among other things, this deficit is owed to the fact that European data protection law still raises many questions regarding jurisdiction and the applicable law. In its interlocutory judgment that will be discussed in this article, the Rechtbank Amsterdam established its jurisdiction and declared the GDPR as well as Dutch data protection and tort law applicable to a lawsuit by the Dutch Data Protection Foundation for alleged violations of rules of data protection and unfair competition. This article agrees with the Rechtbank's findings, but it also draws attention to weaknesses in its reasoning and to unresolved questions of European private international data protection law.

RabelsZ: New issue alert (1/2023)

The latest issue of RabelsZ has just been published. It contains the following articles:

Holger Fleischer: Große Debatten im Gesellschaftsrecht: Fiktionstheorie versus Theorie der realen Verbandspersönlichkeit im internationalen Diskurs, pp. 5–45, DOI: 10.1628/rabelsz-2023-0003

> *Great Debates in Company Law: The International Discourse on Fiction Theory versus Real Entity Theory. – This article opens a new line of research on great debates in domestic and foreign company law. It uses as a touchstone the classical debate on the nature of legal personhood, which was moribund for a time but has recently experienced an unexpected renaissance. The article traces the scholarly fate of fiction theory and real entity theory over time and across jurisdictions. It describes the origins of both theories, explores the processes of their reception in foreign legal systems, and through selected case studies illustrates the areas in which both courts and doctrine to this day have continued to draw on their body of arguments.*

Sabine Corneloup: Migrants in Transit or Under Temporary Protection – How Can Private International Law Deal with Provisional Presence?, pp.46–75, DOI: 10.1628/rabelsz-2023-0004

> *An increasing number of migrants are provisionally present in the territory of a State other than their State of origin, be it because they are granted temporary protection until they can return to their country of origin or because migration policies– notably externalization measures– prevent them from accessing the territory of their State of destination. As a result, many migrants are stuck for months, if not years, in transit countries at the external borders of Europe*

before being able to resume their migratory route. Their provisional presence, which initially was meant to remain transitional and short-term, often becomes indefinite. In the meantime, life goes on: children are born, couples marry and divorce, parental child abductions take place, etc. How can private international law deal with these situations? The 1951 Geneva Refugee Convention, which requires that the personal status of refugees be governed by the law of domicile or residence, does not provide an answer to all difficulties. The paper aims to explore PIL connecting factors, such as nationality, habitual residence, and mere presence, and assess their appropriateness for migrants on the move or under temporary protection.

Hannes Wais: Digitale Persönlichkeitsrechtsverletzungen und anwendbares Recht, pp.76–117, DOI: 10.1628/rabelsz-2023-0005

Digital Infringement of Personality Rights and the Applicable Law. – Under art. 4 para. 1 Rome II Regulation, the law applicable to torts is the law of the state in which the damage occurred. With respect to the violation of personality rights, however, art. 40 para. 1 EGBGB points to the law of the place where the event giving rise to the damage occurred (sent. 1) or, should the victim so decide, the place where the damage occurred (sent. 2). This essay demonstrates that this approach entails an element of unequal treatment and is inconsistent with German substantive law, which tends to favour the tortfeasor over the victim in personality rights cases. These findings give reason to subject the German conflict-of-law rules regarding the infringement of personality rights (which almost exclusively take place online) to an expansive review. The article first discusses the exclusion of personality rights infringements in art. 1 para. 2 lit. g Rome II Regulation and the dormant reform initiative, followed by an analysis of the shortcomings of the solution laid down in art. 40 para. 1 EGBGB. Alternative approaches are subsequently discussed before concluding with a proposal de lege ferenda.

Zheng Sophia TANG: Smart Courts in Cross-Border Litigation, pp. 118–143, DOI: 10.1628/rabelsz-2023-0006

Smart courts use modern technology to improve the efficiency of trials, enabling the parties to access court proceedings from a distance. This advantage is particularly important in cross-border litigation, which is

characterised by the cost and inconvenience for at least one party to take part in proceedings abroad. However, although technology can significantly improve procedural efficiency, legal obstacles make efficiency impossible to achieve. This article uses service of proceedings, collecting evidence and virtual hearing as examples to show how the current law, especially the old-fashioned concept of sovereignty, hampers the functioning of technology. In the age of technology, it is necessary to reconceptualise sovereignty. This article argues that private autonomy may be utilised to reshape sovereignty in cross-border litigation procedures and reconcile the conflict between sovereignty and technology.

