Today is the 40th Anniversary of the HCCH Child Abduction Convention – A time for celebration but also a time for reflection

Today (25 October 2020) is the 40th Anniversary of the HCCH Child Abduction Convention. With more than 100 Contracting Parties, the HCCH Child Abduction Convention is one of the most successful Conventions of the Hague Conference on Private International Law (HCCH). As indicated in the title, this is a time for celebration but also a time for reflection. The Child Abduction Convention faces several challenges, some of which have been highlighted in this blog. The most salient one is that *primary carers* (usually mothers) are now the main abductors, which many argue was not the primary focus of the deliberations in the late 70s and that the drafters assumed that primarily (non-custodial) fathers were the abductors. See the most recent statistical analysis by Nigel Lowe and Victoria Stephens (year: 2015 applications), where it shows that 73% of the abductors were mothers (most primary or joint-primary carers) and 24% were fathers.

A related issue is that *custody laws* continue to change and are granting custody rights to non-primary carers (*e.g.* unmarried fathers, *ne exeat clauses*, etc.), which expands the scope of the Child Abduction Convention. There is also a growing trend of joint parenting.

Another challenge is the increasing importance of *human rights law* and its interaction with the Child Abduction Convention (see our previous post Opening Pandora's Box); in addition, the implementation and application of *article 13(1)(b)* of the Child Abduction Convention also poses challenges (see our previous posts on the HCCH Guide to Good Practice on the grave-risk exception under article 13(1)(b) of the Child Abduction Convention through the lens of human rights: Part I and Part II).

Moreover, other challenges have arisen in these difficult times of *pandemic*. In

this regard, Nadia Rusinova wrote a post on the "Child Abduction in times of Corona" and another one on "Remote Child-Related Proceedings in Times of Pandemic – Crisis Measures or Justice Reform Trigger?"

Last but not least, there is much uncertainty surrounding *Brexit* and the new legal framework of the UK. How about all the UK case law regarding *Brussels II bis* and the related issues regarding the Child Abduction Convention?

Such obstacles are not insurmountable (at least, I hope). Nevertheless, much reflection is needed to continue improving the operation of the Child Abduction Convention in this ever-changing world. Undoubtedly, the Child Abduction Convention is a must-have tool for States to combat internationally removal and retention of children by their parents or someone from the inner family circle in accordance with the UN Convention on the Rights of the Child.

For those of you who are interested in getting more information about this Convention: In addition to the Guides to Good Practice published by the HCCH (open access), some of the leading works in this area are (I will concentrate on ***books*** as there are countless articles, see also bibliography of the HCCH here. Some of the books are from Hart, click on the link on the top of the banner for more info):

Monographic works:

Schuz, Rhona. *The Hague Child Abduction Convention: A Critical Analysis*. Studies in Private International Law; Volume 13. Oxford: Hart Publishing, 2013. ***Former Secretary General of the HCCH, Hans van Loon, wrote a very helpful book review****. See* Van Loon, Hans, "R. Schuz, the Hague Child Abduction Convention: A Critical Analysis." *Netherlands International Law Review*, 62, no. 1 (April, 2015): 201–206.

Beaumont, Paul R. and Peter E. McEleavy. *The Hague Convention on International Child Abduction*. Oxford Monographs in Private International Law. Oxford: Oxford University Press, 1999.

Garbolino, James D. and Federal Judicial Center. *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges,* 2015 (open access).

More specific topic:

Written by Conflictoflaws.net's General Editor: Thalia Kruger.

Kruger, Thalia. *International Child Abduction: The Inadequacies of the Law*. Studies in Private International Law; Vol. 6. Oxford: Hart Publishing, 2011.

Works in Spanish:

Child abduction and mediation

Chéliz Inglés, María del Carmen. *La sustracción internacional de menores y la mediación: Retos y vías prácticas de solución*. Monografías. Valencia: Tirant lo Blanch, 2019.

Forcada Miranda, Francisco Javier. *Sustracción internacional de menores y mediación familiar*. Madrid: Sepín, 2015.

Within the Latin-American region

Tenorio Godínez, Lázaro, Nieve Rubaja, Florencia Castro, ed. *Cuestiones complejas en los procesos de restitución internacional de niños en Latinoamérica*. México: Porrúa, 2017.

Tenorio Godínez, Lázaro, Graciela Tagle de Ferreyra, ed. *La Restitución Internacional de la niñez: Enfoque Iberoamericano doctrinario y jurisprudencial*. México: Porrúa, 2011.

This is just a short list; please feel free to add other books that you may be aware of.

The HCCH news item is available here. The HCCH Access to Justice Convention is also celebrating its 40th anniversary. Unfortunately, this Convention is less used in practice.

Universal Civil Jurisdiction – Which Way Forward?

Serena Forlati and Pietro Franzina edited a book on the Universal Civil Jurisdiction, which was published by Brill a couple of days ago. The book features contributions prepared by colleagues from four different European countries and eight universities.

The contributions included are the following:

- 'The Case of Naït-Liman before the European Court of Human Rights – A Forum Non Conveniens for Asserting the Right of Access to a Court in Relation to Civil Claims for Torture Committed Abroad?' (Andrea Saccucci, University of Campania);

- 'The Role of the European Court of Human Rights in the Development of Rules on Universal Civil Jurisdiction – Naït-Liman v Switzerland in the Transition between the Chamber and the Grand Chamber' (Serena Forlati, University of Ferrara);

- 'The Interpretation of the European Convention on Human Rights – Lessons from the Naït-Liman Case' (Malgosia Fitzmaurice, Queen Mary University);

- 'Public International Law Constraints on the Exercise of Adjudicatory Jurisdiction in Civil Matters' (Lucas Roorda and Cedric Ryngaert, University of Utrecht);

- 'Universal Civil Jurisdiction and Reparation for International Crimes' (Beatrice I. Bonafè, University of Rome La Sapienza);

- ‘Limitations to the Exercise of Civil Jurisdiction in Areas Other Than Reparation for International Crimes’ (Fabrizio Marongiu Buonaiuti, University of Macerata);

- ‘Residual Jurisdiction under the Brussels I bis Regulation – An Unexpected Avenue to Address Extraterritorial Corporate Human Rights Violations (Mariangela La Manna, Catholic University of the Sacred Heart, Milan);

- ‘The Law Applicable to the Civil Consequences of Human Rights Violations Committed Abroad’ (Patrick Kinsch, University of Luxembourg);

- ‘The Changing Face of Adjudicatory Jurisdiction’ (Pietro Franzina, Catholic University of the Sacred Heart, Milan).

More info available here.

Call for Papers “Jurisdiction – Who speaks international law?”

*The German Working Group of Young Scholars in Public International Law (Arbeitskreis junger Völkerrechtswissenschaftler*innen – AjV) asked me to forward the following call for papers. This conference intends to bridge the gap between international public and private international law, thus, contributions from private international law are more than welcome. The official call is on this website or here as pdf: 2020_30_09 – CfP [ENG] .*

The Working Group of Young Scholars in Public International Law (Arbeitskreis junger Völkerrechtswissenschaftler*innen – AjV) and the German Society of International Law (Deutsche Gesellschaft für Internationales Recht – DGIR) invite contributions to their joint conference titled

Jurisdiction

Who speaks international law?

