LEX & FORUM Vol. 3/2022

This editorial has been prepared by **Prof. Paris Arvanitakis,** Aristotle University of Thessaloniki, Greece.

The European Regulations of Private and Procedural International Law are part of an enclosed legislative system. Since the early stages of European integration, third countries, and in particular the USA, had expressed their objections concerning the European integration process, questioning whether it reflects a "nationalistic" character, certainly not in the sense of ethnocentric provisions, since the European legislator had chosen the domicile instead of citizenship as the fundamental ground of jurisdiction from the beginning, but mostly because European law applied extreme provisions, such as the exorbitant jurisdiction, only against persons residing outside the EU, as well as the inability of third countries to make use of procedural options provided to member states (see *Kerameus*, Erweiterung des EuGVÜ-Systems und Verhältnis zu Drittstaaten, Studia Juridica V, 2008, pp. 483 ff., 497). However, the EU never intended a global jurisdictional unification. It simply envisioned a regional legislative internal harmonization in favor of its member states. Like any regional unification, EU law involves discriminatory treatment against those who fall outside its scope. But even when the EU regulates disputes between member states and third countries (for example, the Rome Regulations on applicable law), it does so, not to bind third countries to EU law -nor it could do so-, but to avoid divergent solutions among its member states in their relations with third countries. ?owever, as the issue on the relationship between European Regulations and third countries continues to expand, a precise demarcation of the boundaries of application of European rules, which often differ even within the same legislative text, acquires practical importance.

The "Focus" of the present issue intends to highlight these discrepancies, as well as the corresponding convergences between European Regulations of Private / Procedural International Law and third countries. During an online conference on this topic, which took place on the 29th of September 2022, we had the great

honor to host a discussion between well-known academics and leading domestic lawyers, who have dealt with this topic in depth. We had the honor to welcome the presentations of: Ms. *Astrid Stadler,* Professor of Civil Law, Civil Procedure, Private International and Comparative Law at the University of Konstanz/Germany, who presented a general introduction on the topic ('Ein Überblick auf die Drittstaatenproblematik in der Brüssel Ia VO'); Mr. *Symeon Symeonides,* a distinguished Professor of Law, at the Willamette University USA, , who presented an extremely interesting analysis on 'An Outsider's View of the Brussels Ia, Rome I, and Rome II Regulations'; Dr. *Georgios Safouris,* Judge and Counselor of Justice of Greece at the Permanent Greek Representation in the EU, , , who examined the application of the Brussels Ia and Brussels IIa Regulations in disputes with third countries, from the lens of the CJEU jurisprudence; Mr. *Nikitas Hatzimichael* ,Professor at the Law Department of the University of Cyprus, , who developed the important doctrinal issue of the exercise of judge's discretion in the procedural framework of the European Regulations in relation to third countries; Ms. *Anastasia Kalantzi*, PhD Candidate at the Aristotle University of Thessaloniki who dealt with the key issue of European lis pendens rules and third countries; and, finally Mr. *Dimitrios Tsikrikas*, Professor of Civil Procedure at the University of Athens, who developed the fundamental issue of the legal consequences of court judgments vis-à-vis third countries. On the topic of the relations between European Regulations and third countries, the expert opinion of the author of this editorial is also included in the present issue, focusing on multi-party disputes in cases where some of the defendants are EU residents and others residents of a third country.

In the "Praefatio", Mr. *Nikolaos Nikas,* Emeritus Professor at the Faculty of Law of the Aristotle University of Thessaloniki presents his thoughts on what is the "*next stage on the path to European procedural harmonization: the digitization of justice delivery systems*". In the part of the jurisprudence, two recent judgments of the CJEU are presented: the decision No C-572/21 (CC/VO) regarding international jurisdiction on parental responsibility, when the usual residence of the child was legally transferred during the trial to a third state, that is a signatory to the 1996 Convention, , with a comment by the Judge Mr. *I. Valmantonis*, and the important decision No C-700/20 (London Steam/Spain), which is analyzed by Mr. *Komninos Komnios*, Professor at the International Hellenic University, ("Arbitration and Brussels Ia Regulation: Descent of the 'Spanish Armada' in the English legal order?"). Regarding domestic

jurisprudence, the present issue includes the Supreme Court judgment No. 1181/2022, which demonstrates the incompatibility of the relevant provision of the new Greek CPC on service abroad with EU and ECHR rules, with a case comment by the undersigned, as well as a judgment of the County Court of Piraeus (73/2020), regarding the binding nature of the parties' request for an oral presentation in the European Small Claims procedure, with a comment by Judge Ms. *K. Chronopoulou*. Finally, interesting issues of private international law on torts are also highlighted in the decisions of the Athens First Instance Court No 102/2019 and No 4608/2020, commented by Dr. *N. Zaprianos*.

Lex & Forum renews its scientific appointment with its readers for the next (eighth) issue, focusing on family disputes of a cross-border nature.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 6/2022: Abstracts

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

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

U. Janzen/R. Wagner: **The German implementing rules for the Brussels II ter Regulation**

When the original version of the Brussels II Regulation was adopted in 2000, it was not certain whether this regulation would be such a success. In the meantime, the regulation has become one of the most important legal instruments for judicial cooperation in civil matters. The regulation has recently been revised

for the second time. The following article presents the German implementing rules for this recast.

R. Magnus: **A new Private International Law and new Procedural Rules for Adoptions in Germany**

As a result of two recent reforms the German private international and procedural laws applicable to adoptions have changed quite substantively. Article 22 (1) sentence 1 of the Introductory Act to the German Civil Code (EG-BGB) now refers to the lex fori as the law applicable for all domestic procedures, and section 1 (2) of the Adoption effects Act (AdWirkG) introduces an obligatory recognition procedure for many foreign adoptions. The effects of these and other innovations are examined and evaluated in detail in this article.

H.-P. Mansel: **Liberalization of the Private International Law of Marriage and Registered Civil Partnership: Remarks on the Place of Marriage and Registration as Connecting Factors**

According to the new proposal of the German Council for Private International Law, the law of the "place of marriage" is to govern the establishment of a marriage or registered civil partnership. The article deals with this proposal and explores the question of how this place is to be determined in the case of an online marriage. It argues for the application of the law of the state where the register is kept.

B. Laukemann: **Protecting procedural confidence against the insolvency estate?**

According to Union law, the effects of insolvency proceedings on a pending lawsuit are governed by the lex fori – and thus not by the law of the opening Member State (s. Art. 18 European Insolvency Regulation [EIR], Art. 292 Directive 2009/138, Art. 32 Directive 2001/24). At first glance, the distinction between the lex fori and the lex concursus raised here does not cause any major problems of interpretation. But can the lex fori and its regulatory purpose, which

is to guarantee protection of confidence and legal certainty in civil proceedings, also be brought into position against the liability regime of foreign insolvency proceedings? A look at Art. 7(2)(c) EIR, which, in turn, allocates procedural powers of a debtor and insolvency practitioner to the lex fori concursus, reveals the difficulties of a clear-cut demarcation between the law of the forum and the law governing insolvency proceedings. The present contribution seeks to pursue this classification problem, equally relevant in legal and practical terms, for the relevant pieces of secondary EU legislation. Recently, this legal question was submitted to the CJEU – due to the liquidation of an insurance company within the scope of the Solvency II Directive. The decision gives rise to critically examine the delimitation approach of the CJEU and to ask in general how the protection of procedural confidence, on the one hand, and insolvency-related liability interests of the creditors, on the other, can be brought into an appropriate balance.

J. Kondring: **International Service by WhatsApp: Reflections on the Hague Service Convention and the 1928 Anglo-German Convention in Judgement and Recognition Proceedings**

In times of electronic communication, the question arises whether cross-border service by means of electronic communication is possible. The Higher Regional Court (OLG) of Frankfurt a.M. had to decide this question in recognition proceedings for a Canadian-German service by WhatsApp. Neither the Hague Service Convention nor bilateral agreements such as the Anglo-German Convention of 1928 allow service by WhatsApp. In this respect, the article also examines the interaction of section 189 German Code of Civil Procedure (ZPO) and Art. 15 of the Hague Service Convention in both judgment and recognition proceedings, including the relationship to the parallel Anglo-German Convention of 1928. In certain cases, Art. 15 of the Hague Service Convention moves aside and "neutralises" section 189 German Code of Civil Procedure and its legal consequences. For the recognition proceedings, Art. 15 of the Hague Service Convention will also have to be taken into account in the context of the examination of the regularity of service of the document instituting the proceedings.

S. Arnold: **Applicability of Article 15(1)(c) Lugano II in cases of subsequent relocation of consumers**

In its judgment (C-296/20), the ECJ follows the consumer-friendly course already taken in the mBank decision. It interpreted Article 15(1)(c) Lugano II (and by doing so also the corresponding Article 17(1)(c) Brussels Ibis Regulation). The court clarified that the provision governs the jurisdiction of a court also in such cases where a consumer who has contracted with a professional counterparty subsequently relocates to another contracting State. Thus, it is not necessary for the cross-border activities of the professional party to have already existed at the time the contract was concluded. Rather, the subsequent move of the consumer also constitutes the "pursuit" of the professional or commercial activity in the consumer's member state. Consequently, the court strengthens the position of consumers. Even in the event of a subsequent move, they can rely on the (passive) forum of protection of Article 16(2) Lugano II and the (active) forum of Article 16(1) Lugano II at their place of residence. The burden that this decision places on the professional counterparty – the risk of foreign litigation even if the matter was purely domestic at the time the contract was concluded – seems reasonable, as choice of forum agreements (Art. 17 No. 3 Lugano II) remain possible as a means of protection.

