The Private International Law of Virtual Zoom Backgrounds

Written by Tobias Lutzi, University of Cologne

One of the biggest winners of the current pandemic (other than toilet paper producers, conspiracy theorists, and the climate) seems to be the former Silicon Valley startup Zoom, whose videoconferencing solutions have seen its number of daily users increase about thirtyfold since the end of 2019. While the company's success in a market otherwise dominated by some of the world's wealthiest corporations has taken many people – including investors – by surprise, it can be attributed to a number of factors – arguably including its software's highly popular virtual-background feature.

With more and more people using the cockpit of the *Millennium Falcon*, the couch from *The Simpsons*, and other iconic stills from movies or TV series as virtual backgrounds in their private and professional Zoom meetings and webinars, the question arises as to whether this may not constitute an infringement of copyright.

Unsurprisingly, this depends on the applicable law. Whereas using a single frame from a movie as a virtual background may often qualify as 'fair use' under US copyright law even in a professional setting (and thus require no permission from the copyright holder), no such limitation to copyright will be available in many European legal systems, with any 'communication to the public' in the sense of Art 3 of the Information Society Directive 2001/29/EC potentially constituting a copyright infringement under the domestic copyright laws of an EU Member State.

As far as copyright infringements are concerned, the rules of private international law differ significantly less than the rules of substantive law. Under the influence of the Berne Convention, the so-called *lex loci protectionis* principle has long become the leading approach in most legal systems, allowing copyright holders to seek protection under any domestic law under which they can establish a copyright infringement. For infringements committed through the internet, national courts have given the principle a notoriously wide application, under

which the mere accessibility of content from a given country constitutes a sufficient basis for a copyright holder to seek protection under its domestic law. Accordingly, using an image on Zoom without the copyright holder's permission in a webinar that is streamed to users in numerous countries exposes the user to just as many copyright laws – regardless of whether the image is used by the host or by someone else sharing their video with the other participants.

Interestingly, the fact that the image is only displayed to other users of the same software is unlikely to mitigate this risk. While Zoom's (confusingly numbered) terms & conditions unsurprisingly prohibit infringements of intellectual property (clause 2.d.(vi)) and – equally unsurprisingly – subject the company's legal relationship with its users to the laws of California (clause 22/20.1), courts have so far been slow to attach significance to such platform choices of law as with regard to the relationship between individual users. In fact, the EU Court of Justice held in Case C-191/15 *Verein für Konsumenteninformation v Amazon* (paras. 46–47) that even with regard to a platform host's own liability in tort,

> *the fact that [the platform host] provides in its general terms and conditions that the law of the country in which it is established is to apply to the contracts it concludes cannot legitimately constitute […] a manifestly closer connection [in the sense of Art. 4(3) Rome II].*
>
> *If it were otherwise, a professional […] would de facto be able, by means of such a term, to choose the law to which a non-contractual obligation is subject, and could thereby evade the conditions set out in that respect in Article 14(1)(a) of the Rome II Regulation.*

While the escape clause of Art. 4(3) Rome II is not directly applicable to copyright infringements anyway, the decision illustrates how courts will be hesitant to give effect to a platform host's choice of law as far as the relationship between users – let alone between users and third parties – is concerned. This arguably also applies to other avenues such as Art. 17 Rome II and the concept of 'local data'.

The liability risks described above are, of course, likely to remain purely theoretic. But they are also easily avoidable by not using images without permission from the copyright holder in any Zoom meeting or webinar that cannot safely be described as private under the copyright laws of all countries from where the meeting can be joined.

Corporate responsibility and private (international) law

Written by Giesela Rühl, University of Jena/Humboldt-University of Berlin

Note: This blogpost is part of a series on „Corporate social responsibility and international law" that presents the main findings of all contributions published in August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020.

1. Corporate social responsibility has been the subject of lively debates in private international law for many years. These debates revolve around the question of whether companies domiciled in countries of the Global North can be held liable for human rights violations committed by foreign subsidiaries or suppliers in countries of the Global South (so-called supply chain liability).

2. According to the majority view in the public international law literature, companies are not, at least not directly bound by human rights. Although numerous international law instruments, including the UN's 2011 Guidelines for Business and Human Rights (Ruggie Principles), also address companies, liability for human rights violations is, therefore, a matter of domestic law.

3. The domestic law applicable to liability for human rights violations must be determined in accordance with the provisions of (European) private international law. Direct recourse to the *lex fori*, in contrast, is not possible. The legal situation in Europe is, therefore, different from the United States where actions which are brought on the basis of the Alien Tort Claims Act (ATCA) are governed by US-American federal (common) law.

4. Claims for human rights violations committed abroad will usually be claims in tort. Under (European) private international law it is, therefore, the law of the place where the damage occurs (Article 4(1) Rome II Regulation) and, hence, foreign law which governs these claims. Exceptions apply only within narrow limits, in particular if domestic laws can be classified as overriding mandatory

provisions (Article 16 Rome II Regulation) or if application of foreign law violates the *ordre public* (Article 26 Rome II Regulation).

5. In addition to tort law, claims for human rights violations may also be based on company law, namely when directors are directly held liable for torts committed by a foreign subsidiary. According to the relevant private international law provisions of the Member States these claims are governed by the law of the (administrative or statutory) seat of the foreign subsidiary. As a consequence, claims in company law are also subject to foreign law.

6. The fact that (European) private international law submits liability for human rights violations to foreign law is very often criticized in the private international law literature. Claiming that foreign law does not sufficiently protect the victims of human rights violations, a number of scholars, therefore, attempt to subject liability claims *de lege lata* to the domestic law of the (European) parent or buyer company.

7. These attempts, however, raise a number of concerns: first, under traditional (European) private international law, substantive law considerations do not inform the determination of the applicable law. Second, the wish to apply the domestic law of a European country is mostly driven by the wish to avoid poorly functioning court systems and lower regulatory standards in countries of the Global South. Neither of these aspects, however, has anything to do with the applicable tort or company law. Regulatory standards, for example, are part of public law and, therefore, excluded from the reach of private international law. Finally, the assumption that the domestic law of the (European) parent or buyer company provides more or better protection to the victims of human rights violations does not hold true *de lege lata*. Since parent and buyer companies are legally independent from their foreign subsidiaries and suppliers, parent and buyer companies are only in exceptional cases liable to the victims of human rights violations committed abroad by their foreign subsidiaries or suppliers (legal entity principle or principle of entity liability).

8. The difficulties to hold (European) parent and buyer companies *de lege lata* liable for human rights violations committed by their foreign subsidiaries or suppliers raises the question of whether domestic laws should be reformed and their application ensured via the rules of private international law? Should domestic legislatures, for example, introduce an internationally mandatory human

rights due diligence obligation and hold companies liable for violations? Proposals to this end are currently discussed in Germany and in Switzerland. In France, in contrast, they are already a reality. Here, the Law on the monitoring obligations of parent and buyer companies (Loi de vigilance) of 2017 imposes human rights due diligence obligations on bigger French companies and allows victims to sue for damages under the French Civil Code. The situation is similar in England. According to a Supreme Court decision of 2019 English parent companies may, under certain conditions, be held accountable for human rights violations committed by their foreign subsidiaries.

9. The introduction of an internationally mandatory human rights due diligence obligation at the level of national law certainly holds a number of advantages. In particular, it may encourage companies to take measures to prevent human rights violations through their foreign subsidiaries and suppliers. However, it is all but clear whether, under the conditions of globalization, any such obligation will actually contribute to improving the human rights situation in the countries of the Global South. This is because it will induce at least some companies to take strategic measures to avoid the costs associated with compliance. In addition, it will give a competitive advantage to companies which are domiciled in countries that do not impose comparable obligations on their companies.

