

Mass Litigation in Times of Corona and Developments in the Netherlands

By Jos Hoevenaars and Xandra Kramer, Erasmus University Rotterdam (postdoc and PI ERC consolidator project Building EU Civil Justice, Erasmus University Rotterdam)

Introduction

As is illustrated in a series of blog posts on this website, the current pandemic also has an impact on the administration of justice and on international litigation. As regards collective redress, Matthias Weller reported on the mass litigation against the Austrian Federal State of Tyrol and local tourist businesses. The Austrian Consumer Protection Association (Österreichischer Verbraucherschutzverein, VSV) has been inviting tourists that have been in the ski areas in Tyrol - which turned into Corona infection hotspots - in the period from 5 March 2020 and shortly afterwards discovered that they were infected with the virus, to enrol for claims for damages against the Tyrolean authorities and the Republic of Austria. Hundreds of coronavirus cases in Iceland, the UK, Germany, Ireland, Norway, Denmark and the Netherlands can be traced back to that area. Currently over 4,000 (including nearly 400 Dutch nationals) have joined the action by the VSV.

It may be expected that other cases will follow as the global impact of the pandemic is overwhelming, both in terms of health and economic effects, and it seems that early warnings have been ignored. Like for instance the *Volkswagen* emission case, these events with global impact are those in which collective redress mechanisms - apart perhaps from piggybacking in pending criminal procedures - are the most suitable vehicles. This blog will address mass litigation resulting from the corona crisis and use the opportunity to bring a new Dutch act on collective action to the attention.

Late Response

After the WHO declared the coronavirus a global emergency on 30 January 2020,

and after the virus made landfall in Europe in February, the beginning of March still saw plenty of skiing and partying in Tyrolean winter sports resorts such as Ischgl and Sankt Anton. It later turned out that during that period thousands of winter sports tourists were infected with the corona virus and who, upon returning to their home countries, spread the virus throughout Europe. A group of Icelandic vacationers had already returned sick from Ischgl at the end of February. In response, Iceland designated Tyrol as a high-risk zone. They warned other countries in Europe, but these did not follow the Icelandic example.

The first alarm bells in Tyrol itself rang on 7 March 2020 when it became known that a bartender from one of the busiest and best-known après-ski bars in Ischgl, Café Kitzloch, had tested positive for the corona virus. A day later it appeared that the entire waiting staff tested positive. Still, the bar remained open until 9 March. Other bars, shops, restaurants were open even longer, and it took almost a week for the area to go into complete lockdown. The last ski lifts stopped operating on 15 March.

The public prosecutor in Tirol is currently investigating whether criminal offenses were committed in the process. The investigation started as early as 24 March, at least in part after German channel ZDF indicated that at the end of February there was already a corona infection in an après ski bar in Ischgl and that it had not been made public. Public officials in Tyrol might thus face criminal proceedings, and civil claims are to be expected later in the year. For instance Dutch media have reported that Dutch victims feel misinformed by the Austrian authorities and nearly 400 Dutch victims have joined the claim.

Corona-related Damage as Driver for International (Mass) Litigation

It is unlikely that COVID-19 related mass claims will be confined to the case of Tirol, and to damages resulting directly from infections and possible negligent endangerment of people by communicable diseases. The fall-out from the widespread lockdown measures and resulting economic impact on businesses and consumers alike, has been called a 'recipe for litigation' for representative organizations and litigation firms.

With the coronavirus upending markets, disrupting supply chains and governments enacting forced quarantines, the fallout from lockdowns as well as the general global economic impact will provide fertile grounds for lawsuits in a

host of areas. Some companies are already facing legal action. For instance, GOJO, the producer of *Purell* hand sanitizer, is being accused of ‘misleading claims’ that it can prevent ‘99.9 percent of illness-causing germs’ (see for instance this NBC coverage), and law suits have been brought for price gouging by *Amazon* for toilet paper and hand sanitizer, and for sales of face masks through *eBay* (see here for a brief overview of some of the cases).

Further down the line, manufacturers may sue over missed deadlines, while suppliers could sue energy companies for halting shipments as transportation demand dwindles. Insurers are likely to find themselves in court, with businesses filing insurance claims over the coronavirus fallout. And in terms of labor law, companies may be held liable in cases where work practices have led to employees being exposed and infected with the virus. For instance, this March, in the US the nurses’ union filed a law suit against the New York State Department of Health and a few hospitals for unsafe working conditions (see for instance this CNN coverage). Already at the end of January, the pilots’ union at American Airlines Group Inc. took legal action to prevent the company from serving China, thereby putting its employees at risk (see for instance this CBS coverage).

Private care facilities too, like nursing homes that have seen disproportionate death rates in many countries, could face claims that they didn’t move quickly enough to protect residents, or didn’t have proper contingency plans in place once it became clear that the virus posed a risk especially to their clientele. Similarly, states have a responsibility for their incarcerated population and may face liability claims in case of outbreak in prison facilities. Airlines that have spent years in EU courts fighting and shaping compensation rules for passengers may well again find themselves before the Court of Justice pleading extraordinary circumstances beyond their control to avoid new payouts to consumers. And finally, governments’ careful weighing of public health against individual rights could result in mass claims in both directions.

Developments in the Netherlands: the WAMCA

Dutch collective redress mechanisms have been a subject of discussion in the EU and beyond. While we are not aware of cases related to COVID-19 having been brought or being prepared in the Netherlands so far, the latest addition to the Dutch collective redress mechanisms could prove to be useful. In the Netherlands, a procedure for a collective *injunctive* action has been in place since

1994. This was followed by a collective settlement scheme in 2005 (the Collective Settlement Act, WCAM) which facilitates collective voluntary settlement of mass damage. Especially the *Shell* and *Converium* securities cases have attracted widespread international attention. The decision by the Amsterdam Court of Appeal - having exclusive competence in these cases - has been criticized for casting the international jurisdiction net too wide in the latter case in particular (see for a discussion of private international law aspects Kramer 2014 and Van Lith 2010). These, and a number of other Dutch collective redress cases, have spurred discussions about the alleged risk of the Netherlands opening itself up to frivolous litigation by commercially motivated action groups, a problem that has often been associated with the US system. In an earlier blog post our research group has called for a nuanced approach as there are no indications that the Dutch system triggers abuse.

At the time of enacting the much discussed WCAM, the Dutch legislature deliberately chose not to include the possibility of bringing a collective action for the compensation of damages in an attempt to avoid some of the problematic issues associated with US class actions. However, last year, after many years of deliberating (see our post of 2014 on this blog on the draft bill) the new act enabling a collective *compensatory* action was adopted. The Collective Redress of Mass Damages Act (*Wet afwikkeling massaschade in collectieve actie*, WAMCA) entered into force on 1 January 2020. It applies to events that occurred on or after 15 November 2016.

As announced in an earlier post on this blog, this new act aims to make collective settlements more attractive for all parties involved by securing the quality of representative organizations, coordinating collective (damages) procedures and offering more finality. At the same time it aims to strike the balance between better access to justice in a mass damages claim and the protection of justified interests of persons held liable. The WAMCA can be seen as the third step in the design of collective redress mechanisms in the Dutch justice system, building on the 1994 collective injunctive action and the 2005 WCAM settlement mechanism. An informal and unauthorised English version of the new act is available [here](#).

The new general rule laid down in Article 3:305a of the Dutch Civil Code, like its predecessor, retains the possibility of collective action by a representative association or foundation, provided that it represents these interests under the articles of association and that these interests are adequately safeguarded by the

governance structure of the association or foundation. However, stricter requirements for legal standing have been added, effectively raising the threshold for access to justice. This is to avoid special purpose vehicles (SPVs) bringing claims with the (sole) purpose of commercial gain. In addition to a declaratory judgment a collective action can now also cover compensation as a result of the new act. In case more representatives are involved the court will appoint the most suitable representative organisation as *exclusive* representative. As under the old collective action regime, this has to be a non-profit organisation. The Claim Code of 2011 and the new version of 2019 are important regulatory instruments for representative organisations. Should parties come to a settlement, the WCAM procedural regime will apply, meaning that the settlement agreement will be declared binding by the Court of Appeal in Amsterdam if it fulfils the procedural and substantive requirements. This is binding for all parties that didn't make use of the opt-out possibility.

Limited territorial scope and the position of foreign parties

To meet some of the criticism that has been voiced in relation to the extensive extraterritorial reach of the WCAM, the new act limits the territorial scope of collective actions.

First, the new Article 3:305a of the Dutch Civil Code contains a scope rule stating that a legal representative only has legal standing if the claim has a *sufficiently close relationship* with the Netherlands. A sufficiently close relationship with Dutch jurisdiction exists if:

- (1) the legal person can make a sufficiently plausible claim that the majority of persons whose interests the legal action aims to protect have their habitual residence in the Netherlands; or
- (2) the party against whom the legal action is directed is domiciled in the Netherlands, and additional circumstances suggest that there is a sufficiently close relationship with Dutch jurisdiction; or
- (3) the event or events to which the legal action relates took place in the Netherlands

Though this is not an international jurisdiction rule - that would be at odds with the Brussels I-bis Regulation - this scope rule prevents that the Dutch court can

decide cases such as the *Converium* case in which the settling company was situated abroad and only 3% of the interested parties were domiciled in the Netherlands. In fact, it is a severe restriction of the international reach of the Dutch collective action regime.