A. Staudinger/F. Scharnetzki: **The applicable law for the internal settlement between two liability insurances of a tractor-trailer combination – Karlsruhe locuta, causa non finita.**

If in a tractor-trailer combination the owners of the tractor unit and the trailer are not the same person and two different liability insurers cover the respective operating risk, the question arises as to the internal settlement between the two liability insurances. Here, first the conflict-of-law issue to be dealt with is the source of law that is to be used to determine the relevant statute for recourse. In its decision of 3 March 2021, the Federal Court of Justice endorsed an alternative approach based on Article 19 of the Rome II Regulation and Article 7 para. 4 lit. b) of the Rome I Regulation in conjunction with Article 46d para. 2 of the Introductory Act to the German Civil Code (EGBGB) for a situation in which a German liability insurer of the tractor seeks half compensation from a Czech trailer insurer. In the opinion of the authors, the IV. Civil Senate had, in light of

the European Court of Justice's decision of 21 January 2016 in the joined cases C-359/14 and C-475/14, an obligation to refer to the Court in Luxembourg under Article 267 para. 1 lit. b), para. 3 TFEU. So, the solution via Art. 19 Rome II Regulation seems hardly convincing, at most a special rule on conflict of laws like Art. 7 para. 4 lit. b) Rome I Regulation. Whether and to what extent Article 7 para. 4 lit. b) Rome I Regulation can be instrumentalized to enforce § 78 para. 2 VVG old version via Article 46d para. 2 EGBGB, however, should have been finally clarified by the European Court of Justice. In particular, it seems doubtful whether Article 46d para. 2 EGBGB as a national rule, which goes back to Art. 7 para. 4 lit. b) Rome I Regulation, allows a provision such as § 78 para. 2 VVG old version to be applied as a mere recourse rule between two insurers. This applies all the more since no special public interests or interests of injured parties worthy of protection are affected here.

C. Mayer: **Relevance of the place of marriage for determining the applicable law in relation to the formal requirements of proxy marriage and online marriage**

The decisions of the Federal Court of Justice and the Düsseldorf Administrative Court concern a double proxy marriage in Mexico and an online marriage via live video conference with an official from the US state of Utah. In both cases, the spouses were themselves in Germany. Both decisions focus on the conflict of law determination of the applicable law in relation to the formal requirements of marriage. Due to the German conflict of law rules in Art. 11 and Art. 13 Para. 4 EGBGB, the place of marriage is decisive. The Federal Court of Justice concludes that the double proxy marriage took place in Mexico, which is why the marriage was formally valid under the applicable local law. The Dusseldorf Administrative Court rules that the online marriage was concluded in Germany, so that only German law is applicable and the marriage is therefore formally invalid due to the lack of participation of a registrar. Both cases reveal inconsistencies in German conflict of laws.

S. Deuring: **The Purchase of Trees Growing in Brazil: Not a Contract Relating to a Right in rem in Immovable Property or a Tenancy of**

Immovable Property

ShareWood, a company established in Switzerland, and a consumer resident in Austria had entered into a framework agreement and four purchase contracts for the acquisition of teak and balsa trees in Brazil. When the consumer demanded the termination of the purchase contracts, the question arose of whether this demand could be based on Austrian law, even though the parties had agreed that Swiss law should apply. Siding with the consumer, the ECJ ruled that contractual arrangements such as the present one cannot be considered contracts relating to a right in rem in immovable property or tenancy of immovable property pursuant to Art. 6(4)(c) of the Rome I Regulation. The non-applicability of this provision entails the applicability of Art. 6(2) cl. 2 of the Rome I Regulation. According to the latter, a choice of law may not have the result of depriving consumers of the protection afforded to them by provisions that cannot be derogated from by agreement by virtue of the law of the country where the consumer has his habitual residence. In consequence, the consumer could, in fact, base his action on Austrian law.

C. Benicke/N. Suchocki: **Judicial approval for disclaimer of interests given by parents for their minor children – Polish cases of succession at German courts and the role of the special escape clause in Art. 15 (2) CPC 1996**

Polish probate courts demand for judicial approval of any disclaimer of interest given by parents for their minor children, even if such an approval is not required under the law applicable according to Art. 17 of the Child Protection Convention 1996. If German law is applicable due to Art. 17 CPC 1996, in most cases a judicial approval for the disclaimer of interest is not required according to § 1643 (2) p. 2 BGB. As a consequence, German family courts having jurisdiction to issue a judicial approval according to Art. 5 (1) CPC 1996 cannot do so, because under German law, applicable according to Art. 15 (1) CPC 1996 no judicial approval can be issued if not required by the substantive law applicable according to Art. 17 CPC 1996. This leads to the situation that no valid disclaimer of interest can be made, even though both jurisdictions would allow it in a purely domestic case. Therefore, the question arises as to whether in such cases a German family court may issue a judicial approval due to Art. 15 (2) CPC 1996, which exceptionally allows to apply or take into consideration the law of another State with which the

situation has a substantial connection. One of the various regulatory purposes of the special escape clause in Art. 15 (2) CPC 1996 consists in allowing the court to adjust the lex fori in order to solve an adaptation problem as it is in this case. The Higher Regional Court Hamm issued such a judicial approval in taking into consideration that the Polish law requires a judicial approval for the disclaimer of interest. We agree with the OLG Hamm in the result, but not in the justification. As Art. 15 (2) CPC 1996 refers only to Art. 15 (1) CPC 1996 the taking into consideration of Polish law cannot overrule that the law applicable according to Art. 17 CPC 1996 does not require a judicial approval. To solve the adaptation problem, it suffices that German law applicable according to Art. 15 (1) CPC 1996 is modified in so far that it allows the formal issuance of a judicial approval even though such an approval is not required by the substantive law applicable according to Art. 17 CPC 1996.

R. Hüßtege: German procedural law for obtaining a decision that the removal or retention of a child was wrongful – present and future

Art. 15 of the Hague Convention on the civil aspects of international child abduction requests that the applicant should obtain from the authorities of the State of the habitual residence of the child a decision that the removal or retention was wrongful within the meaning of Article 3 of the Convention. The procedure for obtaining the decision is regulated incomplete in the German implementation law. Most of the problems raised will, however, be remedied by the reform of the German implementing act.

P. Schlosser: Recognition even if service of the document initiating the proceedings had not taken place?

The author is submitting that Art. 22 of the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance provides only one alternative for refusing recognition to a maintenance Judgment (“may be refused”) and that, therefore, more liberal provisions in national Law are upheld. The German code of civil procedure, § 328, seems not to be more liberal, but must be seen in the light of the overwhelming principle of safeguarding the right to be heard in court. Yet, this principle is well safeguarded, if the proposed victim in

the subsequent proceedings of exequatur gets a chance to assert what he would have asserted in the original litigation but, thereby, he had no chance to achieve a different result. Under these circumstances the contrary solution would amount to a refusal of justice to the other party.

B. Heiderhoff: **Refugees and the Hague Child Abduction Convention:**

The ECJ held that the removal of a child cannot be wrong ful in the sense of Article 2(11) of Regulation No 2201/2003 (now Article 2 sec 2(11) of Regulation No 2019/1111), if the parent has complied with a decision to transfer under Regulation (EU) No 604/2013 by leaving the country. This decision makes a valid point, but seems too general and reaches too far. The contribution shows that the integration of family law and migration law is insufficient and urges better coordination between the actors to achieve better protection of the child.

T. Frantzen: **Norwegian International Law of Inheritance**

Norway adopted a new act on inheritance and the administration of estates in 2019. The act came into force on 1 January 2021. The new act is based on the principles of the act on inheritance from 1972 and the act on administration of estates from 1930. This means that descendants may claim a forced share of 2/3 of the estate, however with a limitation of approximately 150,000 Euro. With the new act the amount has been increased, and it is regulated each year. A surviving spouse may, as before, claim a legal share. The spouse may alternatively choose to take over the so-called undivided estate. This means that the division of the estate is postponed.

Until the new succession act was adopted, Norwegian choice of law rules on succession were based on customary law. The general principle was that succession was governed by the law of the State in which the deceased had her/his last domicile, and that there was no, or a very limited space, for party autonomy.

The new act decides that the administration of estates may take place in Norway if the deceased had her/his last habitual residence in Norway. When it comes to

succession, the main rule is that succession is governed by the law of the State where the deceased had her/his last habitual residence. Party autonomy is introduced in the new act, as a person may choose that succession shall be governed by the law of a State of which he or she was a national. The decision on the choice of law is however not valid if the person was a Norwegian citizen by the time of death. The few provisions on choice of law are based on the EuErbVO.

C. Jessel-Holst: **Private international law reform in North Macedonia**

In 2020, North Macedonia adopted a new Private International Law Act which replaces the 2007 Act of the same name and applies from 18.2.2021. The new Act amounts to a fundamental reform which is mainly inspired by the Acquis communautaire. It also refers to a number of Hague Conventions. The Act contains conflict-of-law rules as well as rules on procedure. Many issues are regulated for the first time. The concept of renvoi is maintained but the scope of application has been significantly reduced. As a requirement for the recognition of foreign judgments the Act introduces the mirror principle. As was previously the case, reciprocity does not constitute a prerequisite for recognition and enforcement.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2022: Abstracts

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

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

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

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

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

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

Although contractual rights are usually limited to the parties, almost all jurisdictions in Europe recognize exceptions of this rule. Whereas those “contractual” rights of third parties are strictly limited in common law countries, German and Austrian Law even extend contractual duties of care on third persons

related to the parties. Prior to the Rome Regulations, the conflict-of-law judgments on those "contracts with protective effect in favour of third parties" differed between German and Austrian courts.