One Private International Law Article published in the First Issue of the International and Comparative Law Quarterly for 2023

One recent article on private international law was published today in *International and Comparative Law Quarterly:*

A Chong, "Characterisation and Choice of Law for Knowing Receipt"

Knowing receipt requires the satisfaction of disparate elements under English domestic law. Its characterisation under domestic law is also unsettled. These in turn affect the issues of characterisation and choice of law at the private international law level, as knowing receipt sits at the intersection of the laws of equity, restitution, wrongs and property. This article argues that under the common law knowing receipt ought to be considered as sui generis for choice of law purposes and governed by the law of closest connection to the claim. Where the Rome II Regulation applies, knowing receipt fits better within the tort rather

than unjust enrichment category and the escape clause in Article 4(3) of the Regulation ought to apply.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1/2023: Abstracts

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

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

R. Wagner: **European account preservation orders and titles from provisional measures with subsequent account attachments**

The enforcement of a claim, even in cross-border situations, must not be jeopardised by the debtor transferring or debiting funds from his account. A creditor domiciled in State A has various options for having bank accounts of his debtor in State B seized. Thus, he can apply for an interim measure in State A according to national law and may have this measure enforced under the Brussels Ibis Regulation in State B by way of attachment of accounts. Alternatively, he may proceed in accordance with the European Account Preservation Order Regulation (hereinafter: EAPOR). This means that he must obtain a European account preservation order in State A which must be enforced in State B. By comparing these two options the author deals with the legal nature of the European account preservation order and with the subtleties of enforcement under the EAPOR.

H. Roth: **The „relevance (to the initial legal dispute)“ of the reference for a preliminary ruling pursuant to Article 267 TFEU**

The preliminary ruling procedure under Article 267 of the Treaty on the Functioning of the European Union (TFEU) exists to ensure the uniform interpretation and application of EU law. The conditions under which national courts may seek a preliminary ruling are based on the established jurisdiction of the European Court of Justice (CJEU) and are summarised in Article 94 of the Rules of Procedure of the CJEU. One such condition is that the question referred to the court must be applicable to the decision in the initial legal dispute. Any future judgement by the referring court must thereafter be dependant on the interpretation of Union law. When cases are obviously not applicable, the European Court dismisses the reference for a preliminary ruling as inadmissible. The judgement of the CJEU at hand concerns one of these rare cases in the decision-making process. The sought-after interpretation of Union law was not materially related to the matter of the initial legal dispute being overseen by the referring Bulgarian court.

S. Mock/C. Illetschko: **The General International Jurisdiction for Legal Actions against Board Members of International Corporations – Comment on OLG Innsbruck, 14 October 2021 – 2 R 113/21s, IPRax (in this issue)**

In the present decision, the Higher Regional Court of Innsbruck (Austria) held that (also) Austrian courts have jurisdiction for investors lawsuits against the former CEO of the German Wirecard AG, Markus Braun. The decision illustrates that the relevance of the domicile of natural persons for the jurisdiction in direct actions for damages against board members (Art 4, 62 Brussels Ia Regulation) can lead to the fact that courts of different member states have to decide on crucial aspects of complex investor litigation at the same time. This article examines the decision, focusing on the challenges resulting from multiple residences of natural persons under the Brussels Ia Regulation.

C. Kohler: **Lost in error: The ECJ insists on the “mosaic solution” in**

determining jurisdiction in the case of dissemination of infringing content on the internet

In case C-251/20, Gtflix Tv, the ECJ ruled that, according to Article 7(2) of Regulation No 1215/2012, a person, considering that his or her rights have been infringed by the dissemination of disparaging comments on the internet, may claim, before the courts of each Member State in which those comments are or were accessible, compensation for the damage suffered in the Member State of the court seized, even though those courts do not have jurisdiction to rule on an application for rectification and removal of the content placed online. The ECJ thus confirms the "mosaic solution" developed in case C-509/09 and C-161/10, eDate Advertising, and continued in case C-194/16, Bolagsupplysningen, for actions for damages for the dissemination of infringing contents on the internet. The author criticises this solution because it overrides the interests of the sound administration of justice by favouring multiple jurisdictions for the same event and making it difficult for the defendant reasonably to foresee before which court he may be sued. Since a change in this internationally isolated case law is unlikely, a correction can only be expected from the Union legislator.