10. Any human rights due diligence obligations should, therefore, not (only) be established at the national level, but also at the European or – even better – at the international level. In addition, accompanying measures should ensure that the same rules of play apply to all companies operating in the same market. And, finally, it should be clearly communicated that all these measures will increase prices for many products sold in Europe. In an open debate it will then have to be determined how much the Global North is willing to invest in better protection of human rights in the Global South.

Full (German) version: *Giesela Rühl*, Unternehmensverantwortung und (Internationales) Privatrecht, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020, pp. 89 et seq.

Germany’s Approach to Cross-border Corporate Social Responsibility of Enterprises: Latest Developments

by Marie Elaine Schäfer

The cross-border expansion of EU companies’ economic activities not only leads to a globalised market, but also impacts human rights as well as the environment in countries worldwide. The recent rise of claims against EU companies for the violations committed by their subsidiaries located in third countries is a by-product of that context. With Germany being the world’s third largest importing country, the question of corporate responsibility for harmful events abroad is crucial. The present post provides an overview of the most recent legal developments on that topic.

“National Action Plan” and voluntary principle

The central aspect of Germany’s approach to prevent human rights violations and environmental damages caused by German companies’ foreign subsidiaries is a voluntary – as opposed to binding – principle.

In 2016, the German Government adopted the “Nationaler Aktionsplan Wirtschaft und Menschenrechte” (National Action Plan on Business and Human Rights) to implement the UN guiding principles on Business and Human Rights (Ruggie Principles). This fixed framework is the first of its kind in Germany. The objective of the National Action Plan is to delineate German enterprises’ responsibility to protect human rights: at least 50 per cent of all large companies in Germany (with more than 500 employees) have to implement a system of human rights due diligence by 2020. Accordingly, “[c]ompanies should publicly express their willingness to respect human rights in a policy statement, identify risks, assess the impact of their activities on human rights, take countermeasures if necessary,

communicate how they deal with risks internally and externally and establish a transparent complaints mechanism" (see the Report on the National Action Plan).

An inter-ministerial committee (on business and human rights), formed by the Government under the auspices of the German Federal Foreign Office, monitors the status of implementation of human rights due diligence. However, any tangible measures remain optional for companies and inaction entails no consequences yet.

KiK litigation

German courts faced the question of companies' liability to some extent in the KiK litigation, which ended with a judgment issued by the Court of Dortmund (Germany) in 2019.

The facts of that case are the following: the German textile importer and reseller KiK Textilen and Non-Food GmbH (hereafter, KiK) is listed amongst the ten largest providers in the German textile industry and has over 28.000 employees. In September 2012, 259 people died in a fire in a textile factory in Pakistan and 47 more were injured. The main buyer of the factory's goods was KiK. In 2015, relatives of three of the deceased victims and one of the injured workers himself started proceedings against KiK in the Regional Court of Dortmund for damages of 30.000 € each for suffering and the death of the deceased victims.

The court ruled that, based on Art. 4(1) of the Rome II Regulation, Pakistani law was applicable. In the main proceedings, that court retained expert evidence on Pakistani Law and dismissed the lawsuit due to the Pakistani limitation period for such claims that ended even before the proceedings in Germany had started. For further general discussion on Article 4(1) of the Rome II Regulation as well as on the potential relevance of Article 4(3) Rome II Regulation see here.

According to the further holdings of the court, the claimants could alternatively hold KiK liable for the events in Pakistan, had an acknowledgement of liability been written. However, KiK had agreed on a code of conduct with the supplier, which the court and the expert on Pakistani law evaluated as an agreement to compensate on an **ex gratia** basis and not as an acknowledgement of liability. Furthermore, the court stated that, even if German law was applicable, a code of conduct would then, at most, lead to a legal binding agreement between KiK and the supplier. The suppliers' employees could not file any direct claims against KiK

based on the supply contract and the code of conduct, which cannot be seen as a contract to the benefit of a third party under German law (supplementary interpretation of the contract).

In light of this, it is questionable how long the voluntary principle will remain the leading path in Germany's approach to deal with expanding supply chains and the challenges for both environmental and human rights standards.

Current legislative developments

An alliance of non-governmental institutions (similar to the coalition that launched the Swiss *initiative populaire* "entreprises responsables – pour protéger l'être humain et l'environnement" in 2016) has formed the "Initiative Lieferkettengesetz" (Supply chain Law Initiative) with the intention of establishing binding obligations as they can be found in the French Duty of Vigilance Law ("loi n°2017-399 relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre"). Accordingly, German companies shall establish diligence plans to protect human rights and the environment in the states where their subsidiaries are located. Violations of diligence would lead to sanctions in form of shortening of government aids and high fines. In order to ensure the companies' liability for violations in German courts, the law would be formed as an overriding mandatory provision in the sense of Art. 9(1) of the Rome I Regulation.

Applied to the KiK litigation, the problem does not only lie within the applicability of German law. As the Court of Dortmund ruled, only a written acknowledgement of liability would enable employees to start proceedings. Since a mandatory system of due diligence would likely take the form of codes of conduct rather than acknowledgements of liability, violations of German law would lead to the sanctioning of the companies but would not offer a cause of action to suppliers' employees against the German enterprises.

Even though the enactment of a supply chain law remains highly disputed within the government, recent developments show that a change towards binding obligations may be on its way.
The ministers of labour and of development are of the opinion that the voluntary principle does not lead to the desired result, since only about 20 per cent of the companies affected by the National Action Plan have carried out human rights

due diligence in 2019. According to Gerd Müller, the minister of development, legislation will follow if a second survey in 2020 does not show any improvement.

In addition to that, in 2019, more than 40 German companies, ranging from larger enterprises, such as Nestlé Germany to Start-Ups, publicly demanded binding obligations to ensure legal certainty and equal competitive competitions.

As shown, German Companies' responsibility is a question of voluntary implementation of the National Action Plan. In light of the KiK litigation, employees' proceedings against enterprises will likely have no success, although legislation in this field may lead to higher standards that enterprises then would have to impose to their suppliers abroad.

Still, the introduction of legislation remains uncertain as the result of a second survey on the National Action Plan's implementation will determine upcoming developments and the future of the German voluntary principle.

As was reported on this blog here, the Munich Dispute Resolution Day on 5 May 2020 was going to focus on "Human Rights Lawsuits before Civil and Arbitral Courts in Germany", but Covid-19 forced the organisors to reschedule.

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Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2020: Abstracts

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

A. Stein: **The 2019 Hague Judgments Convention – All's Well that Ends Well?**

The Hague Convention on the Recognition and Enforcement of Foreign Judgments, which was concluded in July 2019, holds the potential of facilitating the resolution of cross-border conflicts by enabling, accelerating and reducing the cost of the recognition and enforcement of judgments abroad although a number of areas have been excluded from scope. As the academic discussion on the merits of this instrument unfolds and the EU considers the benefits of ratification, this contribution by the EU's lead negotiator at the Diplomatic Conference presents an overview of the general architecture of the Convention and sheds some light on the individual issues that gave rise to the most intense discussion at the Diplomatic Conference.

C. North: **The 2019 HCCH Judgments Convention: A Common Law Perspective**

The recent conclusion of the long-awaited 2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the "Judgments Convention") provides an opportunity for States to reconsider existing regimes for the recognition and enforcement of foreign judgments under national law. This paper considers the potential benefits of the Judgments Convention from a common law perspective. It does so by considering the existing regime for recognition and enforcement at common law, and providing an overview of the objectives, structure and a number of key provisions of the Judgments Convention. It then highlights some of the potential benefits of the Convention for certain common law (and other) jurisdictions.