3-4 September 2021

University of Bonn

The topic: Jurisdiction endows an actor with the authority to provide binding answers to legal questions. Etymological observations reveal that an analysis of legal validity necessarily requires grasping the notion of jurisdiction. After all, the Latin roots of the term 'jurisdiction' – juris dicere – can be translated as 'speaking the law'. In international law, the notion of jurisdiction serves to delimit international and domestic spheres of competence. Traditionally tied to territorial sovereignty, jurisdiction refers to the legislative, judicial, and executive power of the state bindingly to determine who speaks in the name of the law – and about whom is (merely) spoken. Against this backdrop, the link between jurisdiction and territorial sovereignty needs to be re-examined.

Several questions arise regarding the theoretical and historical underpinnings of the notion of jurisdiction: Who is given the power to speak in international law and who is not? How can rules that are generally considered to be 'non-binding' exert their influence on jurisdiction? How do actors located in the Global South approach the notion of jurisdiction? What is the role of jurisdiction in shaping the idea and self-description of International Law as a discipline? Do we have to rethink or abandon the conceptual link between sovereignty and jurisdiction? Is there an essential and unifying element that links the different conceptions of jurisdiction?

Interdisciplinary engagements can provide a more nuanced understanding of

jurisdiction: How can accounts not linked to the state help us understand contemporary conflicts of jurisdiction? Which historical circumstances have shaped the notion of jurisdiction? Which (dis)continuities does the history of the idea of jurisdiction reveal? Are questions of jurisdiction always questions of power? How do socio-cultural circumstances inform diverging notions of jurisdiction? How can critical approaches sharpen our understanding of the notion of jurisdiction?

The aim is to shed light on these and other aspects of jurisdiction from different perspectives, taking into account specialized areas of international law: How has private international law dealt with conflicts of jurisdiction and 'forum-shopping'? What is the relationship between sovereignty and state or diplomatic immunity? How do digital spaces challenge existing notions of jurisdiction? Do we need a new concept of jurisdiction for cyber warfare and for space law? What is the role of the notion of jurisdiction in shaping the relationship between humans and their natural environment? How do rival notions of jurisdiction affect the access to justice regarding human rights violations at the borders of Europe? How can the conflict between the German Federal Constitutional Court and the European Court of Justice be analysed through the lens of jurisdiction? What are the causes of the criticism levelled against the International Criminal Court's interpretation and exercise of its jurisdiction?

We invite submissions contemplating these and other questions and hope to cover a broad range of international law topics, including public international law, private international law, and European law. We welcome all theoretical approaches and methods and explicitly invite doctrinal work as well as interdisciplinary, discourse theoretical, historical, philosophical, and critical approaches.

Formal requirements: The main purpose of the conference is to create an opportunity for PhD students and early career researchers to present their work. Established scholars will comment on the young scholars' contributions. Anonymised abstracts in German or English (max. 500 words) must be submitted by 8 January 2021 only via the application form on the conference website. Selected candidates will be notified by 31 January 2021. Paper drafts (max. 7000 words, including footnotes) must be submitted by 1 June 2021. We envisage to publish the contributions.

Out now: PIL – interaction among international, European and national legal instruments (in Croatian)

Following the roundtable organised on 29 October 2020 by the Croatian Academy of Science and Arts (HAZU), the book Private International Law – interaction among international, European and national legal instruments or, in the original, ***Medunarodno privatno pravo – interakcija medunarodnih, europskih i domacih propisa***, has been published by HAZU. The volume contains the following papers:

I. KEYNOTE SECTION

Ivana Kunda
Upucivanje na propise EU u Zakonu o medunarodnom privatnom pravu (References to EU legal instruments in the Private International Law Act)

Hrvoje Sikiric
Priznanje i ovrha stranih odluka – praksa Suda EU (Recognition and enforcement of judgments – the CJEU case law)

Davor Babic
Stranacka autonomija u EU medunarodnom privatnom pravu (Party autonomy in private international law)

Ines Medic
Pocetak uredenja imovinskopravnih pitanja na razini EU, posljedice i moguci daljnji razvoj (Beginnings in regulating the property issues at the EU level,

consequences and possible future development)

Mirela Zupan
Utjecaj ljudskih prava na suvremeno medunarodno privatno pravo (Effects of human rights over contemporary private international law)

II. DISCUSSION SECTION

Kristijan Turkalj
Iskustva hrvatskih sudova u postavljanju prethodnih pitanja pred Sudom EU (Experiences of Croatian courts in making preliminary references to the CJEU)

Tijana Kokic
Primjena uredbi EU iz medunarodnog privatnog prava na Opcinskom gradanskom sudu u Zagrebu (Application of the EU regulations on private international law before the General Civil Court in Zagreb)

Ines Brozovic
Medunarodno privatno pravo u praksi hrvatskih sudova – glediste odvjetnika (Private international law in the Croatian court practice – the attorney's perspective)

Ljiljana Vodopija Cengic
Primjena uredbi EU iz medunarodnog privatnog i procesnog prava u ostavinskim postupcima koje provode javni biljeznici (Application of EU regulations on private and procedural international law in succession proceedings before the notaries)

Facebook's further attempts to resist the jurisdiction of the Federal Court of Australia futile

Earlier in the year, Associate Professor Jeanne Huang reported on the Australian Information Commission's action against Facebook Inc in the Federal Court of

Australia. In particular, Huang covered *Australian Information Commission v Facebook Inc* [2020] FCA 531, which concerned an ex parte application for service outside of the jurisdiction and an application for substituted service.

In April, Thawley J granted the Commission leave to serve the first respondent (Facebook Inc) in the United States, and the second respondent (Facebook Ireland Ltd) in the Republic of Ireland. Through orders for substituted service, the Commission was also granted leave to serve the relevant documents by email (with respect to Facebook Inc) and by mail (with respect to Facebook Ireland Ltd).

Facebook Inc applied to set aside the orders for its service in the United States, among other things. Facebook Ireland appeared at the hearing of Facebook Inc's application seeking equivalent orders, although it did not make submissions.

On 14 September, Thawley J refused that application: *Australian Information Commissioner v Facebook Inc (No 2)* [2020] FCA 1307. The foreign manifestations of Facebook are subject to the Federal Court's long-arm jurisdiction.

The decision involves an orthodox application of Australian procedure and private international law. The policy represented by the decision is best understood by brief consideration of the context for this litigation.

Background

The Australian Information Commission is Australia's 'independent national regulator for privacy and freedom of information', which promotes and upholds Australians' rights to access government-held information and to have their personal information protected.

Those legal rights are not as extensive as equivalent rights enjoyed in other places, like the European Union. Australian law offers minimal constitutional or statutory human rights protection at a federal level. Unlike other common law jurisdictions, Australian courts have been reluctant to recognise a right to privacy. Australians' 'privacy rights', in a positivist sense, exist within a rough patchwork of various domestic sources of law.