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

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

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

In two recent decisions, the CJEU continues to refine the contours of procedural consumer protection in cross-border disputes. In the case of a person who spent on average nine hours a day playing – and winning at – online poker, the court clarified that factors like the amount involved, special knowledge or the regularity of the activity do not as such lead to this person not being classified as a consumer. It remains unclear, however, which criteria are relevant to determine whether a contract is concluded for a purpose outside a trade or profession. Further, the CJEU stated that the relevant time to determine the consumer's domicile is when the action is brought before a court. This seems to be true even if the consumer changes domicile to a different member state after the conclusion of the contract and before the action is brought and the seller or supplier has not pursued commercial or professional activities or directed such activities at this member state. This devalues the relevance of this criterion to the detriment of the professional party.

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

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

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

In its decision of 11 March 2021, the Cologne Higher Regional Court denied the international jurisdiction of the Cologne courts for permission proceedings under the German Telemedia Act (TMG) in cases of suspected abusive customer complaints in online marketplaces. The Cologne court decision combined several precedents of the German Federal Court and the European Court of Justice. Although the Cologne Higher Regional Court decided that permission proceedings constitute a civil and commercial matter within the meaning of the Brussels I Regulation, international jurisdiction could not be established in Germany. The place of performance according to Art. 7 No. 1 lit. b second indent Brussels Ibis Regulation must, in case of doubt, uniformly be determined at the place of establishment of the online marketplace operator in Luxembourg. Article 7 No. 2 of the Regulation also does not give jurisdiction to German courts. The refusal to provide information per se is not a tort in the sense of Article 7 No. 2. Furthermore, there is no own or attributable possibly defamatory conduct of the platform operator. Contradictory considerations of the German legislator alone

cannot establish jurisdiction in Germany.

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

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

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

The judgment of the Oberlandesgericht Frankfurt/Main deals with one of the open procedural questions of the Brexit: the obligation of plaintiffs having permanent residence in the United Kingdom to provide security of costs in German civil proceedings. The Court has rightly decided that from January 1st, 2021 plaintiff cannot rely on sect. 110 par. 1 German Code of Civil Procedure (CCP) anymore as the United Kingdom is no longer member of the EU. If the plaintiff has lodged the complaint before January 1st, 2021, the obligation to provide security of costs arises at that date and security can be claimed by respondent according to sect. 110 CCP. However, the Court has not seen two exceptions from the obligation to provide security for costs according to sect. 110 par. 2 no. 1 and 2 CCP which relieve plaintiff from the obligation to provide security of costs if an international convention so provides (no. 1) or if an international convention grants the recognition and execution of decisions for costs (no. 2). In the instant case the court had to apply art. 9 par. 1 of the European Convention on Establishment of 1955 and the Convention between Germany and the United Kingdom on Recognition and Execution of Foreign Judgments of 1960, both Conventions not having been touched by the Brexit. Facit therefore: claimants having permanent residence in the United Kingdom are not obliged to provide security for costs in German Civil proceedings.

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

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

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

Does the term "contract for the provision of services" in Art 4(1)(b) Rome I Regulation include a building contract with a foreign building site? Or should we apply the exception clause in Art 4(3) Rome I Regulation if the building site is abroad? Which law governs the legal consequences of undisclosed agency, i.e. how should we treat cases where a contracting party acts as an agent for an undisclosed principal? Furthermore, what are the legal grounds in German law for a refund of an advance payment surplus in such a building contract? In the case discussed, the Oberlandesgericht (Higher Regional Court) Köln only addressed the latter question in detail. Unfortunately, the court considered the interesting PIL issues only in disappointing brevity. Therefore, based on a doctrinal examination of the exception clause in Art 4(3) Rome I Regulation, the paper discusses whether the scope of the general conflict of laws rule for contracts for the provision of services should exclude building contracts with a foreign building site by virtue of a teleological limitation. It also sheds light on the dispute around the law governing cases of undisclosed agency. The paper argues that Art 1(2)(g) Rome I Regulation is not applicable in this regard, i.e. the issue is not excluded from the Rome I Regulation's scope. Instead, it is covered by Art 10(1) Rome I Regulation; hence, the law governing the contract remains applicable.

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

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

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

A man of French nationality and a woman of Chilean nationality got married and had a daughter in Buenos Aires. A few months after the birth of their daughter, the family travelled to Europe, where they first visited relatives and friends and finally stayed with the man's family in Bordeaux. One month and a few days after they arrived in Bordeaux, mother and daughter travelled to Buenos Aires and, despite an agreement between the spouses, never returned to Bordeaux. The father in France asked Argentinean authorities for a return order under the HCA. According to the prevailing view, the HCA only applies, if, before the removal or retention, the child was habitually resident in any contracting state except for the requested state. The court of first instance (Juzgado Civil) assumed a change of the child's habitual residence from Argentina to France, but, considering that the lack of the mother's consent to move to France results in a violation of the Convention on the Elimination of All Forms of Discrimination against Women, it granted an exception under Art. 20 HCA. The higher court (Cámara Nacional de Apelaciones en lo Civil) and the Argentinian Supreme Court (Corte Suprema de Justicia de la Nación) required the manifestation of both parents' intent for a change of the child's habitual residence. The higher court saw a sufficient manifestation of the mother's intent to move to France in the termination of her employment in Buenos Aires and ordered the return. In contrast, the CSJN refused to give weight to the termination of employment as it happened in

connection with the birth of the daughter.

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

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

Notifications:

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

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

Tort Litigation against Transnational Companies in England

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

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

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

Extraterritoriality is employed in this context as a method of framing a private international law problem rather than as an expression of outer limits. Therefore, there is nothing pejorative about regulating companies at the place of their seat, and there is no reason why the state where a corporate group is based should not (and indeed should not be obliged to) sanction that group's international industrial misconduct on the same terms as similar domestic misconduct, in tort claims for harm suffered by third parties or stakeholders. (Muir-Watt (ibid) 386)

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

The UK Supreme Court's landmark decisions in *Vedanta v Lungowe* [2019] UKSC 20 and *Okpabi v Shell* [2021] UKSC 3 have granted jurisdiction and allowed such claims to proceed on the merits in English courts. The decisions facilitate victims of corporate human rights and environmental abuse by providing clarity on significant issues. Parent companies may assume a duty of care for the actions of their subsidiaries by issuing group-wide policies. Formal control is not necessarily the determining factor for liability, and any entity that is involved with the management of a particular function risks being held responsible for any damage flowing from the performance of that function. When evaluating whether a

claimant can access substantial justice in another forum, English courts may consider the claimants lack of financial and litigation strength. The UK Supreme Court decisions are in alignment with the ethos of the UN Guiding Principles on Business and Human Rights ("Ruggie Principles"), particularly the pillar focusing on greater access by victims to an effective remedy. (The United Nations Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31 (2011))

Post-Brexit, the broader availability of the doctrine of *forum non conveniens* may help the English courts to ward off jurisdictional challenges against parent companies for damage caused by their subsidiaries at the outset. However, in exceptional cases, the claimant's lack of financial and litigation strength in the natural forum may be considered under the interests of justice limb of *The Spiliada* test, which motivate an English court not to stay proceedings. (*Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada)* [1987] AC 460) It has been argued that if the Australian "clearly inappropriate forum" test for *forum non conveniens* is adopted, (*Voth v Manildra Flour Mills Pty Ltd* (1991) 65 A.L.J.R. 83 (HC); *Regie National des Usines Renault SA v Zhang* [2002] HCA 10 (HC)) it is unlikely that a foreign claimant seeking compensation from a parent company in an English court would see the case dismissed on *forum non conveniens* grounds. As a result, it is more likely that a disadvantaged foreign litigant will succeed in overcoming the jurisdictional hurdle when suing the parent company. From a comparative law standpoint, the adoption of the Australian common law variant of *forum non conveniens* will effectively synthesize *The Spiliada's* wide-ranging evaluative enquiry with the certainty and efficiency inherent in the mandatory rules of direct jurisdiction of the Brussels-Lugano regime.

In relation to choice of law for cross-border torts, the UK has wisely decided to adopt the Rome II Regulation as retained EU law. (See The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019) Article 4(1) of the Rome II Regulation will continue to lead to the application of the law of the country where the damage occurred. Post-Brexit, it remains to be seen whether the English courts would be more willing to displace the applicable law under Article 4(1) by applying Article 4(3) of Rome II more flexibly. The territorial limitations of the *lex loci damni* might be overcome by applying the principle of closest connection to select a more favorable law. The result-selectivism inherent in the idea of a favorable law is reminiscent of the regulatory approach of governmental interest analysis. (See SC

Symeonides, *Codifying Choice of Law Around the World* (OUP 2014) 287) Article 7 of the Rome II Regulation provides the claimant in an environmental damage claim a choice of applicable law either pursuant to Article 4(1) or the law of the country in which the event giving rise to the damage occurred. Alternatively, any regulatory provisions in English law may be classified as overriding mandatory provisions of the law of the forum under Article 16 of the Rome II Regulation. The Rome II Regulation, under the guise of retained EU law, constitutes a unique category of law that is neither EU law nor English law *per se*. The interpretation of retained EU law will give rise to its own set of challenges. Ultimately, fidelity to EU law will have to be balanced with the ability of UK appellate courts to depart from retained EU law and develop their own jurisprudence.