P.-A. Brand: **Recognition and enforcement of decisions in administrative law matters**

Whereas for civil and commercial matters there are extensive rules of international and European civil procedural law on mutual legal assistance and in particular on the recognition and enforcement of civil court decisions, there is no similar number of regulations on legal assistance and for the international enforcement of administrative court decisions. The same applies to the recognition of foreign administrative acts. This article deals with the existing rules, in particular with regard to decisions in administrative matters, and

concludes that the current system of enforcement assistance in the enforcement of administrative decisions should be adapted to the existing systems of recognition and enforcement of judgments in civil and commercial matters.

B. Hess: **About missing legal knowledge of German lawyers and courts**

This article addresses a decision rendered by the Landgericht Düsseldorf in which the court declined to enforce, under the Brussels Ibis Regulation, a provisional measure issued by a Greek court. Erroneously, in its decision the Landgericht held that applications for refusal of enforcement of foreign decisions (article 49 Brussels Ibis Regulation) are to be lodged with the Landgericht itself. Since the party lodged its application with the Landgericht on the last day of

the time limit, the Oberlandesgericht Düsseldorf eventually held that the application was untimely as it was not lodged with the Oberlandesgericht, instead. The Oberlandesgericht refused to restore the status quo ante because the information about the competent court had been manifestly erroneous, whereas the lawyer is expected to be familiar with articles 49 (2) and 75 lit b) of the Brussels Ibis Regulation. This article argues that jurisdiction over applications for refusal of enforcement is not easily apparent from the European and German legal provisions and that the legal literature addresses the issue inconsistently. This results in a certain degree of uncertainty as concerns jurisdiction over such applications, making it difficult to establish cases of possibly manifestly incorrect applications.

C.F. Nordmeier: **Abuse of a power of attorney granted by a spouse – The exclusion of matrimonial property regimes, the place of occurrence of the damage under Brussels Ibis and the escape clause of art. 4 (3) Rome II**

The article deals with the abuse of power of attorney by spouses on the basis of a decision of the Higher Regional Court of Nuremberg. The spouses were both German citizens, the last common habitual residence was in France. After the failure of the marriage, the wife had transferred money from a German bank account of the husband under abusive use of a power of attorney granted to her. The husband sues for repayment. Such an action does not fall within the scope of the exception of matrimonial property regimes under art. 1 (2) (a) Brussels Ibis Regulation. For the purpose of determining the place where the damage occurred (Art. 7 No. 2 Brussels Ibis Regulation), a distinction can be made between cases

of manipulation and cases of error. In the event of manipulation, the bank account will give jurisdiction under Art. 7 No. 2 Brussels Ibis Regulation. Determining the law applicable by Art. 4 (3) (2) Rome II Regulation, consideration must be given not only to the statute of marriage effect, but also to the statute of power of attorney. Particular restraint in the application of Art. 4 (3) (2) Rome II Regulation is indicated if the legal relationship to which the non-contractual obligation is to be accessory is not determined by conflict-of-law rules unified on European Union level.

P.F. Schlosser: **Governing law provision in the main contract – valid also for the arbitration provision therein?**

Both rulings are shortsighted by extending the law, chosen by the parties for the main contract, to the arbitration provision therein. The New York Convention had good reasons for favoring, in the absence of a contractual provision specifically directed to the arbitration provision, the law governing the arbitration at the arbitrators' seat. For that law the interests of the parties are much more predominant than for their substantive agreements.

F. Rieländer: **Choice-of-law clauses in pre-formulated fiduciary contracts for holding shares: Consolidation of the test of unfairness regarding choice-of-law clauses under Art. 3(1) Directive 93/13/EEC**

In its judgment, C-272/18, the European Court of Justice dealt with three conflict-of-laws issues. Firstly, it held that the contractual issues arising from fiduciary relationships concerning limited partnership interests are included within the scope of the Rome I Regulation. While these contracts are not covered by the exemption set forth in Art. 1(2)(f) Rome I Regulation, the Court, unfortunately, missed an opportunity to lay down well-defined criteria for determining the types of civil law fiduciary relationships which may be considered functionally equivalent to common law trusts for the purposes of Art. 1(2)(h) Rome I Regulation. Secondly, the Court established that Art. 6(4)(a) Rome I Regulation must be given a strict interpretation in light of its wording and purpose in relation to the requirement "to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence". Accordingly, this exception is applicable only if the consumer needs to leave the country in which he has his habitual residence for the purpose of enjoying the benefits of the services. Thirdly, the Court re-affirmed that choice-of-law clauses in pre-formulated

consumer contracts are subject to a test of unfairness under Art. 3(1) Directive 93/13/EEC. Since the material scope of this Directive is held to apply to choice-of-law clauses, such a clause may be considered as unfair if it misleads the consumer as far as the laws applicable to the contract is concerned.

U. Bergquist: **Does a European Certificate of Succession have to be valid not only at the point of application to the Land Registry, but also at the point of completion of the registration in the Land Register?**

When it comes to the evidentiary effect of European Certificates of Successions, there are different opinions on whether a certified copy of the certificate has to be valid at the time of the completion of a registration in the Land register. The Kammergericht of Berlin recently ruled that a certified copy loses its evidentiary effect in accordance with art. 69 (2) and (5) of the European Succession Regulation (No. 650/2012) after expiry of the (six-month) validity period, even if the applicant has no influence on the duration of the registration procedure. This contribution presents the different arguments and concludes – in accordance with the Kammergericht – that not the date of submission of the application but the date of completion of the registration has to be decisive for the required proof.

D. Looschelders: **International and Local Jurisdiction for Claims under Prospectus Liability**

The judgment by the Austrian Supreme Court of Justice (Oberster Gerichtshof, OGH) deals with international and local jurisdiction for a claim under prospectus liability. It is mainly concerned with the determination of the place in which the harmful event occurred, as stated in Art. 5(3) of Regulation No 44/2001. Specifying the damage location can pose significant problems due to the fact that prospectus liability compensates pure economic loss. The OGH had stayed the proceedings in order to make a reference to the European Court of Justice (ECJ) for a preliminary ruling on several questions related to this issue. However, the decision by the ECJ left many details unsettled. This article identifies the criteria developed by the OGH in light of the case. The author agrees with the OGH to designate the damage location in this particular case as the injured party’s place of residence. Nevertheless, he points out the difficulties of this approach in cases where not all investment and damage specific circumstances point to the investor’s country of residence.

W.Voß: **U.S.-style Judicial Assistance – Discovery of Foreign Evidence from Foreign Respondents for Use in Foreign Proceedings**

In the future, will German litigants in German court proceedings have to hand over to the opposing party evidence located on German territory based on American court orders? In general, under German law, the responsibility to gather information and to clarify the facts of the case lies with the party alleging the respective facts, while third parties can only be forced to produce documents in exceptional circumstances. However, the possibility to obtain judicial assistance under the American Rule 28 U.S.C. § 1782(a) increasingly threatens to circumvent these narrow provisions on document production in transatlantic relations. For judicial assistance under this Federal statute provides parties to foreign or international proceedings with access to pre-trial discovery under U.S. law, if the person from whom discovery is sought "resides or is found" in the American court district. Over the years, the statute has been given increasingly broad applicability – a trend that is now being continued by the recent ruling of the Second Circuit Court of Appeals discussed in this article. In this decision, the Court addressed two long-disputed issues: First, it had to decide on whether the application of 28 U.S.C. § 1782(a) is limited to a person who actually "resides or is found" in the relevant district or whether the statute could be read more broadly to include all those cases in which a court has personal jurisdiction over a person. Second, the case raised the controversial question of whether 28 U.S.C. § 1782 allows for extraterritorial discovery.