One of the few clear protections is the *Privacy Act 1988* (Cth), (*'Privacy Act'*), which (among other things) requires large-ish companies to deal with personal information in certain careful ways, consistent with the 'Australian Privacy Principles'.

In recent years, attitudes towards privacy and data protection seem to have changed within Australian society. To oversimplify: in some quarters at least, sympathies are becoming less American (ie, less concerned with 'free speech' above all else), and more European (ie, more concerned about privacy et al). If that description has any merit, then it would be due to events like the notorious Cambridge Analytica scandal, which is the focus of this litigation.

Various manifestations of Australian governments have responded to changing societal attitudes by initiating law reform inquiries. Notably, in 2019, the Australian Competition and Consumer Commission ('ACCC') delivered its final report on its *Digital Platforms Inquiry*, recommending that Australian law be reformed to better address 'the implications and consequences of the business models of digital platforms for competition, consumers, and society'. The broad-ranging inquiry considered overlapping issues in data protection, competition and consumer protection—including reform of the *Privacy Act*. The Australian Government agreed with the ACCC that Australian privacy laws ought to be strengthened 'to ensure they are fit for purpose in the digital age'. A theme of this report is that the foreign companies behind platforms like Facebook should be better regulated to serve the interests of Australian society.

Another important part of the context for this Facebook case is Australia's media environment. Australia's 'traditional' media companies—those that produce newspapers and television—are having a hard time. Their business models have been undercut by 'digital platforms' like Facebook and Google. Many such traditional media companies are owned by News Corp, the conglomerate driven by sometime-Australian Rupert Murdoch (who is responsible for Fox News. On behalf of Australia: sorry everyone). These companies enjoy tremendous power in the Australian political system. They have successfully lobbied the Australian government to force the foreign companies behind digital platforms like Google to pay Australian companies for news.

All of this is to say: now more than ever, there is regulatory appetite and political will in Australia to hold Facebook et al accountable.

Procedural history

Against that backdrop, in March 2020, the Commission commenced proceedings against each of the respondents in the Federal Court, alleging 'that the personal information of Australian Facebook users was disclosed to the *This is Your Digital Life* app for a purpose other than the purpose for which the information was collected, in breach of the *Privacy Act*'.

The Commissioner alleges that:

1. Facebook disclosed the users' personal information for a purpose other than that for which it was collected, in breach Australian Privacy Principle ('APP') 6;
2. Facebook failed to take reasonable steps to protect the users' personal information from unauthorised disclosure in breach of APP 11.1(b); and
3. these breaches amounted to serious and/or repeated interferences with the privacy of the users, in contravention of s 13G of the *Privacy Act*.

In April, the service orders reported by Huang were made. Facebook Inc and Facebook Ireland were then served outside of the jurisdiction.

Facebook's challenge to the orders for service outside of the jurisdiction: 'no prima facie case'

Facebook Inc contended that service should be set aside because the Court should not be satisfied that there was a prima facie case for the relief claimed by the Commissioner as required by r 10.43(4)(c) of the *Federal Court Rules 2011* (Cth).

The Court summarised the principles applicable to setting aside an order as to service as follows (at [23]):

- An application for an order discharging an earlier order granting leave to serve out of the jurisdiction, or for an order setting aside such service, is in the nature of a review by way of rehearing of the original decision to grant leave to serve out of the jurisdiction.

- It is open to the party who sought and obtained an order for service out of the jurisdiction to adduce additional evidence, and make additional submissions.
- The onus remains on the applicant in the proceedings to satisfy the Court in light of the material relied upon, including any additional material relied upon, that leave ought to have been granted.

Facebook Inc accepted that although demonstrating a prima facie case is 'not particularly onerous', the Commissioner had failed to establish an arguable case; she had merely posited 'inferences' which did not reasonably arise from the material tendered: [28]-[29].

As noted above, the underlying 'case' that was the subject of that argument is in relation to the Cambridge Analytica scandal and alleged breaches of the *Privacy Act*.

The case thus turns on application of an Australian statute to seemingly cross-border circumstances. Rather than having regard to forum choice-of-law rules, the parties seemingly accepted that the case turns on statutory interpretation. The extra-territorial application of the *Privacy Act* depends on an organisation having an 'Australian Link'. Section 5B(3) relevantly provides:

> *(3) An organisation or small business operator also has an Australian link if all of the following apply: …*
>
> *(b) the organisation or operator carries on business in Australia or an external Territory;*
>
> *(c) the personal information was collected or held by the organisation or operator in Australia or an external Territory, either before or at the time of the act or practice.*

Facebook Inc argued that the Commissioner failed to establish a prima facie case that, at the relevant time, Facebook Inc:

- carried on business in Australia within the meaning of s 5B(3)(b) of the *Privacy Act*; or
- collected or held personal information in Australia within the meaning of s 5B(3)(c) of the *Privacy Act*.

Facebook Inc carries on business in Australia

In *Tiger Yacht Management Ltd v Morris* (2019) 268 FCR 548 (noted here), the Full Court of the Federal Court of Australia 'observed that the expression "carrying on business" may have a different meaning in different contexts and that, where used to ensure jurisdictional nexus, the meaning will be informed by the requirement for there to be sufficient connection with the country asserting jurisdiction': [40].

The Court considered the statutory context of the Commissioner's case, being the application of Australian privacy laws to foreign entities. The Court had regard to the objects of the *Privacy Act*, which include promotion of the protection of privacy of individuals and responsible and transparent handling of personal information by entities: *Privacy Act* s 2A(b), (d). Whether Facebook Inc 'carries on business in Australia' for the purposes of the *Privacy Act* is a factual inquiry that should be determined with reference to those broader statutory purposes.

The Commissioner advanced several arguments in support of the proposition that Facebook Inc carries on business in Australia.

One argument advanced by the Commissioner was that Facebook Inc had financial control of foreign subsidiaries carrying on business in Australia, suggesting that the parent company was carrying on business in Australia. (Cf *Tiger Yacht*, above.) That argument was rejected: [155].

Another argument turned on agency more explicitly. Essentially, the Commissioner sought to pierce the corporate veil by arguing Facebook is 'a single worldwide business operated by multiple entities': [75]. Those entities contract with one another so that different aspects of the worldwide business are attributed to different entities, but the court ought to pierce the jurisdictional veil. The Commissioner submitted that 'the performance pursuant to the contractual arrangements by Facebook Inc of functions necessary for Facebook Ireland to provide the Facebook service…, including in Australia, indicated that Facebook Ireland was a convenient entity through which Facebook Inc carried on business in Australia during the relevant period': [115].

Facebook Inc appealed to cases like *Adams v Cape Industries* [1990] 1 Ch 433,

where the English Court of Appeal explained that, typically, a company would not be considered to be carrying on business within the forum unless: '(a) it has a fixed place of business of its own in this country from which it has carried on business through servants or agents, or (b) it has had a representative here who has had the power to bind it by contract and who has carried on business at or from a fixed place of business in this country' (at 529). (See also *Lucasfilm Ltd v Ainsworth* [2008] EWHC 1878 (Ch).)