Any future amendments to EU private international law will not affect the course of international civil litigation before English courts. (Cf A Dickinson, 'Walking Solo – A New Path for the Conflict of Laws in England' Conflictoflaws.net, suggests engagement with the EU's reviews of the Rome I and II Regulations will provide a useful trigger for the UK to re-assess its own choice of law rules with a view to making appropriate changes) However, recent developments in the UK and Europe are a testament to the realization that the avenue for access to justice for aggrieved litigants may lead to parent companies that are now subject to greater accountability and due diligence.

Out Now: Bizer on Violations of Personality Rights on Social Media

Based on a tweet by the '*enfant terrible* of tech', Elon Musk, Michael Douglas recently discussed 'Conflict of Laws of Freedom of Speech on Elon Musk's Twitter' on this blog. In a new volume published by Mohr Siebeck, Anna Bizer adresses similar questions, from the point of view of German and European PIL. Starting from the observation that social media challenges the existing legal framework (even more so than the internet itself) by incentivizing the sharing of, and interaction with content, and thus perpetuating violations of personality

rights, even where the original author of a post has already deleted it, the author focuses on three areas of law: contract law, tort law, and data protection.

As far as questions of contract law are concerned, Bizer rightly puts an emphasis on the fact that social media platforms often involve a triangle (or pyramid) of contractual relationships between the hosts and at least two users. Regarding the relationship between the host and individual users, she identifies the delineation between private and professional use (only one of which triggers the consumer rules in the Brussels Ia and Rome I Regulations) as the main problem and argues in favour of a much wider understanding of the consumer definition. Regarding the relationship between multiple users of the same service, she rightly acknowledges the potential of the platform contract to influence the applicable law via Art. 4(3) Rome I.

Concerning tort law, Bizer is generally critical of the existing legal framework under Art. 40–42 of the German EGBGB (infringements of personality rights being excluded from the Rome II Regulation). Instead of giving the claimant a choice between *Handlungsort* (place of acting) and *Erfolgsort* (place of damage), potentially leading to a mosaic of applicable laws, the applicable law should be determined by identifying the objective centre of the violation, with the intended readership of a given publication as the guiding criterion, which may be supplemented, if necessary, by the CJEU's centre-of-interests criterion and the place of acting. Again, the author acknowledges that the contract for the social media platform might be taken into account via an escape clause (i.e. Art. 41 EGBGB).

In addition to questions of data protection, the author also addresses the role of the e-Commerce Directive's country-of-origin rule and the *ordre public* in what is a well-argued, excellently researched book on a highly topical question.

Conflict of Laws of Freedom of

Speech on Elon Musk's Twitter

Elon Musk's purchase of Twitter has been a divisive event. Commenting on the response on Twitter and elsewhere, Musk tweeted:

> *The extreme antibody reaction from those who fear free speech says it all*
>
> *>*
>
> *By "free speech", I simply mean that which matches the law.*
>
> *I am against censorship that goes far beyond the law.*
>
> *If people want less free speech, they will ask government to pass laws to that effect.*
>
> *Therefore, going beyond the law is contrary to the will of the people.*

Ralf Michaels quote-tweeted perceptively: 'But which law?'

Twitter and the conflict of laws

By their very nature, digital platforms like Twitter present a variety of conflict of laws issues.

'Twitter' is not a monolithic entity. The functionality of the social media platform with which readers would be familiar is underpinned by a transnational corporate group. Twitter, Inc is incorporated in Delaware, and has various subsidiaries around the world; Twitter International Company, for example, is incorporated in Ireland and responsible as data controller for users that live outside of the United States. The business is headquartered in San Francisco but has offices, assets, and thousands of staff around the world.

The platform is populated by 400 million users from all over the world. After the US, the top 5 countries with the most Twitter users are comprised of Japan, India, the UK and Brazil. The tweets and retweets of those users may be seen all over the world. Users have wielded that functionality for all sorts of ends: to report on Russia's war in real-time; to coordinate an Arab Spring; to rally for an American

coup d'état; to share pictures of food, memes, and endless screams; and to share conflict of laws scholarship.

Disputes involving material on Twitter thus naturally include foreign elements. Where disputes crystallise into litigation, a court may be asked to consider what system of law should determine a particular issue. When the issue concerns whether speech is permissible, the answer may be far from simple.

Free speech in the conflict of laws

The treatment of freedom of speech in the conflict of laws depends on the system of private international law one is considering, among other things. (The author is one of those heathens that eschews the globalist understanding of our discipline.)

Alex Mills has written that the balance between free speech and other important interests 'is at the heart of any democratic political order'.[1] Issues involving free speech may thus engage issues of public policy, or *ordre public*,[2] as well as constitutional considerations.

From the US perspective, the 'limits of free speech' on Twitter is likely to be addressed within the framework of the First Amendment, even where foreign elements are involved. As regards private international law, the Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act 28 USC 4101- 4105 ('SPEECH Act') is demonstrative. It operates in aid of the constitutional right to freedom of expression and provides that a US 'domestic court shall not recognize or enforce a foreign judgment for defamation unless the domestic court determines that' the relevant foreign law would provide the same protections for freedom of speech as would be afforded by the US Constitution.[3]

Other common law jurisdictions have approached transnational defamation issues differently, and not with explicit reference to any capital-c constitutional rights. In Australia, the High Court has held that the *lex loci delicti* choice-of-law rule combined with a multiple publication rule means that defamation is determined by the law of the jurisdiction in which a tweet is 'available in comprehensible form': the place or places it is downloaded.[4] In contrast, where a claim concerns a breach of confidence on Twitter, an Australian court is likely to apply the equitable principles of the *lex fori* even if the information was shared into a

foreign jurisdiction without authorisation.[5] In either case, constitutional considerations are sidelined.

The balance to be struck between free speech on the one hand, and so-called 'personality rights' on the other, is a controversial issue within a legal system, let alone between legal systems. So for example, the choice-of-law rule for non-contractual obligations provided by the Rome II Regulation does not apply to personality rights, as a consensus could not be reached on point.[6] Similarly, defamation and privacy are excluded from the scope of the HCCH Judgments Convention by Art 2(1)(k)–(l).

There is a diversity of approaches to choice of law for cross-border infringements of personality rights between legal systems.[7] But the 'law applicable to free speech on Twitter' is an issue that goes far broader than personality rights. It touches on as many areas of law as there are aspects of human affairs that are affected by the Twitter platform. For example, among other things, the platform may be used to:

- spread misrepresentation about an election, engaging electoral law;
- influence the price of assets, engaging banking and finance law; or
- promote products, engaging consumer law.

Issues falling into different areas of law may be subject to different choice-of-law rules, and different systems of applicable law. What one system characterises as an issue for the proper law of the contract could be treated as an issue for a forum statute in another.

All of this is to say: determining what 'the law says' about certain content on Twitter is a far more complex issue than Elon Musk has suggested.

The law applicable to online dignity

Key to the divisiveness of Musk's acquisition is his position on content moderation. Critics worry that a laissez-faire approach to removing objectionable content on the platform will lead to a resurgence of hate speech.

Musk's vision for a freer Twitter will be subject to a variety of national laws that seek to protect dignity at the cost of free speech in various ways. For example, in April, the European Parliament agreed on a 'Digital Services Act', while in the UK, at the time of writing, an 'Online Safety Bill' is in the House of Commons. In Australia, an Online Safety Act was passed in 2021, which provided an 'existing Online Content Scheme [with] new powers to regulate illegal and restricted content no matter where it's hosted'. That scheme complements various other national laws, like our Racial Discrimination Act 1975, which outlaws speech that is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people, and was done because of the race, colour or national or ethnic origin of the person or group.

When a person in the United States posts content about an Australian that is permissible under US law, but violates Australian statute, the difficulty of Musk's position on the limits of censorship becomes clear. Diverse legal systems come to diverse positions on the appropriate balance between allowing online freedom and protecting human dignity, which are often struck with mandatory law. When your platform is frequented by millions of users all over the world, there is no single 'will of the people' by which to judge. Perhaps Musk will embrace technological solutions to give effect to national standards on what sort of content must be censored.

A host of other conflicts issues

Musk-era Twitter is likely to pose a smorgasbord of other issues for interrogation by conflict of laws enthusiasts.

For example: legal systems take diverse approaches to the issue of whether a foreign parent company behind a platform like Twitter can be imposed with liability, or even criminal responsibility, for content that is on the platform. While conservatives in America consider the fate of s 230 of the Communications Decency Act—a provision that means that Twitter is not publisher of content they host—other countries take a very different view of the issue. Litigation involving the companies behind Twitter is likely to engage courts' long-arm jurisdiction.

Perhaps the thorniest conflicts problem that may emerge on Musk's Twitter is the scope of national laws that concern disinformation. In an announcement on 25

April, Musk stated:

> *'Free speech is the bedrock of a functioning democracy, and Twitter is the digital town square where matters vital to the future of humanity are debated'.*

Recent years have shown that the future of humanity is not necessarily benefited by free speech on social media. How many lives were lost as a result of vaccine-scepticism exacerbated by the spread of junk science on social media? How many democracies have been undermined by Russian disinformation campaigns on Twitter? The extraterritorial application of forum statutes to deal with these kinds of issues may pose a recurring challenge for Musk's vision.[8] I look forward to tweeting about it.

Michael Douglas is Senior Lecturer at UWA Law School and a consultant in litigation at Bennett + Co, Perth.