M. Jänterä-Jareborg: **Sweden: Non-recognition of child marriages concluded abroad**

Combatting child marriages has been on the Swedish legislative agenda since the early 2000s. Sweden's previously liberal rules on the recognition of foreign marriages have been revisited in law amendments carried out in 2004, 2014 and 2019, each reform adding new restrictions. The 2019 amendment forbids recognition of any marriage concluded abroad as of 1/1/2019 by a person under the age of 18. (Recognition of marriages concluded before 1/1/2019 follows the previously adopted rules.) The marriage is invalid in Sweden directly by force of the new Swedish rules on non-recognition. It is irrelevant whether the parties had any ties to Sweden at the time of the marriage or the lapse of time. The aim is to signal to the world community total dissociation with the harmful practice of child marriages. Exceptionally, however, once both parties are of age, the rule of

nonrecognition may be set aside, if called upon for “extraordinary reasons”. No special procedure applies. It is up to each competent authority to decide on the validity of the marriage, independently of any other authority’s previous decision. While access to this “escape clause” from the rule of non-recognition mitigates the harshness of the system, it makes the outcome unpredictable. As a result, the parties’ relationship may come to qualify as marriage in one context but not in another. Sweden’s Legislative Council advised strongly against the reform, as contrary to the aim of protecting the vulnerable, and in conflict with the European Convention on Human Rights, as well as European Union law. Regrettably, the government and Parliament took no notice of this criticism in substance.

I. Tekdogan-Bahçivanci: **Recent Turkish Cases on Recognition and Enforcement of Foreign Family Law Judgements: An Analysis within the Context of the ECHR**

In a number of recent cases, the Turkish Supreme Court changed its previous jurisprudence, rediscovered the ECHR in the meaning of private international law and adopted a fundamental-rights oriented approach on the recognition and enforcement of foreign judgements in family matters, i.e. custody and guardianship. This article aims to examine this shift together with the jurisprudence of the European Court of Human Rights, to find a basis for this shift by analysing Turkey’s obligation to comply with the ECHR and to identify one of the problematic issues of Turkish private international law where the same approach should be adopted: namely recognition and/or enforcement of foreign judgements relating to non-marital forms of cohabitation.

Foreign Limitation Periods in England & Wales: Roberts v SSAFA

Written by Elijah Granet

When a British woman gives birth in a German hospital staffed with British midwives on a contract from the British ministry of defence, what law applies and to what extent? This seemingly simple question took Mrs Justice Foster, in the English and Welsh High Court of Justice, 299 paragraphs to answer in a mammoth judgment released on 24 April: *Roberts (a minor) v Soldiers, Sailors, Airmen and Families Association & Ors* [2020] EWHC 994 (QB). In the course of resolving a variety of PIL issues, Mrs Justice Foster held that the German law of limitations should be disapplied as, on the specific facts of the case, contrary to public policy.

Facts

The British military has maintained a continuous presence in Germany since the end of the Second World War. In June 2000, Mrs Lauren Roberts, the wife of a British soldier serving in Germany and herself a former soldier, gave birth to her son, Harry, in the Allegemeines Krankenhaus in Viersen ('**AKV**'), a hospital in North-Rhine Westphalia.

AKV had been contracted to provide healthcare for British military personnel and their dependents by Guy's & St Thomas's Hospital NHS Trust in London, which, in turn, had been contracted by the British Ministry of Defence ('**MoD**') to procure healthcare services in Germany. Midwifery care for British personnel and dependents, however, was supplied instead by the Soldiers, Sailors, Airmen and Families Association ('**SSAFA**'), a charity. These British midwives worked under the direction of AKV, taking advantage of the mutual recognition of qualifications under EU law.

Tragically, during the birth, Harry suffered a brain injury which has left him severely disabled. Mrs Roberts, who brought the action in her son's name, alleges that negligence on the part of an SSAFA midwife during Harry's birth caused these injuries. She further alleges that the MoD is vicariously liable for this negligence. The MoD, in turn, while denying negligence on the midwife's part, asserts that, regardless, German law allocated any vicarious liability to AKV. These allegations have yet to be tried before the court.

The applicable law

Due to unfortunate procedural delays, the case, although begun in 2004, took

until 2019 to reach the High Court. This meant that the 2007 Rome II Regulation was inapplicable, and the case instead was governed by English conflicts rules. The relevant statutory provision was the Private International Law (Miscellaneous Provisions Act). Section 11 of that Act lays out a general rule of *lex loci delicti commissi*, but s 12 allows this principle to be displaced where significant factors connecting a tort or delict to another country mean 'that it is substantially more appropriate' to use a law other than that of the location of the tort or delict. Counsel for Mrs Roberts argued that the s 12 exception should apply, given that *inter alia* Mrs Roberts was only in Germany at the behest of the Crown, had no familial or personal connections to Germany, moved back to England in 2003, and were being treated by English-trained midwives who were regulated by British professional bodies.

The authoritative text on English conflicts rules, *Dicey, Morris & Collins on the Conflict of Laws* (15th ed), provides that at para 35-148 that the threshold for invoking s 12 is very high, and that the section is only rarely invoked successfully. This is reinforced by *inter alia* the decision of the English and Welsh Court of Appeal, *per* Lord Justice Longmore, in *Fiona Trust and Holding Corp & Ors v Skarga & Ors* [2012] EWCA Civ 275. Mrs Justice Foster (at para 132) ruled (at paras 132–144) that this threshold was not met. Her Ladyship placed great significance on the fact that the midwives were required to learn basic German, follow the directions of German obstetricians, operate according to the rules of the German healthcare system, and provide care to military personnel who were living in Germany. Thus, German law was applicable.

The limitation period question

English jurisprudence addresses questions of foreign law as matters of objective fact to be determined through expert evidence. This can prove, as it did in this case, to an extremely complex task. For the purposes of this article, it is sufficient to note that Mrs Justice Foster ultimately found (after extensive discusssion at paras 192–280) that, in light of various decisions of the German Bundesgerichtshof (Federal Court of Justice) on the application of both the old and new versions of §852 of the Bürgerliches Gesetzbuch (German Civil Code), the relevant limitation period of three years commenced in 2003, meaning that the claim issued in 2004 was within time.

More relevantly for PIL scholars, Her Ladyship also ruled that, in the alternative, any applicable German limitation period was to be disapplied. In English law, the disapplication of foreign limitation periods is governed by the appropriately-named Foreign Limitation Periods Act 1984. While the general rule is that foreign limitation periods displace English limitations, Section 2(2) allows for the disapplication of foreign limitation periods where their application would 'conflict with public policy to the extent that its application would cause undue hardship' to a party. This is, once again, a deliberately high threshold which is rarely applied; the authoritative English text on limitation, *McGee on Limitation Periods* (8th ed), provides (at para 25-027) that '[j]udges should be very slow indeed to substitute their views for the views of a foreign legislature'. Similarly, Mr Justice Wilkie, in *KXL v Murphy* [2016] EWHC 3102 (QB), para 45, warned that the entire system of private international law could collapse if public policy was too readily invoked, and the public policy test should only succeed where the foreign provision caused undue hardship which would be 'contrary to a fundamental principle of justice'.

After surveying the case law, Mrs Justice Foster concluded, at paras 181–184, that undue hardship must be a 'detriment of real significance', whose existence (or lack thereof) must be determined through a careful and holistic evaluation of the particular facts of any given situation. Thus, the question was not if the German limitation period *per se* caused undue hardship (and indeed, Mrs Justice Foster held at para 182 that it did not), but rather if the application of an otherwise unobjectionable provision to the unique factual matrix of the case would create undue hardship. Thus, Mrs Justice Foster ruled (at paras 185–6) that, if (contrary to her findings) the German limitation period commenced in 2001, this would be a disproportionate hardship given the disadvantages Mrs Roberts had as a primigravida unfamiliar with obstetrics who had given birth in a foreign country where she did not speak the language. Furthermore, the highly complex organisational structure of medical care, between the SSAFA, the MoD, and AKV would mean that it would be unjust and disproportionate for the relevant 'knowledge' for the purposes of the §852 limitation period to have been said to commence in 2001.