Second, another often debated issue is the opt-out system of the WCAM. While this makes coming to a settlement obviously much more attractive for companies and increases the efficiency of collective actions, an exception is made for collective actions involving *foreign* parties. Dutch parties can make use of an opt-out within a period to be set by the court of one month at least. However, for foreign parties the new act provides for a general *opt-in* regime for foreign parties. Article 1018 f (5) of the Dutch Code of Civil Procedure provides that persons who are not domiciled or resident in the Netherlands are only bound if they have informed the court registry within the period set by the court that they agree to having their interests represented in the collective action. There is a little leeway to deviate from this rule. The court may, at the request of a party, decide that non-Dutch domiciles and residents belonging to the precisely specified group of persons whose interests are being represented in the collective action, are subject to the opt-out rule.

The introduction by the WAMCA of a compensatory collective action complementing the injunctive collective action and providing a stick to the carrot of the WCAM settlement offers new opportunities, while increased standards of legal standing provide the necessary safeguards. However, the limitation of the scope of the new regime to cases that are closely related to the Netherlands - on top of the international jurisdiction rules - and deviating from the effective opt-out rule for foreign parties restrict the scope of Dutch collective actions. Time will tell what role the new Dutch collective action regime will play in major international cases, and whether it will be of use to provide redress for some of the culpable damage caused by the present pandemic.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)

4/2019: Abstracts

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

S.A. Kruisinga: **Commercial Courts in the Netherlands, Belgium, France and Germany - Salient Features and Challenges**

A new trend is emerging in continental Europe: several states have taken the initiative to establish a new commercial court which will use English as the language of the proceedings. Other states have provided that the English language may be used in civil proceedings before the existing national courts. Several questions arise in this context. Will such a new international (chamber of the) court only be competent to hear international disputes, or only a specific type of dispute? Will there be a possibility for appeal? Will extra costs be involved compared to regular civil proceedings? Which provisions of the law of procedure will the court be required to follow? These questions will be answered in relation to developments in the Netherlands, Belgium, France and Germany. For example, in Belgium, a draft bill, which is now being discussed in Parliament, provides for the establishment of a new court that is still to be established: the Brussels International Business Court. In the Netherlands, as of 1 January 2019, the Netherlands Commercial Court has been established, which will allow to conduct civil proceedings in the English language.

K. de la Durantaye: **Same same but different? Conflict rules for same sex-marriages in Germany and the EU**

Conflict rules for same-sex marriages are as hotly disputed as the legal treatment of such marriages in general. The German rules on the topic contain multiple inconsistencies. This is true even after the latest amendments to the relevant statute (EGBGB) entered into force in January 2019. Things become even more problematic when the German rules are seen in conjunction with Rome III as well as the two EU Regulations on matrimonial property regimes and on property consequences of registered partnerships, both of which are applicable since

January 29, 2019. Some instruments do treat same-sex marriages as marriages, others - notably the EGBGB - do not. Curiously, this leads to a preferential treatment vis-à-vis opposite-sex marriages. The EU Regulation on matrimonial property regimes does not define the term marriage and provides for participating member states to do so. At the same time, the ECJ extends its jurisdiction on recognition of personal statuses to marriages. Given all these developments, one might want to scrutinize the existing conflict rules for marriages as provided for in the EGBGB.

T. Lutzi: Little Ado About Nothing: The Bank Account as the Place of the Damage?

The Court of Justice has rendered yet another decision on the place of the damage in the context of prospectus liability. In addition to the question of international jurisdiction, it also concerned the question of local competence under Art. 5 No. 3 Brussels I (now Art. 7 No. 2 Brussels Ia) in a case where the claimant held multiple bank accounts in the same member state. The Court confirms that under certain circumstances, the courts of the member state in which these banks have their seat may have international jurisdiction, but avoids specifying which bank account designates the precise place of the damage. Accordingly, the decision adds rather little to the emerging framework regarding the localization of financial loss.

P.-A. Brand: International jurisdiction for set-offs - Procedural prohibition of set-off and rights of retention in domestic litigation where the jurisdiction of a foreign court has been agreed for the claims of the Defendant

The question whether or not a contractual jurisdiction clause entails an agreement of the parties to restrict the ability to declare a set-off in court proceedings to the forum prorogatum has been repeatedly dealt with by German courts. In a recent judgement - commented on below - the Oberlandesgericht München in a case between a German plaintiff and an Austrian defendant has held that the German courts may well have international jurisdiction under Article 26 of the Brussels Ia-Regulation also for the set-off declared by the defendant, even if the underlying contract from which the claim to be set-off derived contained a jurisdiction clause for the benefit of the Austrian courts. However, the Oberlandesgericht München has taken the view that the jurisdiction clause for

the benefit of the Austrian courts would have to be interpreted to the effect that it also contains an agreement of the parties not to declare such set-off in proceedings pending before the courts of another jurisdiction. That agreement would, hence, render the set-off declared in the German proceedings as impermissible. The judgment seems to ignore the effects of entering into appearance according to Article 26 of the Brussels Ia-Regulation. That provision must be interpreted to the effect that by not contesting jurisdiction despite a contractual jurisdiction clause for the claim to be set-off, any effects of the jurisdiction clause have been repealed.

P. Ostendorf: (Conflict of laws-related) stumbling blocks to damage claims against German companies based on human rights violations of their foreign suppliers

In an eagerly awaited verdict, the Regional Court Dortmund has recently dismissed damage claims for pain and suffering against the German textile discounter KiK Textilien und Non-Food GmbH („KiK“) arising out of a devastating fire in the textile factory of one of KiK’s suppliers in Pakistan causing 259 fatalities. Given that the claims in dispute were in the opinion of the court already time-barred, the decision deals only briefly with substantial legal questions of liability though the latter were upfront hotly debated both in the media as well as amongst legal scholars. In contrast, many conflict-of-laws problems arising in this setting were explicitly addressed by the court. In summary, the judgment further stresses the fact that liability of domestic companies for human rights violations committed by their foreign subsidiaries or independent suppliers is - on the basis of the existing framework of both Private International as well as substantive law - rather difficult to establish.

M. Thon: Overriding Mandatory Provisions in Private International Law - The Israel Boycott Legislation of Arab States and its Application by German Courts

The application of foreign overriding mandatory provisions is one of the most discussed topics in private international law. Article 9 (3) Rome I- Regulation allows the application of such provisions under very restrictive conditions and confers a discretionary power to the court. The Oberlandesgericht Frankfurt a.M. had to decide on a case where an Israeli passenger sought to be transported from Frankfurt a.M. to Bangkok by Kuwait Airways, with a stop over in Kuwait City.

The Court had to address the question whether to apply such an overriding mandatory provision in the form of Kuwait's Israel-Boycott Act or not. It denied that because it considered the provision to be "unacceptable". However, the Court was not precluded from giving effect to the foreign provision as a matter of fact, while applying German law to the contract. Since the air transport contract had to be performed partly in Kuwait, the Court considered the performance to be impossible pursuant to § 275 BGB. The judgement of the Court received enormous media coverage and was widely criticized for promoting discrimination against Jews.

C.F. Nordmeier: The inclusion of immovable property in the European Certificate of Succession: acquisition resulting from the death and the scope of Art. 68 lit. l) and m) Regulation (EU) 650/2012

The European Certificate of Succession (ECS) has arrived in legal practice. The present article discusses three decisions of the Higher Regional Court of Nuremberg dealing with the identification of individual estate objects in the Certificate. If a transfer of title is not effected by succession, the purpose of the ECS, which is to simplify the winding up of the estate, cannot be immediately applied. Therefore, the acquisition of such a legal title in accordance with the opinion of the OLG Nuremberg is not to be included in the Certificate. In the list foreseen by Art. 68 lit. l and m Regulation 650/2012, contrary to the opinion of the Higher Regional Court of Nuremberg, it is not only possible to include items that are assigned to the claimant „directly“ by means of a dividing order, legal usufruct or legacy that creates a direct right in the succession. Above all, the purpose of the ECS to simplify the processing of the estate of the deceased is a central argument against such a restriction. Moreover, it is not intended in the wording of the provision and cannot constructively be justified in the case of a sole inheritance under German succession law.

J. Landbrecht: Will the Hague Choice of Court Convention Pose a Threat to Commercial Arbitration?

Ermgassen & Co Ltd v Sixcap Financials Pte Ltd [2018] SGHCR 8 is the first judicial decision worldwide regarding the Hague Choice of Court Convention. The court demonstrates a pro-enforcement and pro-Convention stance. If other Contracting States adopt a similar approach, it is likely that the Convention regime will establish itself as a serious competitor to commercial arbitration.