Ultimately, the Court was not satisfied that Facebook Inc carried on business within Australia on the basis that Facebook Ireland conducted Facebook Inc's business in Australia: [117]. More accurately, the Commissioner had not established a prima facie case to that effect.

But the Commissioner *had* established a prima facie case that Facebook Inc *directly* carried on business within Australia.

Facebook Inc is responsible for various 'processing operations' in relation to the Facebook platform, which includes responsibility for installing, operating and removing cookies on the devices of Australian users. Facebook Inc appealed to case authority to argue that this activity did not amount to carrying on business in Australia. The Court thus considered cases like *Dow Jones v Gutnick* (2002) 210 CLR 575 and *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190, which each addressed the territorial aspects of businesses that depend on communication on the internet.

The Court rejected Facebook Inc's argument that 'installing' cookies is to be regarding as equivalent to uploading and downloading a document (cf *Gutnick*). At the interlocutory stage of the proceeding, there was not enough evidence to accept Facebook Inc's claim; but there was enough to draw the inference that the installation and operation of cookies within Australia involves activity in Australia.

The Court concluded: 'the Commissioner has discharged her onus of establishing that it is arguable, and the inference is open to be drawn, that some of the data processing activities carried on by Facebook Inc can be regarded as having occurred in Australia, notwithstanding that the evidence did not establish that any employee of Facebook Inc was physically located in Australia': [137]. It was thus concluded that the Commissioner had established a prima facie case that Facebook Inc carried on business within Australia: [156]. (Cf the reasoning of

Canadian courts that led to *Google Inc v Equustek Solutions Inc* [2017] 1 SCR 824, noted here.)

Facebook Inc collected or held personal information in Australia

The Court was assisted by responses provided by Facebook Inc to questions of the Commissioner made pursuant to her statutory powers of investigation. One question concerned the location and ownership of servers used to provide the Facebook service. Although Facebook Inc's answer was somewhat equivocal, it suggested that the platform depends on servers located in Australia (including network equipment and caching servers) to improve connection and delivery time. This was enough for the Court to make the relevant inference as to collection and holding of personal information within Australia: [170].

The Court had regard to the purposes manifested by the Explanatory Memorandum to the *Privacy Act* in concluding that 'the fact that the personal information is uploaded in Australia and stored on Australian users' devices and browser caches and on caching servers arguably owned or operated by Facebook Inc in Australia, it is arguable that Facebook Inc collected the personal information in Australia': [185].

Combined with the findings as to carrying on business, this was enough to establish a prima facie case that the extra-territorial application of the *Privacy Act* was engaged. The Court's orders as to service were not disturbed.

Concluding remarks

The interlocutory character of this decision should be emphasised. The Court's findings on the territorial aspects of 'carrying on business' and data collection were each subject to the 'prima facie case' qualification. These are issues of fact; the Court may find differently after a thorough ventilation of evidence yet to be adduced.

This decision is not anomalous. The assertion of long-arm jurisdiction over Facebook Inc indicates Australian courts' increasing willingness to pierce the jurisdictional veil for pragmatic ends. In my experience, most Australian lawyers

do not really care about the multilateralist ideals of many private international law enthusiasts. The text of the Australian statutes that engage the case before them is paramount. Lawyers are directed to consider the text of the statute in light of its context and purpose: *Australian Securities and Investments Commission v King* (2020) 94 ALJR 293, [23]; *Acts Interpretation Act 1901* (Cth) s 15AA. Essentially, in the case of a forum statute with putative extraterritorial operation, a form of interest analysis is mandated.

I am OK with this. If the policy of the *Privacy Act* is to have any chance of success, it depends on its application to internet intermediaries comprised of corporate groups with operations outside of Australia. As an island continent in a technologically interconnected world, the policy of Australian substantive law will increasingly determine the policy of Australian private international law.

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Call for Papers: Third German-Speaking Conference for Young Scholars in PIL (Reminder)

As mentioned earlier this summer, the Max Planck Institute for Comparative and International Private Law in Hamburg will host the third conference for young German-speaking scholars in private international law ("IPR-Nachwuchstagung") in March 2021. The conference will focus on the theme of *PIL for a better world: Vision – Reality – Aberration?* and will include a keynote by Angelika Nußberger, former judge at the European Court of Human Rights, and a panel discussion between Roxana Banu, Hans van Loon, and Ralf Michaels.

The organisers are inviting contributions that explore any aspect of the conference theme, which can be submitted until 20 September 2020. The call for papers and further information can be found on the conference website.

Although the conference will mainly be held in German, English proposals and presentations are also most welcome.

Of course, the organizers are mindful of the current Corona pandemic and will adjust the planning accordingly.

Mutual Trust: Judiciaries under Scrutiny – Recent reactions and preliminary references to the CJEU from the Netherlands and Germany

I. Introduction: Foundations of Mutual Trust

A crucial element element for running a system of judicial cooperation on the basis of mutual trust is sufficient trust in the participating judiciaries. EU primary law refers to this element in a more general way in that it considers itself to be based on „the rule of law“ and also „justice“. Article 2 TEU tells us: „The Union is founded on the values of (…) the rule of law (…). These values are common to the Member States in a society in which „(…) justice (…) prevail.“ Subparagraph 2 of the Preamble of the EU Charter of Fundamental Rights, recognized by the EU as integral part of the Union’s foundational principles in Article 6 (1) TEU, confirms: „Conscious of its spiritual and moral heritage, the Union (…) is based on (…) the rule of law. It places the individual at the heart of its activities, by (…) by creating an area of freedom, security and justice“. Article 47 of the EU Charter of Fundamental Rights guarantees the right to an effective remedy and to a fair trial when EU law is „implemented“ in the sense of Article 51 of the Charter, as does Article 6(1) European Convention on Human Rights generally.

The Area of Freedom, Security and Justice has indeed become a primary objective

of the EU. According to Article 3 (1) TEU, „[t]he Union's aim is to promote peace, its values and the well-being of its peoples." Article 3 (2) TEU further spells out these objectives: „The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime". Only in the following subparagraph, in Article 3 (2) Sentence 1 TEU, the original objective of the EU is listed: „The Union shall establish an internal market".

II. No „blind trust" anymore

Based on these fundaments, the CJEU, in its Opinion Opinion 2/13 of 18 December 2014, paras 191 and 192, against the EU's accession to the European Convention on Human Rights, explained: "[t]he principle of mutual trust between the Member States is of fundamental importance in EU law (…). That principle requires (…) to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (…). Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU". Hence, the Court concluded, at para. 194, that "[i]n so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law". This is why (inter alia) the CJEU held that the accession of the EU to the ECHR would be inadmissible – based on the promise in Article 19(1) Sentences 2 and 3 TEU: „[The CJEU] shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." When it comes to judicial cooperation, these Member States are primarily the Member

States of origin, rather than the Member States of destination, unless „systemtic deficiencies“ in the Member States of origin occur.