[1] Alex Mills, 'The Law Applicable to Cross-border Defamation on Social Media: Whose Law Governs Free Speech in "Facebookistan"?' (2015) 7 *Journal of Media Law* 1, 21.

[2] See, eg, International Covenant on Civil and Political Rights, art 19(3).

[3] SPEECH Act s 3; United States Code, title 28, Part VI, § 4102. See generally Lili Levi, 'The Problem of Trans-National Libel' (2012) 60 *American Journal of Comparative Law* 507.

[4] *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

[5] But see Michael Douglas, 'Characterisation of Breach of Confidence as a Privacy Tort in Private International Law' (2018) 41 *UNSW Law Journal* 490.

[6] Art 4(1); see Andrew Dickinson, *The Rome II Regulation* (Oxford University Press, 2008).

[7] See generally Symeon C Symeonides, *Cross-Border Infringement of Personality Rights via the Internet* (Brill, 2021) ch VI; Tobias Lutzi, *Private*

International Law Online: Internet and Civil Liability in the EU (Oxford University Press, 2020) ch 4.

[8] See generally Matthias Lehmann, 'New Challenges of Extraterritoriality: Superposing Laws' in Franco Ferrari and Diego P Fernández Arroyo (eds), *Private International Law: Contemporary Challenges and Continuing Relevance* (Edward Elgar, 2019) ch 10.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1/2022: Abstracts

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

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

E.-M. Kieninger: **Climate Change Litigation and Private International Law**

The recent Shell ruling by the District Court of The Hague raises the question whether Carbon Majors could also be sued outside the state of their corporate home and which law would be applicable to claims for damages or injunctive relief. In particular, the article discusses possible restrictions of the right to choose between the law of the state in which the damage occurred and the law of the state in which the event giving rise to the damage took place (Art. 7 No. 2 Brussels Ia Regulation and Art. 7 Rome II Regulation). It also considers the effects of plant permits and the role that emissions trading should play under Art. 17 Rome II Regulation.

S. Arnold: **Artificial intelligence and party autonomy – legal capacity and capacity for choice of law in private international law**

Artificial intelligence is already fundamentally shaping our lives. It also presents challenges for private international law. This essay aims to advance the debate about these challenges. The regulative advantages of party autonomy, i.e. efficiency, legal certainty and conflict of laws justice, can be productive in choice of law contracts involving artificial intelligence. In the case of merely automated systems, problems are relatively limited: the declarations of such systems can simply be attributed to their users. Existence, validity or voidability of choice of law clauses are determined by the chosen law in accordance with Art. 3(5), 10(1) Rome I Regulation. If, however, the choice of law is the result of an artificial "black box" decision, tricky problems arise: The attribution to the persons behind the machines might reach its limit, for such artificial decisions can neither be predicted nor explained causally in retrospect. This problem can be solved in different ways by the substantive law. Clearly, national contract laws will differ substantially in their solutions. Thus, it becomes a vital task for private international law to determine the law that is decisive for the question of attribution. According to one thesis of this article, two sub-questions arise: First, the question of legal capacity for artificial intelligence and second, its capacity for choice of law. The article discusses possible connecting factors for both sub-questions de lege lata and de lege ferenda. Furthermore, it considers the role of ordre public in the context of artificial choice of law decisions. The article argues that the ordre public is not necessarily violated if the applicable law answers the essential sub-questions (legal capacity and capacity for choice of law) differently than German law.

M. Sonnentag/J. Haselbeck: **Divorce without the involvement of a court in Member States of the EU and the Brussels IIbis- and the Rome III-Regulation**

In recent years some Member States of the European Union such as Italy, Spain, France, and Greece introduced the possibility of a divorce without the involvement of a court. The following article discusses the questions whether such divorces can be recognised according to Art. 21 Regulation No 2201/2003 (Brussels-IIbis), Art. 30 Regulation No 2019/1111 (Brussels-IIbis recast) and if

they fall within the scope of the Regulation No 1259/2010 (Rome III).

W. Hau: **Personal involvement as a prerequisite for European tort jurisdiction at the centre of the plaintiff's interests**

The case Mittelbayerischer Verlag KG v. SM gave the ECJ the opportunity to further develop its case law on the European forum delicti under Art. 7 No. 2 Brussels Ibis Regulation for actions for alleged infringements of personality rights on the internet. The starting point was the publication of an article on the homepage of a Bavarian newspaper, which misleadingly referred to "Polish extermination camps" (instead of "German extermination camps in occupied Poland"). Strangely enough, Polish law entitles every Polish citizen in such a case to invoke the "good reputation of Poland" as if it were his or her personal right. The ECJ draws a line here by requiring, as a precondition of Art. 7 No. 2, that the publication contains objective and verifiable elements which make it possible to individually identify, directly or indirectly, the person who wants to bring proceedings at the place of his or her centre of interest. While this approach allows for an appropriate solution to the case at hand, it leaves several follow-up questions open.

A. Hemler: **Which point in time is relevant regarding the selection of a foreign forum by non-merchants according to § 38(2) German Code of Civil Procedure (ZPO)?**

38(2) German Code of Civil Procedure (ZPO) permits the selection of a foreign forum only if at least one party does not have a place of general jurisdiction in Germany. In the case discussed, the defendant had general jurisdiction in Germany only when the claim was filed. However, there was no general jurisdiction in Germany when the choice of forum clause was agreed upon. The Landgericht (district court) Frankfurt a.M. therefore had to decide on the relevant point in time regarding § 38(2) ZPO. Given the systematic structure of § 38 ZPO and the law's purpose of advancing international legal relations, the court argued in favour of the point in time in which the choice of forum clause was agreed upon. The author of the paper rejects the court's view: He argues that the systematic concerns are less stringent on closer inspection. More important,

however, is the fact that the law also calls for the protection of non-merchants. This can only be sufficiently achieved if the point in time in which the claim was filed is regarded as the crucial one.

D. Henrich: **News on private divorces in and outside the EU**

In two decisions the German Federal Court of Justice ("BGH") had to deal with the recognition of private divorces (divorces without involvement of a state authority). In the first case (XII ZB 158/18) a couple of both Syrian and German nationality had been divorced in Syria by repudiation. While recognition of foreign public divorces (divorces by a state court or other state authority) is a question of procedure, private divorces are recognized if they are effective according to the applicable law, here the Rules of the Rome III Regulation (Article 17(1) Introductory Act to the Civil Code). Because the couple had no common ordinary residence, the Court applied Article 8 lit. c Rome III Regulation. German Law dominating, the Court denied recognition.

In the second case (XII ZB 187/20) the BGH made a reference for a preliminary ruling of the European Court of Justice regarding the recognition of a divorce in Italy in the register office in front of the registrar. The BGH follows the opinion that in such cases it is the consent of the parties that dissolves the marriage, the divorce being a private one. The BGH questions whether in spite of that the divorce could be recognized according to Sec. 21 Council Regulation (EC) No. 2201/2003 or, if not, according to Sec. 46 of the Council Regulation.

C. Budzikiewicz: **On the classification of dowry agreements**

Agreements on the payment of a bride's dowry are a recurring topic in German courts. It usually becomes the subject of a legal dispute in connection with or after a divorce. This was also the case in the decision to be discussed here, in which the applicant demands that her divorced husband pay for the costs of a pilgrimage to Mecca. Since the case has an international connection due to the husband's Libyan nationality, the Federal Supreme Court first addresses the controversial question of the characterization of dowry. However, since all connection options lead to German law in the present case, the Court ultimately

refrains from deciding the question of characterization. It explains that the agreement on the payment of dowry is to be classified under German law as a sui generis family law contract, which requires notarization in order to be effective. The article critically examines the decision. In doing so, it addresses both the question of characterization of dowry and the need for form of agreements on the payment of dowry under German law.

E. Jayme/G. Liberati Buccianti: **Private Divorces under Italian Law: Conflict of Laws**

Divorce, under German law, is only permitted by a decision of a judge, even in cases where a foreign law is applicable which would allow a private divorce based on the agreement of the spouses. Italy, however, has introduced, in 2014, a divorce by private agreement in two procedures: the agreement of the spouses can be submitted to the public prosecutor who, in case he agrees, will send it to the civil registrar, or, secondly, by a direct application of the spouses to the civil registrar of the place where the marriage had been registered.

The article discusses the problems of private international law and international civil procedure, particularly in cases where Italian spouses living in Germany intend to reach a private divorce in Italy. The discussion includes same-sex-marriages of Italian spouses concluded in Germany which are permitted under German law, but not under Italian law, according to which only a "civil union" is possible. The Italian legislator has enacted (2017) a statute according to which the same-sex-marriage concluded by Italian citizens abroad will have the effects of a civil union under Italian law. The question arises of whether the Italian rules on terminating a civil union will have an effect on the spouses marriage concluded in Germany.

The article also discusses the validity of private divorces obtained in Third States which are not members of the European Union, particularly with regard to religious divorces by talaq expressed by the husband, and the problem whether such divorces are compatible with the principles of public policy. The authors mention also the specific problems of Italian law with regard to religious (catholic) marriages concluded and registered in Italy, where a divorce by Italian law is possible which, however, may be in conflict with a nullity judgment of the

catholic church.