F. Berner: Inducing the breach of choice of court agreements and “the place where the damage occurred”

Where does the relevant damage occur under Article 7 (2) of the Brussels I recast Regulation (Article 5 (3) of the Brussels I Regulation), when a third party induces a contracting party to ignore a choice of law agreement and to sue in a place different from the forum prorogatum? The UK Supreme Court held that under Article 5 (3) of the Brussels I Regulation, the place where the damage occurs is not the forum prorogatum, but is where the other contracting party had to defend the claim. This case note agrees, but argues that the situation is now different under the Brussels I recast Regulation because of changes made to strengthen choice of court agreements. Thus, under the recast Regulation, the place where the damage occurs is now the place of the forum prorogatum. Besides the main question, the decision deals implicitly with the admissibility for claims of damages for breach of choice of law agreements and injunctions that are not antisuit injunctions. The decision also raises questions about the impact of settlement agreements on international jurisdiction.

D. Otto: No enforcement of specific performance award against foreign state

Sovereign immunity is often raised as a defence either in enforcement proceedings or in suits against foreign states. The decision of the U.S. District Court for the District of Columbia deals with a rarely discussed issue, whether an arbitration award ordering a foreign state to perform sovereign acts can be enforced under the New York Convention. The U.S. court held that in general a foreign state cannot claim immunity against enforcement of a Convention award, however that a U.S. court cannot order specific performance (in this case the granting of a public permit) against a foreign state as this would compel a foreign state to perform a sovereign act. Likewise, enforcement of an interest or penalty payment award has to be denied for sovereign immunity reasons if the payment does not constitute a remedy for damages suffered but is of a nature so as to compel a foreign state to perform a sovereign act. Whilst some countries consider sovereign immunity to be even wider, the decision is in line with the view in many other countries.

A. Anthimos: No application of Brussels I Regulation for a Notice of the National Association of Statutory Health Insurance Physicians

The Greek court refused to declare a Notice of the National Association of Statutory Health Insurance Physicians in Rhineland-Palatinate enforceable. The Greek judge considered that the above order is of an administrative nature; therefore, it falls out of the scope of application of the Brussels I Regulation.

C. Jessel-Holst: Private international law reform in Croatia

This contribution provides an overview over the Private International Law Act of the Republic of Croatia of 2017, which applies from January 29, 2019. The Act contains conflict-of-law rules as well as rules on procedure. In comparison to the previous Act on Resolution of Conflicts of Laws with Provisions of Other States in Certain Matters which had been taken over after independence from former Yugoslavia in 1991, nearly everything is new. Full EU-harmonization was a key purpose of the reform. The 2019 Act also refers to a number of Hague Conventions. Habitual residence has been introduced as a main connecting factor. Renvoi is as a rule excluded. Many issues are addressed for the first time. For the recognition of foreign judgments, the reciprocity requirement has been abandoned.

G. Ring/L. Olsen-Ring: New Danish rules of Private International Law applying to Matrimonial Property Matters

The old Danish Law on the Legal Effects of Marriage, dating back to the year 1925, has been replaced by a new Law on Economic Relations Between Spouses, which was passed on May 30, 2017. The Law on Economic Relations Between Spouses entered into force on January 1, 2018. There is no general statutory codification of private international law in Denmark. The Law on Economic Relations Between Spouses, however, introduces statutory rules on private international law relating to the matrimonial property regime. The Danish legislature was inspired by the EU Matrimonial Property Regulation, but also developed its own approach. The EU Matrimonial Property Regulation is not applied in Denmark, as Denmark does not take part in the supranational cooperation (specifically the enhanced cooperation) in the field of justice and home affairs, and no parallel agreement has been concluded in international law between the European Union and Denmark. The rules set out in the Danish Law on Economic Relations Between Spouses are based on the principle of closest connection. The main connecting factor is the habitual residence of both spouses at the time when their marriage was concluded or the first country in which they

both simultaneously had their habitual residence after conclusion of the marriage. The couple is granted a number of choice-of-law options. In case both spouses have had their habitual residence in Denmark within the last five years, Danish law automatically applies.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1/2017: Abstracts

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

*H.-P. Mansel/K. Thorn/R. Wagner: **European conflict of laws 2016: Brexit ante portas!***

The article provides an overview of developments in Brussels in the field of judicial cooperation in civil and commercial matters from December 2015 until November 2016. It summarizes current projects and new instruments that are presently making their way through the EU legislative process. It also refers to the laws enacted at the national level in Germany as a result of new European instruments. Furthermore, the authors look at areas of law where the EU has made use of its external competence. They discuss both important decisions and pending cases before the ECJ as well as important decisions from German courts pertaining to the subject matter of the article. In addition, the article also looks at current projects and the latest developments at the Hague Conference of Private International Law.

*P. Mankowski: **Modern Types of Migration in Private International Law***

Migration has become a ubiquitous phenomenon in modern times. Modern immigration law has developed a plethora of possible reactions and has established many different types of migrants. Private international law has to respond to these developments. The decisive watershed is as to whether a

migrant has acquired refugee status under the Geneva Refugees Conventions. If so, domicile substitutes for nationality. A mere petition for asylum does not trigger this. But subsidiary protection as an equivalent status introduced by EU asylum law must be placed on equal footing. Where habitual residence is at stake, it does matter whether a residence has been acquired legally or illegally under the auspices of immigration law. Yet for judging whether a habitual residence exists, the extension of permits might be a factor.

*C. Mäsch/B. Gausing/M. Peters: **Pseudo-foreign Ltd., PLC and LLP: Limited in liability or rather in longevity? - The Brexit's impact on English corporations having their central administration in Germany***

On 23rd of June 2016, the people of the United Kingdom voted in a referendum against the UK staying in the European Union. If, as can be expected, the withdrawal negotiations under Art. 50 of the EU Treaty will not address the issue of pseudo-English corporations operating in the remaining Member States of the EU, the Brexit will have severe consequences for companies incorporated under English law (e.g. a Ltd., PLC or LLP) having their central administrative seat in Germany. No longer protected by the freedom of establishment within the EU (Art. 49, 54 TFEU) these legal entities will be under German PIL and the so-called Sitztheorie subjected to domestic German company law. They will thus be considered simple partnership companies (German GbR or OHG), losing from one day to the next i.a. their limited liability status - an unexpected and unjustified windfall profit for creditors, a severe blow for the company shareholders. In this paper it will be argued that the outcome can and indeed should be rectified by resorting to the legal rationale of Art. 7 para 2 EGBGB (Introductory Act to the German Civil Code). This provision preserves the legal capacity of a natural person irrespectively of whether a change in the applicable law stipulates otherwise. Extending that concept to legal entities will create a "grace period" with a fixed duration of three years during which the English law continues to apply to a "German" Ltd., PLC or LLP, giving the shareholders time to decide whether to transform or re-establish their company.

*L. Rademacher: **Codification of the Private International Law of Agency - On the Draft Bill Submitted by the Federal Ministry of Justice***

Based on a resolution adopted by the German Council for Private International Law, the German Federal Ministry of Justice and Consumer Protection has submitted a bill to amend the Introductory Act to the German Civil Code (EGBGB)

in the to date uncodified area of agency in private international law. This paper provides an overview of the proposed Art. 8 EGBGB and identifies questions of interpretation as well as remaining gaps. The draft provision applies to agents who were authorized by the principal, i.e. neither to statutory agents nor to representatives under company law. The proposal strengthens party autonomy by allowing a choice of law. Absent a choice of law, the applicable law is determined by objective criteria depending on the type of agent. The respective connecting factors, such as the agent's or principal's habitual residence, require perceptibility for the third party. If these requirements are not met, the applicable law residually is determined by the identifiable place of the agent's acts or by the principal's habitual residence. For the most part, the proposal can be characterized as a restatement of previous case law and academic writing.

H. Roth: Rule and exceptions regarding the review of the European Order of Payment in exceptional cases according to art.20 par. 2 of Reg. (EC) 1896/2006

According to Art. 20 para. 2 of Reg. (EC) 1896/2006, the European Order of Payment can be reviewed in exceptional cases. This additional legal remedy is only applicable in exceptional cases such as collusion or other malicious use of process. It is not sufficient that the defendant would have been able to detect misrepresentations by the claimant.

M. Pika/M.-P. Weller: Private Divorces and European Private International Law

Whilst substantive German family law requires a divorce to be declared in court, the instant case addresses the effect of a private divorce previously undertaken in Latakia (Arabic Republic of Syria) under Syrian law. Although, from a German perspective, the Syrian Sharia Court's holding has been merely declaratory, the European Court of Justice considered its effect before German courts to be a matter of recognition. Accordingly, it rejected the admissibility of the questions referred to the Court concerning the Rome III Regulation. This ruling indicates the unexpected albeit preferable *obiter dictum* that the Brussels II bis Regulation applies on declaratory decisions concerning private divorces issued by Member States' authorities. Subsequently, the Higher Regional Court Munich initiated a further, almost identical preliminary ruling concerning the Rome III Regulation. However, the key difference is that it now considered the Regulation to be adopted into national law.

A. Spickhoff: Fraudulent Inducements to Contract in the System of Jurisdiction - Classification of (contractual or legal) basis of claims and accessory jurisdiction

Manipulation of mileage and concealment of accidental damage belong to the classics of car law and indicate a fraud. But is it possible to qualify a fraudulent misrepresentation in this context as a question of tort with the meaning of art. 7 no. 2 Brussels I Regulation (recast)? German courts deny that with respect to decisions of the European Court of Justice. The author criticizes this rejection.