It did not come as a surprise that the European Court of Human Rights rejected the claim made by the European Court of Justice that mutual trust trumps human rights: In *Avoti?š v. Latvia* (ECtHR, judgment of 23 May 2016, Application no. 17502/07), the applicant was defendant in civil default proceedings in Cyprus. The successful claimant sought to get this judgment recognized and enforced in Latvia against the applicant under the Brussels I Regulation. The applicant argued that he had not been properly served with process in the proceedings in Cyprus and hence argued that recognition must be denied according to Article 34 no. 2 Brussels I Regulation. The Latvian courts nevertheless granted recognition and enforcement. Thereupon, the applicant lodged a complaint against Latvia for violating Article 6 (1) ECHR. The ECHR observed, at paras. 113 and 114:

„[T]he Brussels I Regulation is based in part on mutual-recognition mechanisms which themselves are founded on the principle of mutual trust between the member States of the European Union. (…). The Court is mindful of the importance of the mutual-recognition mechanisms for the construction of the area of freedom, security and justice referred to in Article 67 of the TFEU, and of the mutual trust which they require. (…). Nevertheless, the methods used to create that area must not infringe the fundamental rights of the persons affected by the resulting mechanisms (…)“.

The Court further held, in direct response to Opinion 2/13 of the ECJ that „[l]imiting to exceptional cases the power of the State in which recognition is sought to review the observance of fundamental rights by the State of origin of the judgment could, in practice, run counter to the requirement imposed by the Convention according to which the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient“.

Thus, a court must, under all circumstances, even within the scope of the „Bosphorus presumption“ (European Court of Human Rights, judgment of 30 June 2005 – *Bosphorus Hava Yollar? Turizm ve Ticaret Anonim ?irketi v. Ireland* [GC], no. 45036/98, paras. 160-65, ECHR 2005?VI), „[v]erify that the principle of mutual recognition is not applied automatically and mechanically to the detriment

of fundamental rights – which, the CJEU has also stressed, must be observed in this context. In this spirit, where the courts of a State which is both a Contracting Party to the Convention and a member State of the European Union are called upon to apply a mutual-recognition mechanism established by EU law, they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient. However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law". To cut it short: mutual trust does not (fully) trump human rights – "no blind trust" (Koen Lenaerts, La vie après l'avis: Exploring the principle of mutual (yet not blind) trust, Common Market Law Review 54 (2017), pp. 805 et seq.).

III. What does this mean, if a Member State (Poland) undermines the independence of its judiciary?

This question has been on the table ever since Poland started "reforming" its judiciary, first by changing the maximum age of the judges at the Polish Supreme Court and other courts during running appointments, thereby violating against the principle of irremovability of judges. The Polish law („Artyku?i 37 i 111 ust?p 1 of the Ustawa o S?dzie Najwy?szym [Law on the Supreme Court] of 8 December 2017 [Dz. U. of 2018, heading 5]) entered into force on 3 April 2018, underwent a number of amendments (e.g. Dz. U. of 2018, heading 848 and heading 1045), before it was ultimately set aside (Dz. U. of 2018, heading 2507). The CJEU declared it to infringe Article 19 (1) TEU in its judgment of 24 June 2019, C- 619/18 – *Commission v. Poland*. The Court rightly observed, in paras. 42 et seq.: "[t]he European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them, EU law being based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values. That premiss both entails and justifies the existence of mutual trust between the Member States and, in particular, their courts that those values upon which the European Union is founded, including the rule of law, will be recognised, and therefore that the EU law that implements those values will be respected". Indeed, the principle of irremovability is one central aspect of judicial

independence; see e.g. Matthias Weller, Europäische Mindeststandards für Spruchkörper: Zur richterlichen Unabhängigkeit, in Christoph Althammer/Matthias Weller, Europäische Mindeststandards für Spruchkörper, Tübingen 2017, pp. 3 et seq.). Later, and perhaps even more worrying, further steps of the justice "reform" subjected judgments to a disciplinary control by political government authorities, see CJEU, Ordonnance de la Cour (grande chambre), 8 avril 2020, C?791/19 R (not yet available in English; for an English summary see the Press Release of the Court). The European Court of Human Rights is currently stepping in – late, but may be not yet too late. The first communications about filings of cases concerning the independence of Poland's judiciary came up only in 2019. For an overview of these cases and comments see e.g. Adam Bodnar, Commissioner for Human Rights of the Republic of Poland and Professor at the University of the Social Sciences and Humanities in Warsaw, Strasbourg Steps in, Verfassungsblog, 7 July 2020.

IV. What are the other Member States doing?

1. The Netherlands: Suspending cooperation

One of the latest reactions comes from the Netherlands in the context of judicial cooperation in criminal matters, namely in respect to the execution of a European Arrest Warrant under **Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.** In two rulings of 24 March and one of 26 March 2020 (ECLI:NL:RBAMS:2020:1896, 24 March 2020; ECLI:NL:RBAMS:2020:1931, 24 March 2020; ECLI:NL:RBAMS:2020:2008, 26 March 2020) the *Rechtbank* Amsterdam stopped judicial cooperation under this instrument and ordered the prosecutor and the defence to take the entering into force of the latest judicial reforms in Poland into account before deciding to transfer a person to Poland. For a comment on this case line see Petra Bárd, John Morijn, Domestic Courts Pushing for a Workable Test to Protect the Rule of Law in the EU Decoding the Amsterdam and Karlsruhe Courts' post-LM Rulings (Part II). Marta Requejo Isidro, on the EAPIL's blog yesterday, rightly asked the question what a decision to reject judicial cooperation in criminal matters would mean in relation to civil matters. For myself, the answer is clear: if the fundaments for mutual trust are substantially put into question (see above on the ongoing actions by the Commission and the proceedings before the CJEU since 2016 – for a summary see here), the Member States may and must react themselves, e.g. by broadening the

scope and lowering the standards of proof for public policy violations, see Matthias Weller, Mutual Trust: In search of the future of European Private International Law, Journal of Private International Law 2015, pp. 65, at pp. 99 et seq.).

2. Germany: Pushing standards beyond reasonable degrees

Against these dramatic developments, the decision of the Regional Court of Erfurt, Germany, of 15 June 2020, Case C-276/20, for a preliminary reference about the independence of German judges appears somewhat suprising. After referring a question of interpretation of EU law in relation to the VW Diesel scandal, the referring court added the further, and unrelated question: „Is the referring court an independent and impartial court or tribunal for the purpose of Article 267 TFEU, read in conjunction with the third sentence of Article 19(1) TEU and Article 47(2) of the Charter of Fundamental Rights of the European Union?“ The referring court criticizes blurring lines between the executive and the judiciary – which is the very issue in Poland. It explained:

„The referring court, a civil court in the Thuringia region of Germany, shares the concerns and doubts of the Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden, Germany) as to the institutional independence of the German courts and their right of reference pursuant to Article 267 TFEU … . The court refers to the question referred by the Administrative Court, Wiesbaden, on 28 March 2019 and the proceedings pending before the Court of Justice of the European Union (… C-272/19 …). (…). According to the [CJEU's] settled case-law, a court must be able to exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever (see judgment of 16 February 2017, C-503/15, paragraph 36 et seq.). Only then are judges protected from external intervention or pressure liable to jeopardise their independence and influence their decisions. Only that can dispel any reasonable doubt in the mind of an individual seeking justice as to the imperviousness of the courts to external factors and their neutrality with respect to the conflicting interests before them.