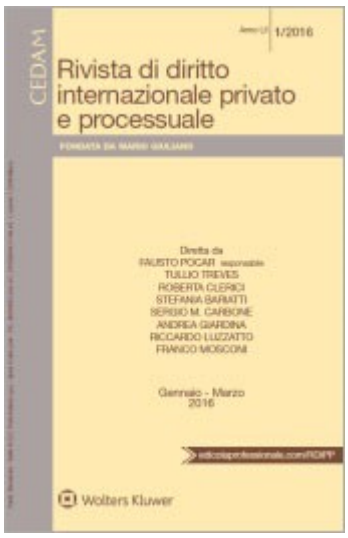
G. Mäsch/C. Wittebol: **None of Our Concern? – A Group of Companies' Cross-border Environmental Liability Before Dutch Courts**

The issue of cross-border corporate responsibility has been in the limelight of legal debate for some time. In its decision of 29 January 2021, the Court of Appeal of The Hague (partially) granted a liability claim against the parent company Royal Dutch Shell plc with central administration in The Hague for environmental damages caused by its Nigerian subsidiary. In particular, the Dutch court had to address the much-discussed question to what extent domestic parent companies are liable before domestic courts for environmental damage committed by their subsidiaries abroad, and whether domestic courts have international jurisdiction over the subsidiary. With this precedent, the number of cross-border human rights and environmental claims is likely to rise in the near future.

H. Jacobs: **Article 4(2) and (3) Rome II Regulation in a case involving multiple potential tortfeasors**

In Owen v Galgey, the High Court of England and Wales engaged in a choice of law analysis in a case involving multiple potential tortfeasors. The claimant, a British citizen habitually resident in England, was injured in France when he fell into an empty swimming pool. In the proceedings before the High Court, he claimed damages from, inter alia, the owner of the holiday home and his wife, both British citizens habitually resident in England, and from a French contractor who was carrying out renovation works on the swimming pool at the material time. The judgment is concerned with the applicability of Article 4(2) Rome II Regulation in multi-party tort cases and the operation of the escape clause in Article 4(3) Rome II Regulation. While the High Court's view that Article 4(2) requires a separate consideration of each pair of claimants and defendants is convincing, it is submitted that the court should have given greater weight to the parties' common habitual residence when applying Article 4(3).

Rivista di diritto internazionale privato e processuale (RDIPP) No 3/2021: Abstracts



The third issue of 2021 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released. It features:

Cristina Campiglio, Professor at the University of Pavia, **Conflitti positivi e negativi di giurisdizione in materia matrimoniale** (Positive and Negative Conflicts of Jurisdiction in Matrimonial Matters)

> Regulation (EC) No 2201/2003 (Brussels II-bis) provides for a range of alternative grounds for jurisdiction in matrimonial matters and is strongly marked by the *favor actoris* principle. The system sets the scene not only for forum shopping but also for a rush to the court. However, spouses who have the nationality of different Member States and reside in a Third State remain deprived of the right to an effective remedy before an EU court. Taking a cue from a case currently pending before the Court of Justice of the European Union, this article examines the possible avenues to address these cases of denial of justice, also in light of Art. 47 of the EU Charter of Fundamental Rights. This analysis is conducted, in particular, with the overarching goal of

launching, at a political level, a general reflection on the question of conflicts of jurisdiction and on the opportunity to create a coherent, unified "European system" in which general and special regulations operate in a coordinated manner.

Fabrizio Marrella, Professor at the Ca' Foscari University of Venice, **Forza maggiore e vendita internazionale di beni mobili in un contesto di pandemia: alcune riflessioni** (*Force Majeure* and International Sales of Goods in the Context of a Pandemic: Some Remarks)

> For centuries, national legal systems have recognised both the principle *pacta sunt servanda* and its exceptions, *i.e*. the *rebus sic stantibus* and *ad impossibilia nemo tenetur* principles. However, the manner in which these basic rules operate varies in the landscape of comparative law. The unforeseeable change of circumstances is among the most relevant issues for international contracts. For this reason, international commercial practice has provided some standard solutions. The Vienna Convention on the International Sale of Goods (CISG) of 11 April 1980 is among the instruments that provide some uniform law solutions: however, these are not satisfactory when compared to modern commercial practice and the potential litigation arising from the Covid-19 pandemic crisis. In this context, legal doctrine on the private international law aspects of *force majeure* also seems scarce. This article explores some of the most pressing private international law issues arising from the impact of the Covid-19 pandemic on cross-border B2B contracts. Notably, it analyses the choice of the *lex contractus* and its scope in relation to *force majeure*, addressing issues of causation, penalty clauses, evidence (with particular reference to "*force majeure* certificates" imposed by some governments), payment, and overriding mandatory rules.

The following comments are also featured:

Marco Argentini, PhD Candidate at the University of Bologna, **I criteri di radicamento della giurisdizione italiana nei contratti di trasporto aereo transnazionale** (The Criteria for Establishing Italian Jurisdiction in Contracts for International Carriage by Air)

> This article analyses the rules to identify the competent courts, in the field of international air carriage contracts, for passenger claims aimed at obtaining

the flat-rate and standardised rights provided for in Regulation No 261/2004 and the compensation for further damage under the Montreal Convention. In particular, the jurisdiction over the former is governed by the Brussels I-bis Regulation, whereas the one over the latter is governed by the Convention itself. Since passengers are the weaker contractual party, the article also addresses some remedies to avoid fragmentation of legal actions between courts of different States, as well as the particular case, tackled by the Court of Justice of the European Union, of a flight forming part of a broader package tour.

Claudia Cantone, PhD Candidate at the University "Luigi Vanvitelli" of Campania, **Estradizione e limiti all'esercizio della giurisdizione penale extraterritoriale nel diritto internazionale: riflessioni a margine della sentenza della Corte di cassazione n. 30642/2020** (Extradition and Limits to the Exercise of Extraterritorial Criminal Jurisdiction in International Law: Reflections on the Court of Cassation's Judgment No 30642/2020)

This article builds upon the judgment of the Court of Cassation 22 October 2020 No 30642, delivered in an extradition case towards the United States of America. The decision of the Supreme Court is noteworthy since, for the first time, the Court examines the restrictions imposed by public international law on States in the exercise of criminal jurisdiction outside their territory. Notably, it states that the existence of a "reasonable connection" could justify the exercise of extraterritorial jurisdiction under international law. In this regard, the Author also analyses the emerging principle of jurisdictional reasonableness in the theory of jurisdiction under international law. Finally, the paper focuses on whether, in extradition proceedings, the judicial authority of the requested State might ascertain the basis of jurisdiction upon which the request is based, taking into consideration the absence of any provision in extradition treaties allowing such assessment.

Curzio Fossati, PhD Candidate at the University of Insubria, **Le azioni di private enforcement tra le parti di un contratto: giurisdizione e legge applicabile** (Private Enforcement Actions between Parties to a Contract: Jurisdiction and Applicable Law)

This article deals with the main private international law issues of antitrust damage claims between contracting parties, according to the latest rulings of

the Court of Justice of the European Union. In particular, these issues concern (a) the validity and the scope of jurisdictions clauses, (b) the determination of jurisdiction under the Brussels I-bis Regulation, and (c) the applicable law under the Rome I and the Rome II Regulations. The article aims at demonstrating that the analysis of these aspects should be preceded by the proper characterization of the damage action for breach of competition law between contracting parties. The conclusion reached is that the adoption of a univocal method to characterize these actions as contractual or non-contractual fosters coherent solutions.

In addition to the foregoing, this issue features the following book review by *Francesca C. Villata*, Professor at the University of Milan: Matthias HAENTJENS, ***Financial Collateral: Law and Practice***, Oxford University Press, New York, 2020, pp. XXXIX-388.

Netherlands journal PIL – 2021, issue 3

The third issue of 2021 of the Dutch journal on private international law (NIPR) is available. A number of papers are dedicated to Brexit and private international law.

Brexit en ipr/brexit and pilSumner, Eerst de echtscheiding, dan de afwikkeling! Brexit en het internationaal privaatrecht / p. 433-453

Abstract

Brexit has changed a lot in the legal landscape. There are few areas of the law that have been unaffected, and international family law is no exception. In this article, attention will be paid to the various areas of international family law that have been affected by the Brexit, drawing attention to the new legal regimes that are applicable with respect to these areas of the law (for example divorce, child protection and maintenance). Each section will further discuss how the new regime differs from the old regime, drawing attention to particular difficulties that may occur in the application of these new rules to the specific situation of the United Kingdom.

Berends, Internationaal insolventierecht tussen het Verenigd Koninkrijk en Nederland na de Brexit / p. 454-470

Abstract

What are the legal consequences in the Netherlands of a British insolvency proceeding since Brexit? In the Netherlands, there is no Act on this matter, and the answers must be found in case law. A foreign representative does not need to apply for recognition. He can exercise his rights unless an interested party prevents him from doing so in a legal procedure, for instance on the ground that the recognition of the insolvency proceeding would be contrary to public policy. A foreign proceeding has the applicable legal consequences according to the law of the State where the insolvency proceeding was opened, with some exceptions. Execution against the debtor’s assets in the Netherlands remains possible.

What are the legal consequences in the United Kingdom of a Dutch insolvency proceeding since Brexit? The United Kingdom has enacted the Model Law of the United Nations Commission on International Trade Law. A foreign representative must apply for recognition. Upon recognition, individual actions concerning the debtor’s assets and execution are stayed, unless such actions and execution are necessary to preserve a claim against the debtor. The consequences of recognition can be modified or terminated if the Court is not satisfied that the interests of interested parties are adequately protected. The so-called Gibbs Rule applies: a party to a contract made and to be performed in England is not

discharged from liability under such contract by a discharge in bankruptcy or liquidation under the law of a foreign country in which he is domiciled.