K. Siehr: In the Labyrinth of European Private International Law. Recognition and Enforcement of a Foreign Decision on Parental Responsibility without Appointment of a Guardian of the Child Abroad

A Hungarian woman and a German man got married. In 2010 a child was born. Two years later the marriage broke down and divorce proceedings were instituted by the wife in Hungary. The couple signed an agreement according to which the child should live with the mother and the father had visitation rights until the final divorce decree had been handed down and the right of custody had to be determined by the court. The father wrongfully retained the child in Germany after having exercised his visitation rights. The mother turned to a court in Hungary which, by provisional measures, decided that rights of custody should be exclusively exercised by the mother and the father had to return the child to Hungary. German courts of three instances recognized and enforced the Hungarian decree to return the child according to Art. 23 and 31 (2) Brussels IIbis-Regulation. The *Bundesgerichtshof* (BGH) as the final instance decided that the Hungarian court had jurisdiction under Art. 8-14 Brussels IIbis-Regulation and did not apply national remedies under Art. 20 Brussels IIbis-Regulation. In German law, the hearing of the child was neither necessary nor possible and therefore the Hungarian return order did not violate German public policy under Art. 23 (a) or (b) Brussels IIbis-Regulation.

H. Dörner: Better too late than never - The classification of § 1371 Sect. 1 German Civil Code as relating to matrimonial property in German and European Private International Law

After more than 40 years of discussion the German Federal Supreme Court finally (and rightly so) has classified § 1371 Sect. 1 of the German Civil Code as relating to matrimonial property. However, the judgment came too late as the European Succession Regulation No 650/2012 OJ 2012 L 201/07 started to apply on 17

August 2015 thus reopening the question of classification in a new context. The author argues that a matrimonial property classification of § 1371 Sect. 1 German Civil Code under European rules is still appropriate. He discusses two problems of assimilation resulting from such a classification considering how the instrument of assimilation has to be handled after the regulation came into force. Furthermore, he points out that a matrimonial property classification creates a set of new problems which have to be solved in the near future (e.g. documentation of the surviving spouse's share in the European Certificate of Succession, application of different matrimonial property regimes depending of the Member state in question).

H. Buxbaum: RICO's Extraterritorial Application: RJR Nabisco, Inc. v. European Community

In 2000, the European Community filed a lawsuit against RJR Nabisco (RJR) in U.S. federal court, alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). After more than fifteen years and a number of intermediate judicial decisions, the litigation came to its likely close in 2016 with the U.S. Supreme Court's ruling in *RJR Nabisco, Inc. v. European Community*. The Court held that RICO's private cause of action does not extend to claims based on injuries suffered outside the United States, denying the European Community any recovery. The case was the third in recent years in which the Supreme Court applied the "presumption against extraterritoriality," a tool of statutory interpretation, to determine the geographic reach of a U.S. federal law. Together, these opinions have effected a shift in the Court's jurisprudence toward more expansive application of the presumption - a shift whose effect is to constrain quite significantly the application of U.S. regulatory law in cross-border cases. The Court's opinion in RJR proceeds in two parts. The first addresses the geographic scope of RICO's substantive provisions, analyzing whether the statute's prohibition of certain forms of conduct applies to acts occurring outside the United States. The second addresses the private cause of action created by the statute, asking whether it permits a plaintiff to recover compensation for injury suffered outside the United States. After beginning with a brief overview of the lawsuit, this essay discusses each of these parts in turn.

T. Lutzi: Special Jurisdiction in Matters Relating to Individual Contracts of Employment and Tort for Cases of Unlawful Enticement of Customers

A claim brought against two former employees, who had allegedly

misappropriated customer data of the claimant, and against a competitor, who had allegedly used said data to entice some of the claimant's customers, provided the Austrian *Oberster Gerichtshof* with an opportunity to interpret the rules on special jurisdiction for matters relating to individual contracts of employment in Art. 18-21 of the Brussels I Regulation (Art. 20-23 of the recast) and for matters relating to tort in Art. 5 No. 3 of the Brussels I Regulation (Art. 7 (2) of the recast). Regarding the former, the court defined the scope of Art. 18-21 by applying the formula developed by the European Court of Justice in *Brogstetter* concerning the distinction between Art. 5 No. 1 and 3 (Art. 7 (1) and (2) of the recast); regarding the latter, the court allowed the claim to be brought at the claimant's seat as this was the place where their capacity to do business was impaired. Both decisions should be welcomed.

Revista de Arbitraje Comercial y de Inversiones, 2014 (3)

The last issue of *Arbitraje. Revista de Arbitraje Comercial y de Inversiones*, 2014 (3), has just been released. Although contributions are in Spanish, most provide for an abstract in English; I reproduce them below. The Journal also offers a section on recently published texts concerning arbitration, case law (Spanish and foreign), as well as news of interest for the arbitration world.

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Miguel VIRGÓS, *La eficacia de la protección internacional de las inversiones extranjeras (The Effectiveness of International Protection of Foreign investments)*

Foreign investments are subject to certain risks arising from host countries that exercise sovereign rights, and typically the risk of opportunistic behavior. In this article expropriation is taken as an example and two different investor protection scenarios are compared: a world without investment protection treaties, and a world with investment protection treaties. To this end, it compares the situation of Spanish nationals' whose property was expropriated during the Cuban

revolution, and the more recent expropriation suffered by a Spanish oil company in Argentina. It also reviews the enforcement mechanisms in public international law and its application to foster compliance in this sector.

Bernardo CREMADES ROMÁN, Nuevas perspectivas de la protección de inversiones en América Latina: Análisis de la situación en Bolivia (New Perspectives of Investment Protection in Latin America: Analysis of the Situation in Bolivia)

This article will review the expropriations executed by the Government of Evo Morales in the Plurinational State of Bolivia. The article will subsequently explore the Bolivian economic indicators and the impact of the expropriations on such indicators. Finally, the author will analyze the new legal framework of foreign investment in Bolivia and the possibility of resorting to arbitration. In particular, the author will analyze and provide a brief commentary on Law No. 516, of 4 April 2014, on the Promotion of Investment and on the Draft Bill on Conciliation and Arbitration.

Unai BELINTXON MARTIN, Jurisdicción / arbitraje en el transporte de mercancías por carretera: ¿comunitarización frente a internacionalización? (Jurisdiction / Arbitration in the transport of goods by road: communitarization against internationalization?)

The aim of this research is to analyze and evaluate the regulations development in the international carriage of goods by road sector, as well as its ascription in the Private International Law area. The analysis will identify the role of the autonomy orders in the competent jurisdiction as well as in the arbitration, and it will be analyzed the interaction between normative blocks and the derivative malfunctions of a complex assembly between the conventional sources (particularly CMR) and the derivative of the Europe institutions normative. From the operators sector's point of view, it will tackle that when the aim of the legal security is achieving or on the contrary the absence of the compatibility of the rules between those deserve rules finishes producing doubts that harm all the interests of the present cast

Hernando DÍAZ CANDIA , Viabilidad y operatividad práctica contemporánea del arbitraje tributario en Venezuela (The practical feasibility of tax arbitration in

Venezuela)

The article refers to arbitration of tax disputes in Venezuela. While it is focused on domestic Venezuelan law, it is useful as a source of comparative tax and arbitration laws to study the differences and similarities of various legal systems. The article explains that the arbitrability of tax disputes is provided in the Venezuelan Tax Code at least since 2001, but that there have been no actual tax arbitrations reported in Venezuela, except in investment arbitrations. The lack of actual cases may be due to complicated legal provisions, which, if taken isolated and literally, could imply that tax arbitration is just a burdensome step within judicial tax matters, which makes the resolution of disputes lengthier and more expensive for the taxpayer. The article proposes that tax arbitration must be approached as arbitration is generally conceived by the Venezuelan Constitution of 1999: as a truly alternative and efficient dispute resolution mechanism. That implies that the Tax Code must be construed to permit the annulment of tax assessment by arbitrators and that the intervention of judicial courts must be limited. Tax arbitration can further the perception of fairness of the tax system, which can ultimately reduce tax evasion

Horacio ANDALUZ VEGACENTENO, *Retando el concepto de validez?. La naturaleza jurídica del reconocimiento de laudos anulados (Challenging the Concept of Validity? The Legal Nature of the Recognition of Annulled Awards)*

The recognition in 2013 in the United States of a Mexican arbitral award annulled by Mexican courts seems to bring the implicit affirmation that it is legally possible to grant recognition to an annulled award. Such affirmation itself challenges the concept of legal validity, since it means that what have been declared void can, at the same time, be valid as to produce legal effects. The point of this article is to find the legal nature behind the so called recognition of annulled awards. In order to do so, the article reviews nine judicial decisions, from 1984 to 2013, and concludes that behind the recognition of annulled awards there are three different hypotheses, each one with a distinctive legal nature and none of them being a challenge to the concept of legal validity.