T. Lutzi: **Art 7 No 2 Brussels Ia as a Rule on International and Local Jurisdiction for Cartel Damage Claims**

Once again, the so-called "trucks cartel" has provided the CJEU with an opportunity to clarify the interpretation of Art. 7 No. 2 Brussels Ia in cases of cartel damage claims. The Court confirmed its previous case law, according to which the place of damage is to be located at the place where the distortion of competition has affected the market and where the injured party has at the same time been individually affected. In the case of goods purchased at a price inflated by the cartel agreement, this is the place of purchase, provided that all goods have been purchased there; otherwise it is the place where the injured party has its seat. In the present case, both places were in Spain; thus, a decision between them was only necessary to answer the question of local jurisdiction, which is also governed by Art. 7 No. 2 Brussels Ia. Against this background, the Court also made a number of helpful observations regarding the relationship between national and European rules on local jurisdiction.

C. Danda: **The concept of the weaker party in direct actions against the insurer**

In its decision T.B. and D. sp. z. o. o. ./. G.I. A/S the CJEU iterates on the principle expressed in Recital 18 Brussels I bis Regulation that in cross-border insurance contracts only the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules. In the original proceedings – a joint case – the professional claimants had acquired insurance claims from individuals initially injured in car accidents in Poland. The referring court asked the CJEU (1) if such entities could be granted the forum actoris jurisdiction under Chapter II section 3 on insurance litigation against the insurer of the damaging party and (2) if the forum loci delicti jurisdiction under Art. 7(2) or 12 Brussels I bis Regulation applies under these conditions. Considering previous decisions, the CJEU clarified that professional claimants who regularly receive payment for their services in form of claim assignment cannot be considered the weaker party in the sense of the insurance section and therefore cannot rely on its beneficial jurisdictions. Moreover, the court upheld that such claimants may still rely on the special jurisdiction under Art. 7(2) Brussels I bis Regulation.

C. Reibetanz: **Procedural Consumer Protection under Brussels Ibis Regulation and Determination of Jurisdiction under German Procedural Law (Sec. 36 (1) No. 3 ZPO)**

German procedural law does not provide for a place of jurisdiction comparable to Article 8 (1) Brussels Ibis Regulation, the European jurisdiction for joinder of parties. However, according to Sec. 36 ZPO, German courts can determine a court that is jointly competent for claims against two or more parties. In contrast to Art. 8 (1) Brussels Ibis Regulation, under which the plaintiff has to choose between the courts that are competent, the determination of a common place of jurisdiction for joint procedure under German law is under the discretion of the courts. Since EU law takes precedence in its application over contrary national law, German courts must be very vigilant before determining a court at their discretion. The case is further complicated by the fact that the prospective plaintiff can be characterised as a consumer under Art. 17 et seq. Brussels Ibis

Regulation. The article critically discusses the decision of the BayObLG and points out how German judges should approach cross-border cases before applying Sec. 36 ZPO.

M.F. Müller: Requirements as to the „document which instituted the proceedings“ within the ground for refusal of recognition according to Art 34 (2) Brussels I Regulation

The German Federal Court of Justice dealt with the question which requirements a document has to comply with to qualify as the “document which instituted the proceedings” within the ground for refusal of recognition provided for in Art 34 (2) Brussels I Regulation regarding a judgment passed in an adhesion procedure. Such requirements concern the subject-matter of the claim and the cause of action as well as the status quo of the procedure. The respective information must be sufficient to guarantee the defendant’s right to a fair hearing. According to the Court, both a certain notification by a preliminary judge and another notification by the public prosecutor were not sufficiently specific as to the cause of action and the status quo of the procedure. Thus, concerning the subject matter of the claim, the question whether the “document which instituted the proceedings” in an adhesion procedure must include information about asserting civil claims remained unanswered. While the author approves of the outcome of the case, he argues that the Court would have had the chance to follow a line of reasoning that would have enabled the Court to submit the respective question to the ECJ. The author suggests that the document which institutes the proceedings should contain a motion, not necessarily quantified, concerning the civil claim.

B. Steinbrück/J.F. Krahé: Section 1032 (2) German Civil Procedural Code, the ICSID Convention and Achmea – one collision or two collisions of legal regimes?