The national constitutional situation in Germany and in Thuringia does not meet those standards (see, with regard to the lack of independence of the German prosecution service, judgment of 27 May 2019, C-508/18). It only recognises a functional judicial independence in the key area of judicial activity, which is a

personal independence. However, that is not sufficient to protect judges from all forms of external influence. The additional institutional independence of the courts required for that is by no means guaranteed. However, the independence of individual judges is guaranteed by the independence of the judiciary as a whole.

In Thuringia, as in every other federal state in Germany, the executive is responsible for the organisation and administration of the courts and manages their staff and resources. The Ministries of Justice decide on the permanent posts and the number of judges in a court and on the resources of the courts. In addition, judges are appointed and promoted by the Ministers for Justice. The underlying assessment of judges is the responsibility of the ministries and presiding judges who, aside from any judicial activity of their own, must be regarded as part of the executive. The Ministers for Justice and the presiding judges who rank below them administratively and are bound by their instructions act in practice as gatekeepers. In addition, the presiding judges exercise administrative supervision over all judges.

The formal and informal blurring of numerous functions and staff exchanges between the judiciary and the executive are also typical of Germany and Thuringia. For example, judges may be entrusted with acts of administration of the judiciary. The traditional practice of seconding judges to regional or federal ministries is one particular cause for concern. Seconded judges are often integrated into the ministerial hierarchy for years. It is also not unusual for them to switch back and forth between ministries and courts and even between the status of judge and the status of civil servant.

The judge sitting alone who referred the question has personally been seconded three times (twice to the Thuringia Ministry of Justice and once to the Thuringia State Chancellery).

This exchange of staff between the executive and the judiciary infringes both EU law and the Bangalore Principles of Judicial Conduct applied worldwide (see Commentary on the Bangalore Principles of Judicial Conduct, www.unodc.org, p. 36: '*The movement back and forth between high-level executive and legislative positions and the judiciary promotes the very kind of blurring of functions that the concept of separation of powers intends to avoid.*').

Most importantly, these informal practices sometimes appear to be arbitrary. While the courts guarantee the absence of arbitrariness outwardly, informal practices may expose judges to the threat of arbitrariness and administrative decisionism. Inasmuch as 'expression-of-interest' procedures have been initiated recently, including in Thuringia, as awareness of the problem increases, for example on secondments and trial periods in higher courts or on the management of working groups for trainee lawyers, there is still no justiciability (enforceability).

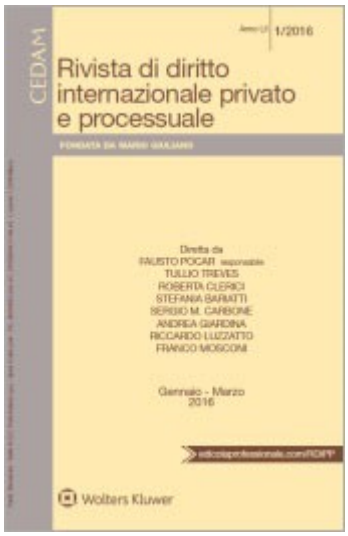
All this gives the executive the facility to exert undue influence on the judiciary, including indirect, subtle and psychological influence. There is a real risk of 'reward' or 'penalty' for certain decision-making behaviours (see Bundesverfassungsgericht (Federal Constitutional Court, Germany) order of 22 March 2018, 2 BvR 780/16, … , paragraphs 57 and 59)."

The close interlock in Germany between the judiciary and the executive and the hierarchical structure and institutional dependence of the judiciary are rooted in the authoritarian state of 19th century Germany and in the Nazi principle of the 'führer'. In terms of administrative supervision, the entire German judiciary is based on the president model (which under National Socialism was perverted and abused by applying the principle of the 'führer' to the courts …)."

These submissions appear to go way over the top: mechanisms to incentivise (which inenvitably contain an aspect of indirect sanction) are well-justified in a judiciary supposed to function within reasonable time limits; comparing the voluntary (!) temporary placement of judges in justice ministries or other positions of the government (or, as is regularly the case, in EU institutions), while keeping a life-time tenure under all circumstances (!) can hardly be compared or put into context with methods of the Nazi regime at the time, whereas cutting down currently running periods of judges and disciplinary sanctions in relation to the contents and results of judgments evidently and clearly violate firmly established principles of judicial independence, as well as a direct influence of the government on who is called to which bench. Yet, the German reference illustrates how sensitive the matter of judicial independence is being taken in some Member States – and how far apart the positions within the Member States are. It will be a delicate task of the EU to come to terms with these fundamentally different approaches within the operation of its systems of mutual recognition based on mutual trust. Clear guidance is needed by the CJEU in the judicial

dialogue between Luxemburg and the national courts. One recommendation put on the table is to re-include the Member States in its trust management, i.e. the control of compliance with the fundaments of judicial cooperation accordingly; concretely: to re-allow second and additional reviews by the courts of the receiving Member States in respect to judicial acts of a Member State against which the EU has started proceedings for violation of the rule of law in respect to the independence of its judiciary.

Rivista di diritto internazionale privato e processuale (RDIPP) No 2/2020: Abstracts



The second issue of 2020 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released. It features:

Fernando Gascón Inchausti, Professor at Universidad Complutense de Madrid, **Does EU Law Ensure an Adequate Protection of Debtors in Cross-Border Enforcement?** (in English)

- From a general perspective, cross-border enforcement of judicial decisions – and of authentic instruments – entails the need to coordinate different procedural systems, interacting with each other. From a practical point of view, however, cross-border enforcement is also a

context of dialectic between opposing parties, typical of any judicial process. Its regulation, therefore, must be developed and interpreted taking into account the rights and powers attributed to the creditor and to the debtor, so that the promotion of efficiency – favourable to the creditor – is not detrimental to the debtor's right of defense. This article assesses the extent to which the civil procedural law of the European Union adequately protects the debtor in cross-border enforcement and, where appropriate, what could be the most reasonable measures to improve it without unduly harming the right of the creditor to a prompt satisfaction of his right. Special attention shall be given in this framework to the legal position of consumers, due to their vulnerability and their special legal status according to EU protective law.