Brian HADERSPOCK, *Revisión de laudos arbitrales en Bolivia: una propuesta plausible (Review of arbitration awards in Bolivia: a plausible proposal)*

The contribution focuses on the question whether or not an extraordinary review

of judgments in respect of arbitral awards would be positive in the Bolivian legal system. Through this note, the author tries to discuss the feasibility of this extraordinary appeal in Bolivia's arbitration process. To do this, the author presents certain criteria that, in his opinion, are positive, therefore concluding, that considering implementing this resource in the Bolivian arbitration legislation would be a feasible decision. In this sense, the author proposes changes to the current arbitration legislation, allowing the value of justice prevail over any judicial or extrajudicial decision

Seguimundo NAVARRO, *Cuestiones relativas al third party funding en arbitraje*

Francisco RUIZ RISUEÑO, *Árbitros e instituciones arbitrales: la ética como exigencia irrenunciable de la actuación arbitral*

Judiciary and Procedural Reforms in Spain, 2013

In his first appearance at the *Congreso de los Diputados* (House of Representatives), less than a year ago, the Spanish Minister of Justice announced a package of far-reaching measures or reforms for the Spanish justice: some address the judiciary, others affect the structure of different procedures, as well as complementary aspects. Among the former I'd like to highlight the already achieved amendment of the *Ley Orgánica del Poder Judicial*, Ley 6/1985, of July 1, by the Ley 4/2013, of June 28, reforming the *Consejo General del Poder Judicial*; and the proposal for a new *Ley de Demarcación y Planta Judicial* (the text prepared by the Institutional Committee established by Agreement of the Council of Ministers in 2012 was recently published). The proposal is based on the creation of *Tribunales de Instancia*, which will gather the current uni-personal tribunals and work at a provincial district level. Appeal hearings will correspond

to the *Tribunales Superiores de Justicia* (instead of the actual *Audiencias*), which will culminate the judiciary in the corresponding Autonomous Community.

Among the latter it is worth mentioning the draft Bill of the Ministry of Justice aiming to amend the *Ley de Enjuiciamiento Civil*, Ley 1/2000, of January 7. The draft is devoted almost entirely to the so called *procuradores* (attorneys). Another draft Bill, this time from the Ministry of Economic Affairs, targets the same group and has met (not surprisingly) with fierce opposition, as it removes the existing fees and eliminates the incompatibility that has so far prevented lawyers to also act as *procuradores*.

From the cross-border perspective I'd like to recall the draft Bill on *Jurisdicción voluntaria*. Chapter one (Articles 9 to 12 of the Act) addresses the rules of Private International Law, meaning grounds of international jurisdiction, conflict of law rules, and effects in Spain of foreign decisions adopted on non-contentious proceedings.

Finally, last Friday the Spanish government adopted the *Real Decreto* that regulates the *Registro de Resoluciones Consurales*, where the results and the handling of bankruptcy proceedings are to be published in order to ensure transparency and legal certainty. The Real Decreto includes a provision on the interconnection of Bankruptcy Public Registers of the European Union Members States.

So, something is on the move in Spain (although it's difficult to say whether in the good direction).

Spanish Mortgages Are Null And Void. Who Says?: The Ecuadorian

Parliament

Nicolás Zambrana has kindly sent me this text. Nicolás Zambrana Tévar (nzambranat@unav.es) is assistant lecturer of Private International Law at the University of Navarra, Pamplona, Spain. He is also member of the Grupo de Estudios sobre el Derecho Internacional Privado y los Derechos Humanos.

Several Ecuadorian political parties have introduced a new draft bill in the Ecuadorian Parliament which explicitly manifests that “no legal validity will be given in Ecuador to financial arrangements made to acquire the property of houses (viviendas) in Spain and the judicial acts which may have been derived from such arrangements because the latter have been made under conditions of illegality and fraud”. Another paragraph of this draft bill introduces criminal sanctions for those responsible of entities which try to seize property for this reason in Ecuador (<http://www.librerred.net/?p=13006>).

The present Spanish economic doom commenced with a real estate crisis. As in the US case, many mortgages were arranged on the basis of the belief that the economic situation would remain stable and the real estate prices would continue to rise. Nevertheless, when the bubble exploded, thousands of families saw how the price of the house which guaranteed their loan began to decrease while their interests continued to increase. Furthermore, apparently, many immigrants contend that they had no idea about the Spanish foreclosure system, where the mortgagor (typically, the bank) can auction the house (often obtaining much less than the market price) and still having to pay the remaining part of the secured debt.

Ecuadorians amount to more than 11% (approximately 360.000) of the total amount of immigrants in Spain (Wikipedia). In 2010, Correa, the populist president of Ecuador had already made a public statement in the sense that debts whose creditors were Spanish banks would not be enforceable in Ecuador (El País.com 18/10/2010).

Spain has no bilateral treaty with Ecuador for the recognition and enforcement of foreign judicial decisions. Therefore, decisions made by Spanish tribunals seeking recovery of debts from assets located in Ecuador would be at the mercy of the Ecuadorian legal system and, hypothetically, the new bill would be applicable. It deserves to be noted that the new draft bill not only amends the Ecuadorian recognition and enforcement system in such a way that all those with assets in Ecuador would be able to benefit from it, but it also declares Spanish mortgages null and void by reason of fraud, with a clear extraterritorial reach which would have no effect whatsoever in Spain but may have effects in, for instance, other Latin American countries. Criminal sanctions promised would be of less interest for private international lawyers, but they may scare plenty of bank officials, given the great presence that Spanish banks have in those countries.

We will inform you of any forthcoming events related to this bizarre new law.

Latest Issue of “Praxis des Internationalen Privat- und Verfahrensrechts”

Recently, the March issue of “Praxis des Internationalen Privat- und Verfahrensrechts” (**IPRax**) was released.

It contains the following **articles/case notes (including the reviewed decisions)**:

- **R. Wagner/B. Timm** on the German ministerial draft bill on the law applicable to companies, juristic persons and associations (“Der

Referentenentwurf eines Gesetzes zum Internationalen Privatrecht der Gesellschaften, Vereine und juristischen Personen“). The English abstract reads as follows:

Companies that operate across borders need clarity with regard to which respective national law applies to them. There are some decisions of the European Court of Justice on the right of settlement according to the Treaty which touch this matter. However, no uniform picture has yet emerged in the European Union. A uniform European regulation would be desirable, but the EU-Commission has not taken up this question yet. In order to promote legal certainty, the German Federal Ministry of Justice has therefore presented a ministerial draft bill on the law applicable to companies, juristic persons and associations. The bill might later on serve as the basis for work on a European regulation. As a general rule, the ministerial draft bill provides for the “law of establishment”, i.e. the law at the place of registration, as the law applicable to companies, legal persons and associations. For non-registered companies, legal persons and associations, the applicable law is to be that under which they are organised. Furthermore, the proposed bill clarifies the scope of “the law of establishment” and contains regulations regarding the law applicable to cross-border reorganisations, the change of applicable law and other aspects of cross-border cases.

- **J. Fingerhuth/J. Rumpf** on the consequences of the German MoMiG for cross-border relocations of German entities (“MoMiG und die grenzüberschreitende Sitzverlegung – Die Sitztheorie ein (lebendes) Fossil?”). Here is the English abstract:

The German government rendered a top-to-bottom reform of the German Law on Limited Liability Companies (‘GmbHG’) with the governmental draft of the MoMiG dated 23 May 2007. The reform also covers the German law on Stock Corporations (‘AktG’) and general corporate law matters. It is intended by the reform to abandon the required concurrence of statutory seat and seat of the head office of a company and, therefore, to allow German GmbHs and AGs to move their head office to another country (cross-border relocation). Both GmbH and AG will have the same opportunities as entities from countries, where the incorporation theory is applicable. The article discusses the consequences of

the MoMiG for cross-border relocations of German entities. In particular, by using the example of the GmbH & Co KG, the authors illustrate problems arising from the intentions of the MoMiG and the 'real seat' theory as it is currently applied in Germany. Furthermore, the authors discuss the need for German entities to completely apply the incorporation theory in Germany. The article comes to the conclusion that the 'real seat' theory will be entirely abandoned by the MoMiG becoming effective. The authors finally encourage the legislator to express this consequence literally within the reasoning of the MoMiG.

- **A.-K. Bitter** on the interpretative connection between the Brussels I Regulation and the (future) Rome I Regulation (“Auslegungszusammenhang zwischen der Brüssel I-Verordnung und der künftigen Rom I-Verordnung”)
- **A. Kampf** on the implications of the European directive on services on PIL (“EU-Dienstleistungsrichtlinie und Kollisionsrecht”). The abstract reads:

On 28 December 2006, after a period of almost three years of debate and political manoeuvring, the European directive on services (2006/123/EC) came into force. It will have to be implemented by the Member States by 28 December 2009 at the latest. The directive applies to a wide range of service activities based upon the case law of the European Court of Justice relating to the freedom of establishment and the free movement of services. In order to make it easier for businesses to set up in other Member States or to provide services across-border on a temporary basis, each Member State shall set up Points of Single Contact. These shall ensure that providers have access to all necessary information and can complete the formalities necessary for doing business in other Member States. Moreover regulatory and authorization bodies across the EU are meant to cooperate more effectively. The directive is expected to engender consumer confidence in cross-border services through access to information. Restrictive legislation and practices shall be abolished after having been screened. A rather neglected aspect in public discussion are the directive's implications on private international law. Nevertheless they should be examined for both practical and systematic reasons.