While the ECJ in Achmea and Komstroy took a firm stance against investor-State arbitration clauses within the European Union, the question of whether this will also apply to arbitration under the ICSID Convention, which is often framed as a “self-contained” system, remains as yet formally undecided. On an application by the Federal Republic of Germany, the Berlin Higher Regional Court has now ruled

that § 1032 (2) Civil Procedural Code, under which a request may be filed with the court to have it determine the admissibility or inadmissibility of arbitral proceedings, cannot be applied to proceedings under the ICSID Convention. The article discusses this judgment, highlighting in particular that the Higher Regional Court chooses an interpretation of the ICSID Convention which creates a (presumed) conflict between the ICSID Convention and German law, all the while ignoring the already existing conflict between the ICSID Convention and EU law.

L. Kuschel: **Copyright Law on the High Seas**

The high seas, outer space, the deep seabed, and the Antarctic are extraterritorial – no state may claim sovereignty or jurisdiction. Intellectual property rights, on the other side, are traditionally territorial in nature – they exist and can be protected only within the boundaries of a regulating state. How, then, can copyright be violated aboard a cruise ship on the high seas and which law, if any, ought to be applied? In a recent decision, the LG Hamburg was confronted with this quandary in a dispute between a cruise line and the holder of broadcasting rights to the Football World Cup 2018 and 2019. Unconvincingly, the court decided to circumnavigate the fundamental questions at hand and instead followed the choice of law agreement between the parties, in spite of Art. 8(3) Rome II Regulation and opting against the application of the flag state's copyright law.

T. Helms: **Validity of Marriage as Preliminary Question for the Filiation and the Name of a Child born to Greek Nationals in Germany in 1966**

The Higher Regional Court of Nuremberg has ruled on the effects of a marriage on the filiation and the name of a child born to two Greek nationals whose marriage before a Greek-orthodox priest in Germany was invalid from the German point of view but legally binding from the point of view of Greek law. The court is of the opinion that – in principle – the question of whether a child's parents are married has to be decided independently applies the law which is applicable to the main question, according to the conflict of law rules applicable in the forum. But under the circumstances of the case at hand, this would lead to a result which

would be contrary to the jurisprudence of the Court of Justice on names lawfully acquired in one Member State. Therefore – as an exception – the preliminary question in the context of the law of names has to be solved according to the same law which is applicable to the main question (i.e. Greek law).

K. Duden: PIL in Uncertainty – failure to determine a foreign law, application of a substitute law and leaving the applicable law open

A fundamental concern of private international law is to apply the law most closely connected to a case at hand – regardless of whether this is one's own or a foreign law. The present decision of the Hanseatic Higher Regional Court as well as the proceedings of the lower court show how difficult the implementation of this objective can become when the content of the applicable law is difficult to ascertain. The case note therefore first addresses the question of when a court should assume that the content of the applicable law cannot be determined. It examines how far the court's duty to investigate the applicable law extends and argues that this duty does not seem to be limited by disproportionate costs of the investigative measures. However, the disproportionate duration of such measures should limit the duty to investigate. The comment then discusses which law should be applied as a substitute for a law whose content cannot be ascertained. Here the present decision and the proceedings in the lower court highlight the advantages of applying the lex fori as a substitute – not as an ideal solution, but as the most convincing amongst a variety of less-than-ideal solutions. Finally, the note discusses why it is permissible as a matter of exception for the decision to leave open whether German or foreign law is applicable.

M. Weller: Kollisionsrecht und NS-Raubkunst: U.S. Supreme Court, Entscheidung vom 21. April 2022, 596 U.S. ____ (2022) – Cassirer et al. ./. Thyssen-Bornemisza Collection Foundation

In proceedings on Nazi-looted art the claimed objects typically find themselves at the end of a long chain of transfers with a number of foreign elements. Litigations in state courts for recovery thus regularly challenge the applicable rules and doctrines on choice of law – as it was the case in the latest decision of the U.S. Supreme Court in Cassirer. In this decision, a very technical point was submitted

to the Court for review: which choice-of-law rules are applicable to the claim in proceedings against foreign states if U.S. courts ground their jurisdiction on the expropriation exception in § 1605(3)(a) Federal Sovereign Immunities Act (FSIA). The lower court had opted for a choice-of -aw rule under federal common law, the U.S. Supreme Court, however, decided that, in light of Erie and Klaxon, the choice-of-law rules of the state where the lower federal courts are sitting in diversity should apply.