Comment

This case demonstrates the complexities which arise when applying abstract rules

of private international law to the realities of human affairs. Although the (by comparative standards) wide discretion accorded to judges in English law has its critics, in this case, the ability to disapply foreign law where it might lead to an unjust result was able to ensure that the Roberts family, for whom one must have the greatest sympathy, were able to proceed with their claim. It is hard to disagree with Mrs Justice Foster's conclusion that, on the facts, it would be a disproportionate hardship on the family. Both the case-law and texts are clear that this discretion should be applied only rarely, given that its overuse would be to the detriment of the principles of legal certainty and English conflicts rules, *Roberts* demonstrates that the common law preference for flexibility can, if used wisely, avert serious injustice in those rare circumstances where the general rules are insufficient.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2/2020: 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 Law 2019: Consolidation and multilateralisation**

This article provides an overview of developments in Brussels in the field of judicial cooperation in civil and commercial matters from January/February 2019 until November 2019. It provides an overview of newly adopted legal instruments and summarizes current projects 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 important decisions of the CJEU. In addition, the article looks at current

projects and the latest developments at the Hague Conference of Private International Law.

B. Hess: **The Abysmal Depths of the German and European Law of the Service of Documents**

The article discusses a judgment of the Higher Regional Court Frankfurt on the plaintiff's obligations under the European Service Regulation in order to bring about the suspension of the statute of limitations under § 167 of the German Code of Civil Procedure (ZPO). The court held that the plaintiff should first have arranged for service of the German statement of claim in France pursuant to Art. 5 Service Regulation because, pursuant to Art. 8(1) Service Regulation, a translation is not required. However, the article argues that, in order to comply with § 167 ZPO, the translation must not be omitted regularly. The service of the translated lawsuit shall guarantee the defendant's rights of defense in case he or she does not understand the language of the proceedings.

H. Roth: **The international jurisdiction for enforcement concerning the right of access between Art. 8 et seq. Brussel IIbis and §§ 88 et. seq., 99 FamFG**

According to § 99 para. 1 s. 1 No. 1 German Act on Procedure in Family Matters and Non-Contentious Matters (FamFG), German courts have international jurisdiction for the enforcement of a German decision on the right of access concerning a German child even if the child's place of habitual residence lies in another Member State of the Regulation (EC) No. 2201/2003 (EuEheVO) (in this case: Ireland). Regulation (EC) No. 2201/2003 does not take priority according to § 97 para. 1 s. 2 FamFG because it does not regulate the international jurisdiction for enforcement. This applies equivalently to the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (KSÜ).

J. Rapp: **Attachment of a share in a Limited Liability Partnership (LLP) by German courts**

Attachment of a share in a Limited Liability Partnership (LLP) by German courts: Despite Brexit, the LLP still enjoys great popularity in Germany, especially among international law and consulting firms. Besides its high acceptance in

international business transactions, it is also a preferred legal structure due to the (alleged) flexibility of English company law. In a recent judgement, the Federal Court of Justice (Bundesgerichtshof) had the opportunity to examine the LLP's legal nature in connection with the attachment of a share in a Limited Liability Partnership. The court decided that German courts have jurisdiction for an attachment order if the company has a branch and its members have a residence in Germany. By applying § 859 Code of Civil Procedure, it furthermore ruled that not the membership as such but the share of a partner in the company's assets is liable to attachment.

U. Spellenberg: **How to ascertain foreign law – Unaccompanied minors from Guinea**

The Federal Court's decision of 20 December 2017 is the first of four practically identical ones on the age of majority in Guinean law. It is contested between several Courts of Appeal whether that is 18 or 21 years. As of now, there are nine published decisions by the Court of Appeal at Hamm/Westf. and five by other Courts of Appeal. For some years now, young men from Guinea have been arriving in considerable numbers unaccompanied by parents or relatives. On arrival, these young men are assigned guardians ex officio until they come of age. In the cases mentioned above, the guardians or young men themselves seized the court to ascertain that the age of majority had not yet been reached. The Federal Court follows its unlucky theory that it must not state the foreign law itself but may verify the methods and ways by which the inferior courts ascertained what the foreign law is. Thus, the Federal court quashed the decisions of the CA Hamm inter alia for not having ordered an expert opinion on the Guinean law. The CA justified, especially in later judgments, that an expert would not have had access to more information. With regards to the rest of the judgment, the Federal Court's arguments concerning German jurisdiction are not satisfying. However, one may approve its arguments and criticism of the CA on the questions of choice of law.

D. Martiny: **Information and right to information in German-Austrian reimbursement proceedings concerning maintenance obligations of children towards their parents**

A German public entity sought information regarding the income of the Austrian son-in-law of a woman living in a German home for the elderly, the entity having initially made a claim for information against the woman's daughter under

German family law (§ 1605 Civil Code; § 94 para. 1 Social Security Act [Sozialgesetzbuch] XII). German law was applicable to the reimbursement claim pursuant to Article 10 of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations. Pursuant to § 102 of the Austrian Act on Non-Contentious Proceedings (Außerstreitverfahrensgesetz), and in accord with the inquisitorial principle, third persons like a son-in-law are also obligated to give information. The court applied this procedural rule and declared possible restrictions under Austrian or German substantive law inapplicable.

In the reverse case of an Austrian recovery claim filed in Germany, the outcome would be doubtful. While true that under German law an adjustment (Anpassung) might allow the establishment of an otherwise non-existing duty to inform, restrictions on the duty to disclose information pursuant to Austrian and German law make it difficult to justify such a claim.

M. Gernert: **Effects of the Helms-Burton Act and the EU Blocking Regulation on European proceedings**

For more than 20 years, each US president had made use of the possibility of suspending the application of the extraterritorial sanctions of the Helms-Burton Act, thus preventing American plaintiffs from bringing actions against foreigners before American courts for the „trafficking" of property expropriated to Cuba. This changed as President Trump tightened economic sanctions against the Caribbean state. The first effects of this decision are instantly noticeable, but it also has an indirect influence on European court proceedings. In this article, the first proceeding of this kind will be presented, focusing on international aspects in relation to the Helms-Burton Act and the EU-Blocking-Regulation.

K. Thorn/M. Cremer: **Recourse actions among third-party vehicle insurance companies and limited liability in cases of joint and several liability from a conflict of laws perspective**

In two recent cases, the OGH had to engage in a conflict of laws analysis regarding recourse actions among third-party vehicle insurance companies concerning harm suffered in traffic accidents which involved multiple parties from different countries. The ECJ addressed this problem in its ERGO decision in 2016, but the solution remains far from clear. The situation is further complicated because Austria, like many European states, has ratified the Hague Convention on

the Law Applicable to Traffic Accidents. This causes considerable differences in how the law applicable to civil non-contractual liability arising from traffic accidents is determined.

In the first decision discussed, the OGH endorsed the decision of the ECJ without presenting its own reasoning. The authors criticizes this lack of reasoning and outline the basic conflict of laws principles for the recourse actions among third-party vehicle insurance companies. The second decision discussed provides a rare example for limited liability in the case of joint and several liability. However, given that the accident in question occurred almost 20 years ago, the OGH was able to solve the problem applying merely the Convention and autonomous Austrian conflict of laws rules. The authors examine how the problem would have been solved under the Rome II Regulation.