- **A. Fuchs** on the question of international jurisdiction for direct actions against the insurer in the courts of the Member State where the injured party is domiciled (“Internationale Zuständigkeit für Direktklagen”), (ECJ, 13.12.2007, C-463/06 (*FBTO Schadeverzekeringen N.V. v. Jack Odenbreit*); Higher Regional Court Karlsruhe, 7.9.2007 - 14 W 31/07; Local Court Bremen, 6.2.2007 - 4 C 251/06). This is the English abstract:

The injured party may bring an action directly against the insurer in the courts of the place in a Member State where the injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State. This follows, according to the judgment of the ECJ, from the reference in Article 11 (2) of the Brussels I Regulation to Article 9 (1) (b). The previous judgment of the first instance court in Bremen was based on the same argument. However, according to a judgment of the court of appeal in Karlsruhe, courts at the place of domicile of the injured party lack international jurisdiction under the Lugano Convention. Fuchs argues that neither the wording nor the historic interpretation support the assumption of jurisdiction of the courts in the state where the injured party is domiciled. This situation has not been altered in the course of the transfer of the Brussels Convention into a regulation. The main argument in favour of admitting direct claims before the courts of the injured party’s domicile can be drawn from the systematic interpretation. However, this additional place of jurisdiction will have undesirable consequences such as forum shopping and race to the court. In case of Article 11 (3), it will lead to unforeseeable results for the policyholder or the insured. Furthermore, it may have a negative economic impact for drivers in relatively poor Member States. The author criticizes the European legislator for not having discussed these issues openly in the context of the Brussels I Regulation.

- **A. Staudinger** on a decision of the German Federal Supreme Court on the scope of the head of jurisdiction of Art. 15 (2) Brussels I Regulation (“Reichweite des Verbrauchergerichtsstandes nach Art. 15 Abs. 2 EuGVVO”), (Federal Supreme Court, 12.6.2007 - XI ZR 290/06)
- **E. Eichenhofer** on a decision of the Higher Labour Court Frankfurt (Main) dealing with the question of international jurisdiction regarding contribution claims of German social security benefits offices against

employers having their seat in another EU Member State (“Internationale Zuständigkeit für Beitragsforderungen deutscher tariflicher Sozialkassen gegen Arbeitgeber mit Sitz in anderen EU-Staaten”), (Higher Labour Court Frankfurt (Main), 12.2.2007 – 16 Sa 1366/06)

- **J. von Hein** on the concentration of jurisdiction regarding appeals in cross-border cases according to § 119 (1) No. 1 lit. b GVG (“Die Zuständigkeitskonzentration für die Berufung in Auslandssachen nach § 119 Abs. 1 Nr. 1 lit. b GVG – ein gescheitertes Experiment?”), (Federal Supreme Court, 19.6.2007 – VI ZB 3/07 and 27.6.2007 – XII ZB 114/06)
- **D. Henrich** on the question of renvoi in PIL of names occurring due to a different qualification by foreign law (“Rückverweisung aufgrund abweichender Qualifikation im internationalen Namensrecht”), (Federal Supreme Court, 20.6.2007 – XII ZB 17/04)
- **B. König** on the requirements of due information as well as the scope of application of the Regulation creating a European Enforcement Order for uncontested claims (“EuVTVO: Belehrungserfordernisse und Anwendungsbereich”), (Regional Court Wels, 5.6.2006 – 1 Cg 159/06m, Higher Regional Court Linz, 4.7.2007 – 1 R 124/07x)
- **A. Laptew/S. Kopylov** on the requirement of reciprocity with regard to the enforcement of foreign judgments between the Russian Federation and Germany (Yukos Oil Company) (“Zum Erfordernis der Gegenseitigkeit bei der Vollstreckung ausländischer Urteile zwischen der Russischen Föderation und der Bundesrepublik Deutschland (Fall Yukos Oil Company)”), (Federal Commercial District Court Moscow, 2.3.2006 – KG-A40/698-06P)
- **H. Krüger** on the recognition and enforcement of foreign titles in Cameroon (“Zur Anerkennung und Vollstreckung ausländischer Titel in Kamerun”)
- **A. Jahn** on PIL questions in the context of withdrawals of wills due to marriage in anglo-american legal systems (“Kollisionsrechtliche Fragen des Widerrufs eines Testamentes durch Heirat in anglo-amerikanischen Rechtsordnungen”)
- **C. Jessel-Holst** on the Statute of Private International Law of the

Republic of Macedonia (“Zum Gesetzbuch über internationales Privatrecht der Republik Mazedonien”)

Further, this issue contains the following **materials**:

- Statute of Private International Law of the Republic of Macedonia of 4 July 2007 (“Gesetz über internationales Privatrecht - Gesetz der Republik Mazedonien vom 4.7.2007”)
- Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock - signed in Luxembourg on 23 February 2007 (“Protokoll von Luxemburg zum Übereinkommen über internationale Sicherungsrechte an beweglicher Ausrüstung betreffend Besonderheiten des rollenden Eisenbahnmaterials - unterzeichnet in Luxemburg am 23.2.2007”)

As well as the following **information**:

- **H.-G. Bollweg/K. Kreuzer** on the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (“Das Luxemburger Eisenbahnprotokoll - „Protokoll zum Übereinkommen über internationale Sicherungsrechte an beweglicher Ausrüstung betreffend Besonderheiten des rollenden Eisenbahnmaterials“ vom 23. 2. 2007”)
- **E. Jayme** on the (critical) debate in France about the Community’s competence in PIL which was made public by French PIL professors by means of open letters on this issue (“Frankreich: Professorenstreit zum Europäischen IPR - einige Betrachtungen”)
- **E. Jayme** on the convention of the Ludwig-Boltzmann-Institutes in Vienna (“Kodifikation des IPR, des grenzüberschreitenden Zivilrechts und Zivilverfahrensrechts in der Europäischen Union - Tagung der Ludwig-Boltzmann-Institute in Wien”)
- **C. Gross**: report on the 40th UNCITRAL session (“Bericht über die 40. Sitzung der Kommission der Vereinten Nationen zum internationalen Handelsrecht (UNCITRAL)”)

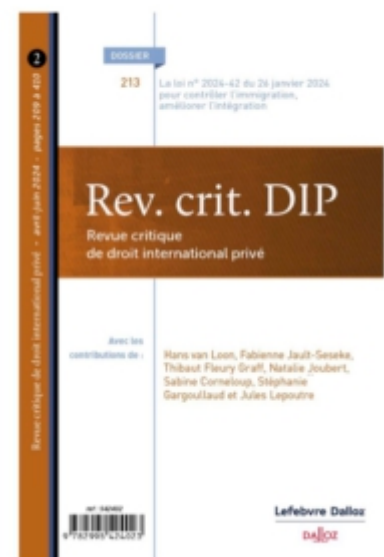
For recent information on PIL see also the website of the Institute for Private

International Law, Cologne.

(Many thanks to Prof. Dr. Heinz-Peter Mansel, editor of the journal (University of Cologne) for providing the English abstracts.)

New Issue of Revue Critique de droit international privé (2024/2)

Written by Hadrien Pauchard (assistant researcher at Sciences Po Law School)



The second issue of the Revue Critique de droit international privé of 2024 was released a few weeks back. It contains a rich thematic dossier of seven articles and several case notes.

Under the direction of Prof. Sabine Corneloup (Université Paris-Panthéon-Assas), the doctrinal section of this issue is entirely devoted to an in-depth study of the latest French immigration law (Loi n° 2024-42 du 26 janvier 2024 pour contrôler l'immigration, améliorer l'intégration). In line with the Revue Critique's recent

policy, this doctrinal part has been made available in English on the editor's website (for registered users and institutions). Against the backdrop of tightening migration controls at the global scale, this Act radically shifts administrative, procedural, and substantial aspects of the status of aliens in France.

The dossier opens up with Prof. Hans van Loon's (University of Edinburgh, former Secretary General of the HCCH) call for *La nécessité d'un cadre mondial de coopération pour une réglementation durable de la migration de travailleurs* (The need for a cooperative global framework for a sustainable regulation of labor migration). Its abstract reads as follows:

"Sustainable regulation of labor migration cannot be based exclusively on unilateral initiatives by a given country individually, but requires the development of a worldwide framework for cooperation between states, which is sorely lacking at present. Both realistic and highly ambitious, the author proposes a - fully drafted - framework convention aimed at strengthening practical cooperation at global level for a particular type of crossborder displacement of persons for work: temporary and circular migration. This framework could subsequently be extended to other types of migration."

Adopting the same critical ambition, the subsequent articles further engage with the French bill by following the order of its chapters.