Maria Caterina Baruffi, Professor at the University of Verona, **Gli effetti della maternità surrogata al vaglio della Corte di Cassazione italiana e di altre corti** ('Effects of Surrogacy in the Jurisprudence of the Italian *Corte di Cassazione*? and Other Courts', in Italian)

- This paper examines the decision by means of which the Italian Supreme Court, in plenary session, on 8 May 2019 dealt with the issue of surrogacy, with particular regard to the notion of international public policy. The Court concluded that the ban on surrogacy constitutes a principle of public order aimed at protecting fundamental values, such as the surrogate mother's human dignity. This decision is consistent with the advisory opinion given in April 2019 by the European Court of Human Rights, that, upon request of the French Supreme Court in the context of the *Mennesson* case, ruled that each State can discretionarily determine the modalities by which it guarantees the recognition of the parent-child relationship, including the possibility to adopt. Nonetheless, the difficulties in the application of public policy are apparent and the situations that may arise as a result of such application are equally complex, for instance as a result of genetic ties being established with different persons. Therefore, this paper puts forth new proposals, also in the light of the most recent French case law.

The following comment is also featured:

Roberto Ruoppo, Doctor in Law, **Lo status giuridico di Taiwan e i suoi riflessi**

sul piano internazionalprivatistico ('Taiwan's Legal Status and Its Consequences from a Private International Law Perspective', in Italian)

- This paper focuses on the consequences brought in the field of private international law by the lack of recognition of a State. In particular, the paper aims to understand if it is possible that actors of the international community give effect to the acts and decisions adopted by the authorities of an entity not recognized as a State. Notably, this work addresses the case of Taiwan which, despite the lack of recognition from the others States, owns all the factual requirements to be considered as an autonomous subject in accordance with international law. Relying to the principle of effectiveness and the analysis of precedent case-law – such as those involving the Soviet Union and the German Democratic Republic – this paper aims to demonstrate that the response to this question should be premised on the consideration of the interests involved in the specific case. The conclusion reached is that the acts of an entity which lacks recognition should be given effects in the other States when this is more consistent with the principle of legal certainty and the legitimate expectations of the individuals involved.

In addition to the foregoing, this issue features the following book review by *Roberta Clerici*, Professor at the University of Milan: J. von Hein, E.-M. Kieninger, G. Rühl (eds.), **How European is European Private International Law? Sources, Court Practice, Academic Discourse**, Intersentia, Cambridge, 2019, pp. XXVI-373.

Lord Jonathan Mance on the future relationship between the

United Kingdom and Europe after Brexit

Nicole Grohmann, a doctoral candidate at the Institute for Comparative and Private International Law, Dept. III, at the University of Freiburg, has kindly provided us with the following report on a recent speech by Lord Jonathan Mance.

On Wednesday, 15 July 2020, the former Deputy President of the Supreme Court of the United Kingdom (UKSC), Lord Jonathan Mance, presented his views on the future relationship between the United Kingdom and Europe after Brexit in an online event hosted by the *Juristische Studiengesellschaft Karlsruhe*. This venerable legal society was founded in 1951; its members are drawn from Germany's Federal Constitutional Court, the Federal Supreme Court, the office of the German Federal Prosecutor, from lawyers admitted to the Federal Supreme Court as well as judges of the Court of Appeals in Karlsruhe and the Administrative Court of Appeals in Mannheim. In addition, the law faculties of the state of Baden-Württemberg (Heidelberg, Freiburg, Tübingen, Mannheim, Konstanz) are corporate members. Due to Corona-induced restrictions, the event took place in the form of a videoconference attended by more than eighty participants.

After a warm welcome by the President of the *Juristische Studiengesellschaft*, Dr. Bettina Brückner (Federal Supreme Court), Lord Mance shared his assessment of Brexit, drawing on his experience as a highly renowned British and internationally active judge and arbitrator. In the virtual presence of judges from the highest German courts as well as numerous German law professors and scholars, Lord Mance elaborated – in impeccable German – on the past and continuing difficulties of English courts dealing with judgments of the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) and the future legal struggles caused by the end of the transition period on the withdrawal of the United Kingdom from the European Union on 31 December 2020. Lord Mance's speech was followed by an open discussion regarding the most uncertain political and legal aspects of Brexit.

In his speech, Lord Mance highlighted the legal difficulties involved in the withdrawal of his country from the European Union. Since Lord Mance himself

tends to picture the British as being traditional and generally pragmatic, he named Brexit as a rare example of a rather unpragmatic choice. Especially with regard to the role of the United Kingdom as a global and former naval power, Lord Mance considered Brexit a step backwards. Besides the strong English individualism, which has evolved over the past centuries, the United Kingdom did not only act as an essential balancing factor between the global players in the world, but also within the European Union. Insofar, the upcoming Brexit is a resignation of the United Kingdom from the latter position.

Subsequently, Lord Mance focussed on the role of the European courts, the European Court of Justice and the European Court of Human Rights and their judgments in the discussions leading to Brexit. Both European courts gained strong importance and influence in the UK within the first fifteen years of the 21st century. Especially, the ECtHR is of particular importance for the British legal system since the Human Rights Act 1998 incorporated the European Convention on Human Rights into British law. Lord Mance described the Human Rights Act 1998 as a novelty to the British legal system, which lacks a formal constitution and a designated constitutional court. Apart from the Magna Charta of 1215 and the Bill of Rights of 1689, the British constitutional law is mainly shaped by informal constitutional conventions instead of a written constitution such as the German Basic Law. Following the Human Rights Act 1998 and its fixed catalogue of human rights, the British courts suddenly exercised a stricter control over the British executive, which initially gave rise to criticism. Even though the British courts are not bound by the decisions of the ECtHR following the Human Rights Act 1998, the British participation in the Council of Europe soon started a dialogue between the British courts and the ECtHR on matters of subsidiary and the ECtHR's margin of appreciation. The UK did not regard the growing caseload of the ECtHR favourably. Simultaneously, the amount of law created by the institutions of the European Union increased. Lord Mance stressed the fact that in 1973, when the United Kingdom joined the European Economic Community, the impact of the ECJ's decision of 5 February 1963 in *Van Gend & Loos*, C-26/62, was not taken into account. Only in the 1990s, British lawyers discovered the full extent and the ramifications of the direct application of European Union law. The binding nature of the ECJ's decisions substantiating said EU law made critics shift their attention from Strasbourg to Luxembourg.

In line with this development, Lord Mance assessed the lack of a constitutional

court and a written constitution as the main factor for the British hesitance to accept the activist judicial approach of the ECJ, while pointing out that Brexit would not have been necessary in order to solve these contradictions. The EU's alleged extensive competences, the ECJ's legal activism and the inconsistency of the judgments soon became the primary legal arguments of the Brexiteers for the withdrawal from the EU. Especially the ECJ's teleological approach of reasoning and the political impact of the judgments were mentioned as conflicting with the British cornerstone principles of parliamentary sovereignty and due process. Lord Mance stressed that the so-called *Miller* decisions of the Supreme Court in *R (Miller) v Secretary of State* [2017] UKSC 5 and *R (Miller) v The Prime Minister, Cherry v Advocate General for Scotland* (Miller II) [2019] UKSC 41, dealing with the parliamentary procedure of the withdrawal from the EU, are extraordinary regarding the degree of judicial activism from a British point of view. In general, Lord Mance views British courts to be much more reluctant compared to the German Federal Constitutional Court in making a controversial decision and challenging the competences of the European Union. As a rare exception, Lord Mance named the decision in *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, in which the UKSC defended the British constitutional instruments from being abrogated by European law. Indeed, Lord Mance also expressed scepticism towards the jurisprudential approach of the ECJ, because inconsistences and the need of political compromise could endanger the foreseeability and practicability of its decisions. Especially with regard to the recent decision of the German Constitutional Court of 5 May 2020 on the European Central Bank and the Court's approach to *ultra vires*, Lord Mance would have welcomed developing a closer cooperation between the national courts and the ECJ regarding a stricter control of the European institutions. Yet this important decision came too late to change Brexiteers' minds and to have a practical impact on the UK.