A. Hiller: **Reform of exequatur in the United Arab Emirates**

In the United Arab Emirates, an extensive reform of the Code of Civil Procedure entered into force on 2 February 2019. The reform covers half of the Code's provisions, among them the law regulating the enforcement of foreign judgments, arbitral awards and official deeds. This article provides an overview of the amendments made on the enforcement of foreign decisions and puts them into the context of the existing law. The article also sheds light on the procedure applying to appeals against decisions on the enforcement. The reform does away with the requirement of an action to declare the foreign decision enforceable. Instead, a simple ex parte application is sufficient, putting the creditor at a strategic advantage. However, with a view to arbitral awards in particular, important issues remain unadressed due to the somewhat inconsistent application of the New York Convention by Emirati courts.

Cross-border Corona mass

litigation against the Austrian Federal State of Tyrol and local tourist businesses?

While the Corona Crisis is still alarmingly growing globally, first movers are apparently preparing for mass litigation of ski tourists from all over Europe and beyond against the Austrian Federal State of Tyrol and local businesses. The Austrian Consumer Protection Association (*Österreichischer Verbraucherschutzverein, VSV,* https://www.verbraucherschutzverein.at/) is inviting tourists damaged from infections with the Corona virus after passing their ski holidays in Tyrol, in particular in and around the Corona super-hotspot of Ischgl, to enrol for collective redress against Tyrol, its Governor, local authorities as well as against private operators of ski lifts, hotels, bars etc., see https://www.verbraucherschutzverein.at/Corona-Virus-Tirol/.

In Austria, no real "class action" is available. Rather, the individual claimants need to assign their claims to a lead claimant, often a special purpose vehicle (in this case the Association) which then institutes joint proceedings for all the claims. For foreign claimants who consider assigning their claims to the Association, the Rome I Regulation will be of relevance.

According to Article 14 (1) Rome I Regulation the relationship between assignor and assignee shall be governed by the law that applies to the contract between the assignor and assignee under the Regulation. So far, however, there seem to be only pre-contractual relationships between the Austrian Association inviting "European Citizens only" (see website) to register for updates by newsletters. These pre-contractual relationships will be governed by Article 12 (1) Rome II Regulation. "[T]he contract" in the sense of that provision will be the one between the Association and the claimant on the latter's participation in the collective action which may, but does not necessarily, include the contract on the assignment of the claim and its modalities. It is the Association that is the "service provider" in the sense of Article 4 (1) lit. b Rome I Regulation. Its habitual residence is obviously in Austria, therefore the prospective contract as well as the pre-contractual relations to this contract will be governed (all but surprisingly) by Austrian law. Art. 6 does not come into play, since the service is to be supplied to

the consumer exclusively in Austria, Article 6 (4) lit. a Rome I Regulation.

According to Article 14 (2) Rome I Regulation, the law governing the assigned claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and whether the debtor's obligations have been discharged. As far as the Rome II Regulation is applicable *ratione materiae*, i.e. for claims against the businesses, its Article 4 will select (again all but surprisingly) Austrian law – no "distance delict" as the potentially delictual act and its harmful effects on the claimant's health both took place in Austria. Follow-up damages in other states are irrelevant for the law-selecting process.

In respect to delictual claims against Tyrol and its public entities and authorities, Recital 9 of the Rome II Regulation reminds us that, with a view to Article 1 (1) Sentence 2 of the Regulation (no applicability to *"acta iure imperii"*), "[c]laims arising out of *acta iure imperii* should include claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed office-holders. Therefore, these matters should be excluded from the scope of this Regulation." Rather, an autonomous rule of choice of law for liability of Austrian public entities will apply, and this rule will certainly select Austrian law.

There are certain advantages in bundling a multitude of claims in the "Austrian" way: First, the high amount of damages from the collection of claims allows seeking third-party funding. Second, costs for both the court and the lawyers are structured on a diminishing scale. While the collective proceedings are pending, prescription periods do not proceed in respect to claims participating in the joint action. And of course, the "class" of these active claimants has much more weight for negiations than an individual would have.

On the other hand, the jurisdiction at the consumer's domicile under Art. 18 Brussels Ibis Regulation will no longer be available, once the consumer has assigned his or her claim to another, e.g. a lead claimant. However, this is only relevant in respect to the contractual claims of consumers and only as long as the conditions for directing one's business at the consumer's domicile under Article 17 (1) lit. c Brussels Ibis Regulation are fulfilled. The claims in question here mainly ground in non-contractual claims against public entities and private businesses, and they seem to be envisaged as independent civil follow-on

proceeding after successful criminal proceedings – if these should ever result in convictions.

The allegation is that the respective public agencies and officers did not shut down the area immediately despite having gained knowledge about first Corona infections in the region, in order to let the tourism businesses go on undisturbed. These allegations are extended to local businesses such as ski lifts, hotels and bars etc., once they gained knowledge about the Corona risk. It will be an interesting question (of the applicable Austrian law of public and private liability for torts) amongst many others (such as those on causality) in this setting to what extent there is a responsibility of the tourist to independently react adequately to the risk, of course depending on the time of getting him/herself knowledge about the Corona risk. If there is such responsibility on the part of the damaged, the next question will be whether this could affect or reduce any tortious liability on the part of the potential defendants. Overall, all of that appears to be an uphill battle for the claimants.

Speaking of responsibilities, a more pressing concern these days is certainly how the European states, in particular the EU Member States and the EU itself, might organise a more effective mutual support and solidarity for those regions and states that are most strongly affected by the Corona Pandemic, in particular in Italy, Spain and France, these days. Humanitarian and moral reasons compel us to help, both medically and financially. Some EU Member States have started taking over patients from neighbouring countries while they are still disposing of capacities in their hospitals, but there could perhaps be more support (and there could have perhaps been quicker support). The EU has a number of tools and has already taken some measures such as the Pandemic Epidemic Purchase Programme (PEPP) by the European Central Bank (ECB). The European Stability Mechanism (ESM) could make (better?) use of its precautionary financial assistance via a Precautionary Conditioned Credit Line (PCCL) or via an Enhanced Conditions Credit Line (ECCL). Further, the means of Article 122 TFEU should be explored, likewise the possibilities for ad hoc-funds under Article 175 (3) TFEU. The European Commission should think about loosening restrictions for state aids.

All of these considerations go beyond Conflict of Laws, and this is why they are not mine but were kindly provided (all mistakes and misunderstandings remain my own) in a quick email by my colleague and expert on European monetary law,

Associate Professor Dr. René Repasi, Erasmus University of Rotterdam, https://www.eur.nl/people/rene-repasi (thanks!).

However, cross-border solidarity is a concern for all of us, perhaps in particular for CoL experts and readers. Otherwise, a “European Union” does not make sense and will have no future.

Brexit: No need to stop all the clocks.

Written by Jonathan Fitchen.

‘The time has come’; a common enough phrase which may, depending on the reader’s mood and temperament, be attributed variously to Lewis Carroll’s discursive Walrus, to Richard Wagner’s villainous Klingsor, or to the conclusion of Victor Hugo’s epigrammatic comment to the effect that nothing is as powerful as an idea whose time has come. In the present context however ‘the time has come’ refers more prosaically to another step in the process described as ‘Brexit’ by which the UK continues to disentangle itself from the EU.