In this vein, Prof. Fabienne Jault-Seseke (Université Paris-Saclay, UVSQ) first assesses the law's provisions relating to *L'accès au séjour : l'objectif d'intégration au service d'un discours brouillé* (Access to residency: the objective of integration serving a blurred discourse). It is introduced as follows:

"Fabienne Jault-Seseke highlights the restriction of the conditions for obtaining residence permits, both for new arrivals and for foreign citizens applying for long-term permits. With regard to one of the Act's flagship measures - the regularization of undocumented workers in short-staffed occupations - the author regrets that the reform's contribution is ultimately very limited, and that its scope has been further reduced by an administrative order, casting doubt on the legislator's real desire to promote work as a factor of integration."

Then, Prof. Thibaut Fleury Graff (Université Paris-Panthéon-Assas) severely

judges *L'éloignement des étrangers dans la loi du 26 janvier 2024 : régression des protections, extension des rétentions* (The expulsion of foreign nationals under the January 26, 2024 law: regression of protections, extension of detentions). His contribution's abstract reads as follows:

“The author shows the regression in protection resulting from the removal of legislative obstacles to expulsion. In place of the general, objective protection against expulsion enjoyed by certain categories of foreign nationals under the law, the reform substitutes a case-by-case review, by the administrative authority and the administrative judge, of the rights and freedoms constitutionally and conventionally recognized for foreign nationals. This casuistic approach to deportation is accompanied by new provisions facilitating measures that deprive or restrict freedom (administrative detention, house arrest, bans), the duration of which has also been extended.”

In the fourth article, Prof. Natalie Joubert (Université de Bourgogne) takes a hard look on *La loi Immigration du 26 janvier 2024 et les droits sociaux* (The immigration law of January 26, 2024 and social rights). Her analysis is presented as follows:

“Natalie Joubert highlights the issue of ‘disguised national preference’, which was to have taken the form of a condition of length of legal residence in France - ultimately censured by the Constitutional Council - in historical context, before showing that this condition was not actually censured in itself, but only for its excessive duration. In terms of taking into account the vulnerability of foreign nationals, the author contrasts an advance in protection of access to housing, with a regression in the protection of young adults and asylum seekers.”

The Act also implements *Une réforme structurelle du droit d'asile* (A structural reform of asylum law), which is precisely the subject of Prof. Sabine Corneloup's study. Its abstract reads as follows:

“In the field of asylum law, the most noteworthy contribution has been the structural reform of both the administrative and judicial phases of the asylum procedure. Sabine Corneloup analyzes the territorialization of the two phases, which raises considerable material and human stakes, and shows that the

introduction of the principle of a single judge before the National Asylum Court, which removes the United Nations High Commissioner from the procedure, can only give rise to the most serious reservations. Whether or not the collegiate system is maintained in the future will depend exclusively on the policy of the President of the Court. With regard to the status of individuals, the author shows that, through the new cases of administrative detention and house arrest of asylum seekers, the Act affects the very legal grounds for such measures.”

The sixth contribution is authored by Stéphanie Gargoullaud (Cour d’appel de Paris) and tackles the procedural aspects of *La loi Immigration du 26 janvier 2024 et les règles du contentieux administratif et judiciaire* (The Immigration Act of January 26, 2024 and the rules of administrative and judicial litigation). The following abstract was provided:

“Stéphanie Gargoullaud analyzes the law’s main contributions to both judicial and administrative processes. The legislator’s stated aim of simplifying the rules 4 meets a strong expectation on the part of those concerned, given that the French system had become too complex. While simplification is perceptible in the case of administrative recourse, where the number of procedures has been reduced to three, it is hardly visible in the numerous provisions reforming court process concerning administrative detention and waiting zones.”

Last but not least, Prof. Jules Lepoutre (Université Côte d’Azur) discusses *La nationalité dans la loi du 26 janvier 2024 : une apparition éphémère, des questions persistantes* (*Nationality in the law of January 26, 2024: a fleeting appearance, some enduring interrogations*). The abstract reads as follows:

“Nationality and citizenship law was at the heart of parliamentary debates, even though it did not feature in the initial bill and occupies a rather anecdotal place in the enacted text. The provisions introduced by the Senators concerning the restriction of ‘droit du sol’, the extension of forfeiture of nationality, the raising of language requirements for naturalization, etc. did not pass constitutional scrutiny. Jules Lepoutre shows that both the policy pursued by the legislator and the control exercised by the constitutional court reveal much about contemporary issues relating to belonging: the presence of reiterative ideologies, and the strong interconnexion between nationality and citizenship on the one hand and immigration and integration on the other.”

What's more, the international audience will undoubtedly be interested in the Bibliographic section of the issue, which has always been a remarkable feature of the *Revue critique*. Under the direction of Dr. Elie Lengart (Université Université de Lille) and Dr. Sandrine Brachotte (UC Louvain), this section has diversified to include major French-language and non-French-language publications in both private international law and international arbitration, as well as contemporary works in global law. Notably, some reviews are authored in English and will therefore benefit readers beyond the borders of the *francophonie*.

The full table of contents is available [here](#).

Previous issues of the *Revue Critique* (from 2010 to 2022) are available on Cairn.

Book review: Research Handbook on International Abortion Law (Cheltenham: Edward Elgar Publishing, 2023)



RESEARCH HANDBOOK ON
**International
Abortion Law**

Edited by
Mary Ziegler



RESEARCH HANDBOOKS IN LAW AND SOCIETY

Written by Mayela Celis

Undoubtedly, Abortion is a hot topic. It is discussed in the news media and is the subject of heated political debate. Indeed, just when one thinks the matter is settled, it comes up again. In 2023, Elgar published the book entitled “**Research Handbook on International Abortion Law**”, ed. Mary Ziegler (Cheltenham: Edward Elgar Publishing Limited, 2023). For more information, [click here](#). Although under a somewhat misleading name as it refers to *international* abortion law, this book provides a wonderful comparative overview of national abortion laws as regulated by States from all the four corners of the world and internal practices, as well as an analysis of human rights law.

This book does not deal with the conflict of laws that may arise under this topic. For a more detailed discussion, please refer to the post [Singer on Conflict of Abortion Laws \(in the U.S.\)](#) published on the blog of the European Association of Private International Law.

In this book review, I will briefly summarise 6 parts of this book (excluding the introduction) and will provide my views at the end.

This book is divided into 7 parts:

Part I - Introduction

Part II - Histories of liberalization

Part III - The promise and limits of decriminalization

Part IV - Abortion in popular politics

Part V - Movements against abortion

Part VI - Race, sex and religion

Part VII - The role of international human rights

Part II - Histories of Liberalization

Part II begins with a historical journey of the abortion reform in Sweden in the

1930s and 1940s. It highlights the limited legalization of abortion in Sweden in 1938 and the revised abortion law in 1946 introducing a “socialmedical” indication. In particular, it underscores how the voices of women were absent from the process.

It then moves on to a comparative study of the history of abortion in the USA and Canada from 1800 to 1970, that is before Roe (USA) and Morgentaler (Canada). It analyses the distinct approaches of Canada and the USA when dealing with abortion (legislative vs. court-based). Furthermore, it provides a very interesting historical account on how the right of abortion came about in both countries - it sets the stage for Roe v. Wade (pp. 50-52).

Finally, Part II examines the situation in South Africa by calling it “unfinished business”. In South Africa, Abortion is a right codified in law: The Choice on Termination of Pregnancy Act 92 of 1996. However, this article argues that the legislative response is not enough. Factors such as lack of enough health facilities that perform abortions, gender inequality etc. are an obstacle to making safe abortion a reality.

Part III - The promise and limits of decriminalization

This Part analyses several laws regarding abortion. First, it explores Malawi’s 160-year-old law that criminalises abortion based on a UK law, as well as the failed tentative attempt to adopt a new law in 2020. Interestingly, this article analyses CEDAW resolutions against the UK, which promptly complied with the resolution (pp. 92-93).

Secondly, it studies the recently adopted law in Thailand on 7 February 2021 that makes abortion available up to 12 weeks’ gestation period. However, this article criticises that the law creates a loophole as the abortion must be performed by a physician or a registered medical facility and in compliance with the law, greatly medicalizing abortion.

Finally, this Part examines Australian laws and policy over the past 20 years and while acknowledging the significant advances in reproductive rights, it notes that a number of barriers to abortion still remain. This chapter is better read in conjunction with Chapter 10, also about Australia.

Part IV - Abortion in popular politics

This Part begins with an excellent comparative public policy study between France and the United States. In particular, it discusses the weaknesses of *Roe v. Wade*, underlining the role and analysis of the late justice Ruth Bader Ginsburg. It also puts into context the superiority of the French approach regarding abortion, which is proven with the reversal of *Roe*.

It then analyses abortion law in China, a State that has the most lenient abortion policies in the world. It discusses the Chinese one-child policy, which then changed to two and even three children-policy, as well as sex-selective abortions.

Subsequently, it recounts how South Australia became the last Australian jurisdiction to modernise its abortion laws and underlines the fact that laws in Australian jurisdictions on this topic are uneven and no two laws are the same.

Finally, it examines abortion history in Israel noting that apart from health reasons, abortions on no specific grounds are mainly intended for out-of-wedlock pregnancies. As a result, abortion is restricted to married women unless they claim adultery, a ground that must be reviewed by a Committee. Apparently, this leads married women to lie to get an abortion and go through the shameful process of getting approval by a Committee.