Bens, Brussel na de Brexit: nieuwe regels in burgerlijke en handelszaken? / p. 471-492

Abstract

The UK formally left the EU on 31 January 2020, although the Brussels Ibis Regulation remained applicable in and for the UK until the end of the transition period on 31 December 2020. This article analyses the changes in the framework for international jurisdiction and the recognition and enforcement of decisions in cross-border civil and commercial matters between the Netherlands and the UK after 1 January 2021. After setting the historical context, the transitional provisions provided for the Brussels regime in the Withdrawal Agreement are scrutinised. It is argued that, considering these arrangements and the current EU framework for judicial co-operation in civil and commercial matters, the Brussels Convention and the NL-UK Enforcement Treaty of 1967 are not applicable to proceedings instituted after 1 January 2021. Consequently, the rules governing international jurisdiction and the cross-border recognition and enforcement of judgements applicable to 'new' cases and judgements are outlined and salient problems are highlighted. It is argued that most of these rules are not new, but are rather cast in a different perspective through Brexit, thereby raising some 'old' problems that require careful (re-)consideration of the post-Brexit legal framework.

Other articles

L.M. van Bochove, De voorzienbaarheid herzien? De fluctuerende invulling van het vereiste dat bevoegdheid ex artikel 7(2) Brussel I*bis* redelijkerwijs voorzienbaar is / p. 493-506

Abstract

This article discusses the requirement that the jurisdiction over matters in tort, based on Article 7(2) Brussels Ibis Regulation, is reasonably foreseeable for the

defendant. An analysis of CJEU case law shows that the interpretation of what is ‘reasonably foreseeable’ fluctuates. Often, the threshold is set rather low, but in two recent cases the CJEU seems to have adopted a stricter interpretation. In VEB/BP and Mittelbayerischer Verlag, the foreseeability requirement actually precludes the attribution of jurisdiction on the basis of established (sub-)criteria, including the place of damage and the centre of main interest. This article attempts to identify the rationale for the use of different yardsticks of reasonable foreseeability. It offers two possible explanations: the degree of the culpability of the defendant and the desired outcome in terms of jurisdiction, in particular the opportunity to use jurisdiction rules as a means to promote the enforcement of EU law. However, both explanations are problematic, in view of the Regulation’s scheme and objectives. This paper argues in favour of a uniform, rather strict interpretation, which ensures that the defendant can reasonably foresee the jurisdiction of the court and avoids a multitude of competent courts. Current law offers no legal basis to consider the enforcement of (EU) law as a factor to establish a reasonably foreseeable jurisdiction; this would require intervention by the European legislator.

Schmitz, Rechtskeuze in consumentenovereenkomsten: artikel 6 lid 2 Rome I-Verordening en de Nederlandse rechter / p. 507-331

Abstract

Party autonomy has been a widely accepted principle of private international law ever since the Rome Convention. Yet, the right to choose the applicable law is often restricted when weaker parties are involved. According to Article 6(2) Rome I Regulation, the parties to a consumer contract may choose the applicable law provided that this choice does not deprive ‘the consumer of the protection afforded to him’ by the objectively applicable law (the law of his habitual place of residence). In the Netherlands, academic opinion is still divided on the issue of how ‘deprived of protection’ should be interpreted. Some argue that the objectively applicable law trumps the chosen law, even if the latter is more beneficial for the consumer. Others want to apply the law that better protects the consumer – regardless of whether it is the chosen or the objectively applicable law. This question goes hand in hand with a (possibly complex) legal comparison between both systems of law. How this comparison needs to be exercised is

unclear. Delving deeply into Dutch case law shows that Dutch judges do not have a 'joined approach'. This paper uses a case study to illustrate that following a certain approach when applying Article 6(2) Rome I can alter the level of protection that the consumer enjoys. A lack of guidance from the European Court of Justice could be at fault here; and national courts should refer a question as to the 'right way' of applying Article 6(2) Rome I to the Court.

te Winkel, X.P.A. van Heesch, The *Shell* judgment – a bombShell in private international law? / p. 532-542

Abstract

This article discusses the recent judgment of the District Court of The Hague in Milieudefensie et al. v. RDS (May 26, 2021, ECLI:NL:RBDHA:2021:5337). It reviews the most important substantive rulings of the Court and then focusses on the private international law aspects of the case. Milieudefensie et al. argued that the adoption of the concern policy for the Shell Group by RDS qualifies as the Handlungsort and that Dutch law is therefore applicable to their claims based on Article 7 Rome II Regulation. RDS disagreed with this line of reasoning for multiple reasons. Since there is (as yet) no legal precedent regarding this discussion, both Milieudefensie and RDS relied on the analogous application of case law that concerned the interpretation of the Handlungsort under the Brussels Ibis Regulation. The legal debate between the parties regarding this aspect and the conclusion of the Court are set out in this article. The authors conclude with an analysis of the assessment of the Court and suggest that, given the impact of this ruling and the fact that there is no legal precedent, the Court ex officio should have requested a preliminary ruling from the Court of Justice.

Case note

Arons, HvJ EU 12 mei 2021, zaak C-709/19, ECLI:EU:C:2021:377, *NIPR* 2021, 267 (*VEB/BP*) / p. 543-550

Abstract

In this judgment the CJEU has ruled on localising purely financial losses in order to determine jurisdiction in tort claims. A claimant may sue a defendant on the basis of Article 7(2) of the Brussels Ibis Regulation in the court of another Member State at the place where the harmful event occurred or may occur. The

CJEU has reiterated that the 'place where the harmful event occurred' may not be construed so extensively as to encompass any place where the adverse consequences of an event caused damage to the claimant.

For jurisdiction on this basis a close connection has to be established between the place where the damage occurred and the court addressed by the claimant. This ensures certainty for the defendant: the defendant has to be able to reasonably foresee the court(s) where he may be sued.

The mere location of an investment account is not sufficient to establish the required close connection; additional circumstances are required (paras. 34 and 35). In the Kolassa case (C-375/13) information was published and notified by the defendant in a prospectus aimed at investors in Austria. The CJEU ruled that foreseeability is not ensured if the claim is brought before the courts in the Member State where the investment account used for the purchase of securities listed on the stock exchange of another State is situated, and the issuer of those securities is not subject to statutory reporting obligations in the Member State where the investment account is held by the purchaser (para. 34). A claim can only be brought on the basis of Article 7(2) against a listed company for publishing misleading information to investors in the jurisdiction where that company had to comply, for the purposes of its listing, with statutory reporting obligations. It is only in that Member State that a listed company can reasonably foresee the existence of an investment market and incur liability (para. 35).

Conference Report: The Private Side of Transforming our World – UN Sustainable Development

Goals 2030 and the Role of Private International Law

The Private Side of Transforming our World
UN Sustainable Development Goals 2030and the Role of Private International Law

September 9-11, 2021, Hamburg, Germany,
Max Planck Institute for Comparative and Private International Law

By *Madeleine Petersen Weiner* and *Mai-Lan Tran*

The Max Planck Institute for Comparative and Private International Law hosted a hybrid conference on the Institute's premises, and digitally via Zoom, under the above title from September 9-11, 2021, on the occasion of the publication of the nearly 600-page anthology "The Private Side of Transforming our World – UN Sustainable Development Goals 2030 and the Role of Private International Law".

The Sustainable Development Goals ("**SDGs**") include 17 goals for sustainable development. Formulated by the United Nations in 2015, they form the core of the 2030 Agenda and aim to enable people worldwide to live in dignity while respecting the earth's ecological limit. Fighting poverty and other global ills, improving health and education, reducing inequality and boosting economic growth while combating climate change are the themes of this agenda, also referred to as a "contract for the future of the world". In Public Law, including International Law, SGDs have already established themselves as a subject of research. This has not been the case for Private Law so far. The project "The Private Side of Transforming our World – UN Sustainable Development Goals 2030 and the Role of Private International Law" addresses this research gap identified by the editors and organizers of the conference, *Ralf Michaels*, Director of the Max Planck Institute for Comparative and International Private Law (D), *Verónica Ruiz Abou-Nigm*, Senior Lecturer at Edinburgh Law School , University of Edinburgh (UK) and *Hans van Loon*, former Secretary General of the Hague Conference on Private International Law (NL). The project's aim was to raise awareness that Private International Law („**PIL**"), with its institutions and methods, can also make a significant contribution to achieving these goals.

The conference was structured around the individual SDGs and was divided into six overarching thematic blocks. Renowned and emerging scholars from around the world presented excerpts from their research for the anthology on the relationship between PIL and each of the SDGs. Following the contributions of the individual speakers, discussants for each thematic block pointed out connecting lines and questions within the respective clusters and stimulated the discussion on the podium with initial questions and sometimes provocative theses. Afterwards, the floor was opened to questions from the audience. Next to the organizers, *Maria Mercedes Albornoz*, Centro de Investigación y Docencia Económicas (MEX), *Duncan French*, University of Lincoln (UK), and *Marta Pertegás*, Maastricht University (NL), took on the role of discussants.

The mix of speakers as well as the audience were very international, also thanks to the hybrid format. The English-language conference was translated simultaneously into Spanish for the audience dialed in via Zoom.

After a warm welcome by the organizers, the conference kicked off with the "Basic Socio-Economic-Rights" cluster. The first speaker, *Benyam Dawit Mezmur*, University of the Western Cape (ZAF), focused on SDG 1 "No Poverty". He stated

that this was a very ambitious goal and that the COVID-19 pandemic had actually increased poverty in the world. He went on to point out that it was the poverty of refugee children that needed to be addressed. PIL could contribute to this by simplifying the recognition of status.