On the 31st of January 2020 at 24.00 CET (23.00 UK time) the UK ceases to be an EU Member State. This event is one that some plan to celebrate and other to mourn. For those interested in private international law and the conflict of laws in the EU or in the legal systems of the UK, celebration is unlikely to seem apt. Whether for the mundane reason that the transition period of the Withdrawal Agreement preserves the practical application and operation of most EU law concerning our subject in the UK and within the EU27 until the projected end point of 31st December 2020, or for deeper reasons connected with the losses to the subject that the EU and the UK must each experience due to the departure of the UK from the EU. If celebration is not appropriate must we therefore opt to mourn? This

post suggests that mourning is not the only option (nor if overindulged is it a useful option) and sets out some thoughts on the wider implications for the private international laws of the UK's legal systems and the legal systems that will comprise the EU27 consequent on the UK's departure.

This exercise is necessarily speculative and very much a matter of what one wishes to include in or omit from the equation under construction. If too little is included, the result may be of only abstract relevance; if too much is included, the equation may be incapable of solution and hence useless for the intended purpose of calculation. Such difficulties, albeit expressed in a non-mathematical form, are familiar to private international lawyers who while engaging with their subject routinely consider the macroscopic, the microscopic and many points in between. In what remains of this post I will offer some thoughts that hopefully will provoke further thoughts while avoiding useless abstraction and (at least for present purposes) 'useless' incalculability.

The loudest calls for the UK to leave the EU did not arise from UK private international law, nor from its practitioners; few UK private international lawyers appear to have wished for Brexit as a means of reforming private international law. Whatever appeals to nostalgia may have swayed opinions in other sectors of the UK and may have induced those within them to vote to leave, they were not expressed with reference to matters of private international law. Few who remember or know the law as it stood in any of the UK's legal systems prior to the implementation of the UK's accession to the Brussels Convention of 1968 would willingly journey back to the law as it then stood and regard it as an upgrade. Mercifully, aspects of this view are, at present, apparently shared by the UK Government and account for its wish, after 'copying and pasting' most EU law and private international law into the novel domestic category of 'retained EU Law', to then amend and allow that which does not depend on reciprocity to be re-presented as a domestic private international law to be applied within and by the UK's legal systems: thus the Rome I and Rome II Regulations will be eventually so 'imitated' within the legal systems of the UK. Unfortunately, many other EU

provisions do require reciprocity, and thus cannot be ‘saved’ in this manner; for these provisions the news in the UK is less good.

There are however other available means of salvage. Because the UK will no longer be an EU Member State at 24.00 Brussels Time it may, but for the Withdrawal Agreement, thereafter participate more fully in proceedings and projects at the Hague Conference on Private International Law. The UK plans to domestically clarify the domestic understanding of certain existing Hague conventions, e.g. 1996 Parental Responsibility Convention, via the recently announced Private International Law (Implementation of Agreements) Bill 2019. Earlier in 2018 the UK deposited instruments of accession concerning conventions it plans to ratify at the end of the Withdrawal Agreement’s transition period to attempt to retain prospectively the salvageable aspects of certain reciprocity requiring EU private international law Regulations lost via Brexit: thus, the UK plans to ratify the 2005 Choice of Court Convention and the 2007 Maintenance Convention.
After these ratifications it may be that the UK will also consider the ratification of the 2019 judgment enforcement convention, particularly it the EU takes this option too. In the medium and long term however, the UK, assuming it wishes to participate in an active sense, will have to accept the practical limitations of the HCCH as it (the UK) becomes accustomed to the differences, difficulties and frustrations of private international law reform via optional instruments that *all* the intended parties are entitled to refuse to opt-in to or ratify.

Over the medium term and longer term, it should additionally be noted that though the UK has left the EU it has not cast-off and sailed away from continental Europe at a speed in excess of normal tectonic progress: there may therefore eventually be further developments between the two. It may be that the UK can be induced at some point in the future, when Brexit has become more mundane and less politically volatile within the UK, to cooperate in relation to private international law in a deeper sense with the EU27; whether by negotiating to join the 2007 Lugano Convention or a new convention pertaining to aspects of private international

law. If this last idea seems too controversial then maybe it would be possible for the UK to eventually negotiate with an existing EU Member State as a third country via Regulation 664/2009 or Regulation 662/2009 or perhaps via another yet to be produced Regulation with a somewhat analogous effect? Brexit, considered in terms of private international law, may well re-focus a number of existing questions for the EU27 pertaining to the interaction of its private international law with third States, whether former Member States or not.

What is however unavoidably lost by Brexit is the UK's direct influence on the development and particularly the periodic recasting of the EU's private international law: this loss cuts both ways. For the EU27 the UK will no longer be at the negotiating table to offer suggestions, criticisms and improvements to the texts of new and recast Regulations. For the EU27 this loss is somewhat greater than it might appear from the list of Regulations that the UK did not opt-in to as the terms of the UK's involvement in these matters permitted it to so participate without having opted-in to the draft Regulation.

The suggested loss of influence will however probably be felt most acutely by the private international lawyers in the UK. Despite the momentary impetus and excitement of salvaging that which may be salvaged and ratifying that which may be ratified to mitigate the effect of Brexit on private international law, the reality is that we in the UK will have lost two of the motive forces that have seen our subject develop and flourish over decades: viz. the European Commission and the domestic political reaction thereunto. Post-Brexit, once the salvaging (etc.) is done, it seems unlikely that the UK Government will continue to regard a private international law now no longer affected by Commission initiatives or re-casting procedures as retaining its former importance or meriting any greater legislative relevance than other areas of potential law reform. The position may be otherwise in Scotland as private international law is a devolved competence that devolution entrusted to the Scottish Government. It may be that once the dust has settled and the returning UK competence related reforms have been applied that the comparatively EU-friendly Scottish Government may seek to domestically align aspects of Scots private international law with EU law equivalents.

For he who would
mourn for the effect of Brexit on the subject of private international law, it is the abovementioned loss of influence of the subject at both the EU level and particularly at the domestic level that most merits a brief period of mourning. After this, the natural but presently unanswerable question of, 'What now?' occurs.
Though speculation is offered above, all in the short term will depend on the progress
in negotiations over an unfortunately already shortened but technically still extendable transition period during which the EU and UK are to attempt to negotiate a Free Trade Agreement: thereafter for the medium term and long term all
depends on the future political relationship of the EU and the UK.

RabelsZ, Issue 1/2020

The first 2020 issue RabelsZ has just been released. It features the following articles:

Magnus, Robert, Unternehmenspersönlichkeitsrechte im digitalen Raum und Internationales Privatrecht (Corporate Personality Rights on the Internet and the Applicable Law), pp. 1 et seq

> *Companies can defend themselves against defamatory and business-damaging statements made on the internet. German case law in this area is based primarily on the concept of a corporate right relating to personality, which has some similarities but also important differences to the personality rights of natural persons. A corresponding legal right is also recognised in European law. However, determining the applicable law for these claims proves to be difficult. First of all, it is an open though not yet much-discussed question whether the exception in Art. 1(2) lit. g Rome II Regulation for "violation[s] of privacy or personal rights" is limited to the rights of natural persons or whether it applies also to the corresponding claims of legal entities. Moreover, the*

determination "of the country in which the damage occurs" in accordance with Art. 4(1) Rome II Regulation is hotly debated with respect to violations of rights relating to personality, especially when the violations were committed via the internet. The thus far prevailing mosaic principle produces excessively complex results and therefore makes it unreasonably difficult to enforce the protected legal position. This article discusses alternative concepts for the determination of the applicable law for these actions and analyses the scope and background of the exception in Art. 1(2) lit. g Rome II Regulation.