Part V - Movements against abortion

This Part begins with abortion politics in Brazil and the backlash that occurred with the government of former president Bolsonaro who, as is well known, is against abortion. It recounts a case where a priest filed an habeas corpus in favour of a foetus who had a severe birth defect. Although the case arrived at the Federal Supreme Court, it was not decided as the child died 7 minutes after being born (p. 232).

Secondly, a history scholar recounts the pro-life movement across continents and analyses what drives them (*i.e.* gender and religion).

Finally, it deals with abortion law in Poland and Hungary and the impact of illiberal courts. In particular, it discusses the trends against abortion and goes on to explain an interesting concept of “illiberal constitutionalism”. The authors argue that they do not see Poland and Hungary as authoritarian systems but as illiberal States, an undoubtedly interesting concept.

Part VI - Race, sex and religion

This Part begins examining the sex-selective abortions in India. In particular, the authors recommend an equality-based approach instead of anti-discriminatory approach in order to avoid recognising personhood to the foetus.

It then continues with an analysis of abortion law in the Arab world. The authors note that there is scant but emerging literature and that abortion laws in this region are - unsurprisingly - punitive or very restrictive. Interestingly, the position of Tunisia differs from other Arab States.

Finally, it discusses the struggles in Ecuador where a decision of the constitutional court of 2021 decriminalising abortion in cases of rape. It declared unconstitutional an article of the Ecuadorian Criminal Code, and in 2022 the legislature approved a bill based on this ruling. It also refers to teenage pregnancy and violence.

Part VII - The role of international human rights

For those interested in international human rights, this will be the most fascinating Part of the book. Part VII calls for the decriminalization of abortion in *all circumstances* and it supports this argument by making reference to several human rights documents such as those issued by the Human Rights Committee (in particular, General Comment No 36 - Article 6: Right to life) and the Committee on the Elimination of Discrimination against Women (referring to a myriad of general comments and concluding observations).

Subsequently, this Part challenges the classification of European abortion law as *fairly liberal* and provides some convincing arguments (including the setbacks in Poland in this regard and other procedural or legal barriers to access abortion in more liberal States) and some surprising facts such as the practice in the Netherlands (see footnote 60). The authors -fortunately- dared to say that this chapter is drafted from a feminist perspective as opposed to the current “male norm” in legal doctrinal scholarship.

Finally, this Part explains the history of abortion laws including the fascinating recent developments in Argentina and Ireland (referred to as “small island”!) and the influence (or the lack thereof) of international human rights law. In particular, it makes reference to the Argentinian Law 27,610 of 2020 (now unfortunately in

peril with the new government) and the repealing by referendum of the 8th Amendment in Ireland in 2018.

Below are a few personal thoughts and conclusions that particularly struck me from the book:

Starting from the beginning: the title of the book and the definitions.

In my view, and as I previously mentioned, the title of the book is somewhat misleading. Strictly speaking, there is no such thing as “international” abortion law but rather abortion prompts a discussion of international human rights, such as women’s rights and the right to life, and whether or not national laws are compliant with these rights or are coherent within their own national legal framework. This is in contrast to international child abduction / adoption laws where international treaties regulate those very topics.

While perhaps counterintuitive, the definition of a “woman” has been controversial; see for example the Australian versus the Thai approaches. The Australian approach deals with gender identification and the fact that persons who do not identify as a woman can become pregnant (p. 124, footnote 1). While the Thai approach defines a woman as those capable of bearing children (p. 112). Needless to say, the definition of a woman is essential when legislating on abortion and unavoidably reflects the cultural and political complexities of a particular society. A brief reference is made to men and gender non-conforming people and their access to abortion (p. 374, footnote 2).

A surprising fact is the pervasive sex-selective abortion in some countries (sadly against female foetuses), such as India and China, and which arguments are invoked by scholars to avoid them, without falling into the “trap” of recognising personhood to the foetus.

More importantly, this book shows that the abortion discussion is much more than the polarised “pro-life” and “pro-choice” movements. The history of abortion is complicated, full of intricacies. And what is frustrating to some, this area is rapidly evolving sometimes at the whim of political parties.

Most authors seem to agree that a legislative approach to abortion is more

recommended than a court-based approach. Indeed, there is a preference for democratically elected lawmakers when it comes to dealing with abortion. This is evident from the recent setbacks that occurred in the USA.

Having said that, those expecting an in-depth analysis of the landmark US decision *Dobbs v. Jackson Women's Health Organization* 597 U.S. 215 (2022), which overturned *Roe v. Wade*, will be disappointed (only referred to very briefly in the introduction and Chapters 8, 11 and 13). Instead, however, you will be able to immerse yourself into a multidisciplinary study of abortion law, including topics such as politics, sociology, constitutional law, health law and policy, history, etc. In addition, you will read unexpected facts such as the role of Pierre Trudeau (former Prime Minister (PM) of Canada and father of current Canadian PM, Justin Trudeau - p. 56 *et seq.*) in abortion law in Canada or the delivering of abortion pills via drones (p. 393).

Because of all the foregoing, and whatever one's standpoint on abortion is, I fully recommend this book. But perhaps a cautionary note: people in favour of reproductive rights will be able to enjoy the book more fully.

I would like to end this book review with the words of the French writer and philosopher Simone de Beauvoir, which appear in her book entitled *The Second Sex* and which are also included in chapter 8 (p. 159) of this book:

"Never forget that a political, economic or religious crisis would suffice to call women's rights into question"

Full citation:

"Rien n'est jamais définitivement acquis. Il suffira d'une crise politique, économique ou religieuse pour que les droits des femmes soient remis en question. Votre vie durant, vous devrez rester vigilantes."

Rivista di diritto internazionale privato e processuale (RDIPP) No 3/2023: Abstracts

The third issue of 2023 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released. It features:

Pietro Franzina, Professor at the Università Cattolica del Sacro Cuore, **Un nuovo diritto internazionale privato della protezione degli adulti: le proposte della Commissione europea e gli sviluppi attesi in Italia** (A New Private International Law on the Protection of Adults: The European Commission's Proposals and the Developments Anticipated in Italy; in Italian)

The European Commission has presented on 31 May 2023 two proposals aimed to enhance, in cross-border situations, the protection of adults who are not in a position to protect their interests due to an impairment or the insufficiency of their personal faculties. One proposal is for a Council decision that would authorise the Member States to ratify, in the interest of the Union, the Hague Convention of 13 January 2000 on the international protection of adults, if they have not done so yet. The decision, if adopted, would turn the Convention into the basic private international law regime in this area, common to all Member States. The other proposal is for a regulation the purpose of which is to improve, in the relationships between the Member States, the cooperation ensured by the Convention. The paper illustrates the objects of the two proposals and the steps that led to their presentation. The key provisions of the Hague Convention are examined, as well as the solutions envisaged in the proposed regulation to improve the functioning of the Convention. The paper also deals with the bill, drafted by the Italian Government and submitted to the Italian Parliament a few days before the Commission's proposals were presented, to prepare for the ratification of the Convention by Italy and provide for its implementation in

the domestic legal order. The bill, it is argued, requires extensive reconsideration as far as the domestic implementation of the Convention is concerned. Alternative proposals are discussed in the paper in this regard.

This issue also comprises the following comment:

Riccardo Rossi, Juris Doctor, **Reflections on Choice-of-Court Agreements in Favour of Third States under Regulation (EU) No 1215/2012**

This article tackles the absence of a provision addressing choice-of-court agreements in favour of third States under Regulation (EU) No 1215/2012 (“Brussels Ia Regulation”). The CJEU case law and the present structure of the Regulation leave no room for the long-debated argument of *effet réflexe*. In light of Arts 33 and 34 (and Recital No 24), enforcing such agreements is now limited to the strict respect of the priority rule in the trans-European dimension. The first part of the article deals with the consequences of such a scheme. Namely, forum running, possible interferences with the free circulation of judgments within the EU pursuant to Art 45(1)(d), and inconsistencies with the 2019 Hague Convention. In its second part, from a *de lege ferenda* perspective, the article examines the most delicate issues raised by the need for introducing a new provision enforcing jurisdiction agreements in favour of third States: from the jurisdiction over the validity of such agreements, to the applicable law, to the weight to be given to the overriding mandatory provisions of the forum. Finally, it proposes a draft of two new provisions to be implemented in the currently discussed review of the Brussels Ia Regulation.

In addition to the foregoing, this issue includes a chronicle by *Francesca C. Villata*, Professor at the University of Milan, **Il regolamento (UE) 2023/1114 relativo ai mercati delle cripto-attività: prime note nella prospettiva del diritto internazionale privato** (Regulation (EU) 2023/1114 on Market in Crypto-Assets: First Remarks from a Private International Law Perspective; in Italian).

Finally, the following book review by *Francesca C. Villata*, Professor at the University of Milan, is featured: **Gabriele CARAPEZZA FIGLIA, Ljubinka KOVAČEVIĆ, Eleonor KRISTOFFERSSON (eds), Gender Perspectives in Private Law**, Springer Nature, Chan, 2023, pp. XV-242.