Finally, Lord Mance turned to the legal challenges resulting from the upcoming end of the transition period regarding Brexit. The European Union (Withdrawal) Acts 2018 and 2020 lay down the most important rules regarding the application of EU instruments after the exit day on 31 December 2020. In general, most instruments, such as the Rome Regulations, will be transposed into English domestic law. Yet, Lord Mance detected several discrepancies and uncertainties regarding the scope of application of the interim rules, which he described as excellent bait for lawyers. Especially two aspects mentioned by Lord Mance will

be of great importance, even for the remaining Member States: Firstly, the British courts will have the competence to interpret European law, which continues to exist as English domestic law, without the obligation to ask the ECJ for a preliminary ruling according to Art. 267 TFEU. In this regard, Lord Mance pointed out the prospective opportunity to compare the parallel development and interpretation of EU law by the ECJ and the UKSC. Secondly, Lord Mance named the loss of reciprocity guaranteed between the Member States as a significant obstacle to overcome. Today, the United Kingdom has to face the allegation of 'cherry picking' when it comes to the implementation of existing EU instruments and the ratification of new instruments in order to replace EU law, which will no longer be applied due to Brexit. Especially with regard to the judicial cooperation in civil and commercial matters and the recast of the Brussels I Regulation, the United Kingdom is at the verge of forfeiting the benefit of the harmonized recognition and enforcement of the decisions by its courts in other Member States. In this regard, Lord Mance pointed out the drawbacks of the current suggestion for the United Kingdom to join the Lugano Convention, mainly because it offers no protection against so-called torpedo claims, which had been effectively disarmed by the recast of the Brussels I Regulation – a benefit particularly cherished by the UK. Instead, Lord Mance highlighted the option to sign the Hague Convention of 30 June 2005 on Choice of Court Agreements which would allow the simplified enforcement of British decisions in the European Union in the case of a choice of court agreement. Alternatively, Lord Mance proposed the ratification of the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments. So far, only Uruguay and Ukraine have signed this new convention. Nevertheless, Lord Mance considers it as a valuable option for the United Kingdom as well, not only due to the alphabetical proximity to the other signatories.

Following his speech, the event concluded with a lively discussion about the problematic legal areas and consequences of Brexit, which shall be summarised briefly. Firstly, the President of the German Supreme Court Bettina Limperg joined Lord Mance in his assessment regarding the problem of jurisprudential inconsistency of the ECJ's decisions. However, like Lord Mance she concluded that the Brexit could not be justified with this argument. Lord Mance pointed out that in his view the ECJ was used as a pawn in the discussions surrounding the referendum, since the Brexiteers were unable to find any real proof of an overarching competence of the European Union. Secondly, elaborating on the

issue of enforceability, Lord Mance added that he considers the need for an alternative to the recast of the Brussels I Regulation for an internationally prominent British court, such as the London Commercial Court, not utterly urgent. From his practical experience, London is chosen as a forum mainly for its legal expertise, as in most cases enforceable assets are either located in London directly or in a third state not governed by EU law. Hence, Brexit does not affect the issue of enforceability either way. Finally, questions from a constitutional perspective were raised regarding the future role of the UKSC and its approach concerning cases touching on former EU law. Lord Mance was certain that the UKSC's role would stay the same regarding its own methodological approach of legal reasoning. Due to the long-standing legal relationship, Lord Mance anticipated that the legal exchange between the European courts, UK courts and other national courts would still be essential and take place in the future.

In sum, the event showed that even though Brexit will legally separate the United Kingdom from the European Union, both will still be closely linked for economic and historical reasons. As Lord Mance emphasized, the UK will continue to work with the remaining EU countries in the Council of Europe, the Hague Conference on PIL and other institutions. Further, the discrepancies in the Withdrawal Acts will occupy lawyers, judges and scholars from all European countries, irrespective of their membership in the European Union. Lastly, the event proved what Lord Mance was hoping to expect: The long-lasting cooperation and friendship between practitioners and academics in the UK and in other Member States, such as Germany, is strong and will not cease after Brexit.

Monograph on international surrogacy with emphasis on Bosnia and Herzegovina

Anita Durakovic, Associate Professor at the University Dzemal Bijedic Mostar, and Jasmina Alihodzic, Professor at the University of Tuzla, co-authored a monograph titled **International Surrogate Motherhood – Account of the Legislation in Bosnia and Herzegovina** (in the original: *Medunarodno surogat materinstvo – osvrt na zakonodavstvo u Bosni i Hercegovini*). The book was published earlier in 2020 by the Faculty of Law of the University Dzemal Bijedic in Mostar.

The book's first pages are devoted to interdisciplinary approaches to the surrogacy phenomenon followed by the comparative perspective over substantive laws. The central part of the book is focused on the legislation in Bosnia and Herzegovina, where particularly interesting for the readers of this blog are the sections devoted to recognition of cross-border surrogacy arrangements there at three distinct levels: within the proceedings on the merits before the competent authorities in Bosnia and Herzegovina, as part of the recognition of the status certified by the foreign authentic document, and as part of the recognition of the foreign judgment in which the decision is made concerning the personal status. In evaluating the difficulties which incoming intended parents would be faced with in Bosnia and Herzegovina, especially against the background of the prohibition of surrogate motherhood in force in one of the territorial units there, the authors differentiate between situations where surrogate parents request issuing of the travel documents in order to enter Bosnia and Herzegovina with the child, and where subsequent to entering the country they attempt to regulate the child's civil status. Further chapters are glancing through human rights aspects of the surrogate arrangements and efforts on international level to regulate these matters, particularly within the Hague Conference on Private International Law. The conclusion favours recognition of foreign authentic documents and judgments concerning the legal parenthood deriving from a surrogate arrangement as opposed to the long and costly family law proceedings to obtain decisions establishing fatherhood and adoption on the part of the mother. The authors also stress that the competent authorities need to take account of the best interest of the child when deciding in recognition proceedings and assessing whether to apply the public policy clause.

While this book offers some discussion on theoretical level, it is primarily

intended to serve as a reference point for the competent authorities and potential intended parents as well as to advise legislator or the need to adjust legal framework. It would have been much more convincing if the actual cases rated to the Bosnia and Herzegovina could have been discussed. However, according to the authors, there are no official cases although it is known to have happened in practice. Perhaps this book will contribute to raising awareness not only among legal professionals but also in the local community about important interests at stake in surrogate parenting arrangements, especially that of the child.