Thon, Marian, Transnationaler Datenschutz: Das Internationale Datenprivatrecht der DS-GVO (Transnational Data Protection: The GDPR and Conflict of Laws), pp. 24 et seq

This article analyses the territorial scope of the new General Data Protection Regulation (GDPR) and addresses the question whether Article 3 GDPR can be considered as a conflict-of-law rule. It analyses the possibility of agreements on the applicable law and argues that Article 3 GDPR qualifies as an overriding mandatory provision. It finds that the issue of the applicable national law is no longer addressed by the GDPR and that a crucial distinction should therefore be made between internal and external conflicts of law. It argues that the country-of-origin principle is the key to determining which national data protection law applies. Furthermore, the article analyses Article 3 GDPR in more detail from the perspective of private international law. It finds that the targeting criterion is helpful in mitigating the problem of information asymmetries in view of the applicable data protection law. However, it criticizes the establishment criterion because it puts European companies at a competitive disadvantage. Finally, the article proposes to incorporate a "universal" conflict-of-law rule into the Rome II Regulation which should be accompanied by a general conflict-of-law rule specifically addressing violations of privacy and rights relating to personality.

Voß, Wiebke, Gerichtsverbundene Online-Streitbeilegung: ein Zukunftsmodell? Die online multi-door courthouses des englischen und kanadischen Rechts (Court-connected ODR: A Model for the Future? – Online Multi-door Courthouses Under English and Canadian Law), pp. 62 et seq

Will conflict management systems based on the model of companies such as

eBay and PayPal soon become a part of civil proceedings before German state courts? Recently, some thought has been given to the development of a new "expedited online procedure" designed to provide an affordable and fast alternative to traditional civil litigation for small consumer claims, thus broadening access to justice. After a brief outline of the current barriers to the justice system and the shortcomings of the private ODR platforms consumers often turn to instead, this article explores the concept of online procedures which other legal systems have developed in response to similar challenges. The analysis of typical, trendsetting examples of e-courts – the Civil Resolution Tribunal under Canadian Law as well as the Online Court that is currently being established in England – reveals a new model of court-connected ODR that is based on the integration of private ODR structures into the justice system. By harnessing digital technologies and integrating methods of dispute prevention and consensual dispute resolution into the state-based proceedings, such online courts offer enormous potential for lay-friendly, accessible civil justice while at the same time using scarce judicial resources sparingly. On the other hand, online technology alone is not a panacea. Establishing online procedures in Germany poses challenges which go beyond the technical dimension. These procedures may conflict with constitutional requirements and procedural maxims such as the principle of open justice, the right to be heard before the legally designated court and the principle of immediacy. However, a well thought-out design and minor modifications of the English and Canadian models would avoid these conflicts without losing the benefits of the innovative procedure.

Monsenepwo, Justin, Vereinheitlichung des Wirtschaftsrechts in Afrika durch die OHADA (The Unification of Business Law in Africa Through OHADA), pp. 97 et seq

In the 1980s, legal and judicial uncertainty prevailed in most western and central African countries, thereby impeding local and foreign investments. To improve the investment climate and further legal and economic integration in Africa, fourteen western and central African States created the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (Organization for the Harmonization of Business Law in Africa, OHADA) on 17 October 1993. As per the preamble of the Treaty on the Harmonization of Business Law in Africa, OHADA aims to harmonize business laws in Africa through the elaboration and

the adoption of simple, modern, and common business law regulations adapted to the economies of its Member States. Nearly two decades after its creation, OHADA has developed ten Uniform Acts and three main Regulations, which cover several legal areas, such as company law, commercial law, security interests, mediation, arbitration, enforcement procedures, bankruptcy, transportation law, and accounting. This article analyses the historical background, the institutions, and the main provisions of some of these Uniform Acts and Regulations. It also recommends a few legal areas which OHADA should make uniform to increase legal certainty and predictability in civil and commercial transactions in Africa.

Conference Report: Conflict of Laws 4.0 (Münster, Germany)

Written by Prof. Dr. Stefan Arnold, Thorben Eick and Cedric Hornung, University of Münster

Digitization, Artificial Intelligence and the blockchain technology are core elements of a historic transformation of modern society. Such transformations necessarily challenge traditional legal concepts. Hitherto, the academic discourse is much more intense in the area of substantial private law than it is in the area of Private International Law. Thus, a conference on the specific challenges of Artificial Intelligence and Digitization for Private International Law was long overdue. Stefan Arnold and Gerald Mäsch of the Institute of International Business Law (WWU Münster) organized a conference with that specific focus on November 8th at Münster University. The title of the conference was »*Conflict of laws 4.0: Artificial Intelligence, smart contracts and bitcoins as challenges for Private International Law*«. Around a hundred legal scholars, practitioners, doctoral candidates and students attended the conference.

The first speaker, Wolfgang Prinz of Fraunhofer Institute and Aachen University, provided insight into the necessary technical background. His presentation made

clear that blockchain technology is already a key factor in international contracting, as e.g. in agricultural crop insurance policies. This introduction into complex digital processes to a largely non-tech-expert audience helped kick off the first round of vivid discussion.

Michael Stürner of Konstanz University devoted his presentation to smart contracts and their role in applying the Rome I Regulation. After raising the question of a specific *lex digitalis*, he focused on the scope of the Regulation with regard to qualification, choice of law and the objective connecting factors. While he concluded that the respective contracts can mainly be treated on the basis of the Rome I Regulation, he also took a quick glance on subsequent questions in terms of virtual securities and the statute of form.

In the third presentation, Stefan Arnold of Münster University explored the issues Artificial Intelligence raises concerning party autonomy and choice of law. At the beginning of his presentation, he emphasized that these questions are closely related to the different levels of AI and their (lack of) legal capacity: As long as machines act as simple executors of human will, one should establish a normative attribution to the human being in question. For the cases in which the AI exceeds this dependency, Arnold claimed there was no answer in the Rome I Regulation, leaving the way open for the national rules, primarily Art. 5 II EGBGB. Finally, he discussed possibilities *de lege ferenda* such as applying the law of the country of effect and future gateways for the *ordre public*.

Jan Lüttringhaus of Hannover University presented about questions of insurance and liability in the context of Private International Law. In order to underline the importance of this topic, he referred to a provision in the usual insurance conditions presupposing the application of German national law. In a first step, he examined the international civil procedure law of the Brussels I bis Regulation as well as potential difficulties with state immunity. The second part of his lecture was dedicated to the problem of determining the applicable law in situations that feature a decentralization of injury and damage.

In the following presentation, Gerald Mäsch of Münster University proposed a solution for finding the applicable law to Decentralized Autonomous Organizations (DAOs). When legal practitioners try to determine which law applies, they usually resort to the traditional rules of domicile and establishment. Since DAOs have neither of the two, it cannot be subjected to the law of a specific

nation by these two approaches. Leaving the international corporate law behind, Mäsch called for a return to the basics: If there is no primary choice of law, one should plainly refer back to the most significant relationship as stated by Savigny. Acknowledging the regular lack of publicity, he nonetheless insisted that this solution answered the parties' needs at the best possible rate.

Bettina Heiderhoff of Münster University presented on how questions of liability can be solved in the context of autonomous systems. She started her presentation by raising the question whether autonomous systems could simply fall into the scope of the Product Liability Directive. Following up, the speaker focused on new fund and insurance systems and the deriving problems with regard to conflict of laws. She expanded upon Art. 5 of the Rome II Regulation and its applicability on autonomous systems, emphasizing the legislator's intention behind the respective rules.

In the following presentation, Matthias Lehmann of Bonn University examined the interaction between blockchain, bitcoin and international financial market law. After a short introduction into the basics of Distributed Ledger Technology (DLT), he shed light onto problems in international banking supervision and how they could be solved by implementing DLT-based solutions. He closed with a plea for common international regulations regarding cryptocurrencies.

Concluding remarks from a practitioners' point of view were made by Ruth-Maria Bousonville and Marc Salevic from Pinsent Masons LLP. The speakers shared their perspective on the topics that had been raised by their predecessors and how practitioners deal with these questions in creating solutions for their clients.