Jeannette Tramhel, Organization of American States (USA), then commented on SDG 2 "No Hunger". She talked about an "elephant in the room" in the goal of eliminating world hunger by 2030, referring to the discussion of whether the industrial agri-food system ("**Big Ag**") was the solution to the puzzle, or rather its cause. This "elephant" then ran not only proverbially but also figuratively through her presentation. She then addressed harmonized regimes such as the Hague Conference on Private International Law 2005 Choice of Court Convention, which she believes provide an effective contribution to the goal. Avoiding parallel proceedings, she said, would also be beneficial for internationally operating companies in the agricultural and food sectors.

This first set of topics was concluded by the presentation of *Anabela Susana de Sousa Gonçalves*, University of Minho (PRT), on SDG 3 "Good health and well-being". She first talked about telemedicine and e-health platforms with cross-border functions. With these resources, universal health coverage and healthcare as such – even in the poorest countries of the world – could be supported by PIL.

After a joint lunch break, the participants turned their attention to the second set of topics, "Energy, Work and Infrastructure." *Nikitas E. Hatzimihail*, University of Cyprus (CYP), kicked off the session. He spoke on SDG 7 "Affordable and clean energy". He advocated using the regulatory function of PIL to help achieve some harmonization of regulatory standards at the global level and thereby contribute to the efficient achievement of regulatory goals.

Ulla Liukkunen, University of Helsinki (FIN), then outlined the main findings from her chapter on SDG 8 "Decent Work and Economic Growth". In her presentation, she spoke in favor of broadening the perspective on existing regulatory approaches in PIL. Workers' rights should be placed at the center, and laws as well as legal practices should also be evaluated from this point of view.

In the third and last presentation on the topic, *Vivienne Bath*, University of Sydney (AUS), dealt with SDG 9 "Industry, Innovation and Infrastructure". She elaborated on PIL's fundamental role in infrastructure projects, starting with

contractual issues and ending with dispute resolution. Summing up, she argued for an approach that was more concerned with sustainability than with enforcing the commercially based doctrines of choice of law autonomy and the importance of binding parties to their choice of forum.

A short coffee break refreshed the speakers and the audience for the final set of topics of the day, "Education, Gender and Socio-Economic Inequality." Here, first *Klaus D. Beiter*, North-West University, Potchefstroom (ZAF), gave an insight into his findings on SDG 4 "Quality Education". At the outset, he emphasized his difficulties in even recognizing a link to PIL, since education is a central task of the state. However, according to *Beiter*, the link becomes clear when one observes the progressive privatization of the education sector. He identified as a problem that shortcomings in the education sector on the part of the state in the Global South were being systematically exploited by companies in the global North. PIL thus must be further developed in order to offer more protection to the "weaker" actors in the education sector.

Gülüm Bayraktaro?lu-Özçelik, Bilkent University, Ankara (TUR), followed by highlighting the role of PIL in achieving SGD 5 "Gender Equality". She showed that gender equality issues can play a role in all traditional areas of PIL (such as applicable law or jurisdiction) as well as specifically in the recognition of marriages. On the one hand, a one-size-fits-all approach would not do justice to all areas. On the other hand, the opportunities of cross-cutting soft law instruments, such as the guiding principles for the realization of gender equality, also in cross-border matters, should not be negated but further explored.

Lastly, *Thalia Kruger*, University of Antwerp (BEL), spoke on SDG 10 "Reduced inequalities". Inequality exists on many levels and plays a role in many different places in PIL. In her presentation, she focused on tort law. Inequality could be countered by adequate compensation of the injured parties by the damaging parties. She also expressed her disappointment at the failed attempt to create a new conflict of laws provision in the Rome II Regulation for human rights violations. A draft by the European Parliament's Legal Affairs Committee had envisaged giving injured parties the right to choose between four possible applicable legal systems. Criticism was voiced that the right of choice would create too much legal uncertainty for companies. *Kruger* countered that companies would simply have to comply with all and thus the highest standard of the four possible applicable laws.

The first day culminated in the live book launch of the anthology at *Intersentia*. In order to make it available to as many people as possible worldwide, it was made freely accessible online (open access) at www.intersentiaonline.com – the current preliminary version soon to be replaced by the final text. A PDF version of the book will also be available for free download on the website, as will print versions of the book.

The second day of the conference began with a presentation by *Eduardo Álvarez-Armas*, Brunel University of London (UK) and Université catholique de Louvain (BEL), on SDG 13 "Action on Climate Change". Using the example of the recent lawsuit of the environmental organization *Milieudefensie* and other environmental associations against *Royal Dutch Shell* before the District Court of The Hague, which was successful in the first instance, and the lawsuit of the Peruvian farmer *Lliuya* against *RWE AG*, which has been pending in the second instance at the Higher Regional Court of Hamm since 2017, *Álvarez-Armas* attested to the ability of PIL in the form of Private International Law Climate Change Litigation to contribute to the realization of SDG 13.

Tajudeen Sanni, Nelson Mandela University (ZAF), also attested to the discipline's potential in the context of transnational claims by local communities dependent on the sea and its resources, in light of SDG 14, "Life Below Water". He advocated further development of PIL principles in light of the SDGs; the choice of applicable law should be made on the basis of which of the possible ones called upon to apply (better) promotes sustainable development.

To conclude this fourth Cluster, "Climate and Planet," *Drossos Stamboulakis*, University of the Sunshine Coast (AUS), presented his insights on SDG 15, "Life on Land". In his view, the necessary redesign of PIL to make it fruitful for sustainable development should avoid stripping PIL of its legitimacy based on technical and dogmatic answers.

Finally, the organizers were able to secure *Anita Ramasastry*, University of Washington, Member of the U.N. Working Group on Business and Human Rights, as keynote speaker. She was able to identify overarching *leitmotifs* in the debate and at the same time set her own impulses. PIL could provide guidelines for promoting responsible corporate conduct. However, transnational corporations have so far been understood by the discipline predominantly as a problem but not as (positive) actors. Against this backdrop, her recommendation was to delve

deeper into what kind of positive roles business could play in the future.

The remainder of the morning was devoted to the somewhat broader topic „Living Conditions". *Klaas Hendrik Eller*, University of Amsterdam (NL), kicked it off with SDG 11 "Sustainable Cities and Communities". He was guided by the question of how PIL's rich experience in identifying, delineating, and addressing conflicts could help create an appropriate forum for spatial justice issues in a global city.

Geneviève Saumier, McGill University (CAN), then addressed SDG 12 "Sustainable consumption and production". In her view, PIL has so far fallen short of its potential. Provisions that ensure access to justice, especially in the case of lawsuits against transnational corporations, as well as choice-of-law rules that provide *ex ante* incentives for producers to comply with higher standards of potentially applicable laws could change this.

The third presentation of this set of topics was given by *Richard Frimpong Oppong*, California Western School of Law, San Diego (USA), considering SDG 6 "Clean Water and Sanitation". He did not deny PIL's supporting role in the management of water and sanitation resources. Ultimately, however, the problems associated with achieving SDG 6 were too complex and multifaceted to be solved by the traditional methods of PIL and adversarial litigation (alone).

After the lunch break, *Sabine Corneloup*, University Paris II Panthéon-Assas (FRA), and *Jinske Verhellen*, Ghent University (BEL), commented on SDG 16 "Peace, Justice and Strong Institutions" in the last Cluster "Rights, Law and Cooperation". They put their focus on target 16.9 – legal identity in the context of migration. They showed that restrictive migration policies of the Global North counteract one of the fundamental goals of PIL, cross-border continuity. Only when issues of legal identity are separated from migration policy decisions does PIL have the potential to ensure that identity across borders has real value and enable migrants to exercise their rights.

For *Fabricio B. Pasquot Polido*, Federal University of Minas Gerais (BRA), who was scheduled to be the last speaker of the afternoon on SDG 17 "Partnerships to Achieve the Goals", but was unfortunately unable to attend at short notice, *Hans van Loon* stepped in. In light of SDG 17, he shared his practical experience regarding cross-border cooperation between administrations and courts as former Secretary General of the Hague Conference on Private International Law. He

reported on the remarkable developments in the organization's relations with Latin America, and incrementally with the Asia-Pacific region. Looking to the future, he looked at efforts to build appropriate partnerships to Africa as well, and a possible Hague Conference convention on private international law aspects of environmental and climate change issues.

With heartfelt thanks to all participants, the organizers finally closed the public part of this extremely diverse and inspiring conference, which sees itself rather as the beginning than the end of the joint project under the hashtag **#SDG2030_PIL**.

On the morning of the last day of the conference, the organizers and speakers met internally to pick up on the impulses of the two previous days, to continue the threads of discussion from bilateral talks in a large group and to develop the future of the project.

The conference set itself ambitious goals in terms of both organization and content. The hybrid format, up till now untested, was a complete success and, as *Ralf Michaels* already pointed out in his introductory remarks to the conference, excellently reflected the nature of PIL; it united international and local levels.

In terms of content, the conference was in no way inferior to this (technical) success. On the contrary, it not only convinced speakers and discussants, who had shared their initial reservations about the PIL's power of impact for sustainable development in the sense of the SDGs, but also convinced the audience to acknowledge the private side of the transformation of our world through the diversity and substantive precision of the contributions. It was a great pleasure and honor for the two authors of this summary to witness the contagious commitment of the project's participants to the discipline's assumption of responsibility for the realization of the SDGs in beautiful, late-summer Hamburg.

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