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Rachael Mulheron, Asserting personal jurisdiction over non-resident class members: comparative insights for the United Kingdom

The opt-out class action involves a unique participant, *viz*, the absent class member whose claim is prosecuted by a representative claimant, who does not opt-out of the action nor do anything else in relation to it, and yet who is bound by its outcome. In a cross-border class action, the means by which a domestic court may validly assert personal jurisdiction over absent class members who are resident outside of that court's jurisdiction remains perhaps the single biggest conundrum in modern class actions jurisprudence. The United Kingdom (UK) legislature requires that non-resident class members compulsorily opt-in to the UK's competition law class action, in order to demonstrably signify their consent to the jurisdiction of the UK court. However, that legislative enactment is unusual, and becoming even rarer, in modern class actions statutes. The comparative analysis undertaken in this article demonstrates that where that type of statutory provision is *not* enacted, then the judicially-developed "anchors" by which to assert personal jurisdiction over non-resident class members are multifarious, diverse, and conflicting, across the leading class actions jurisdictions. This landscape yields important lessons for UK law-makers, and strongly suggests that the UK legislature's approach towards non-resident class members represents "best practice", in what is a complex conundrum of class actions law.

Richard Garnett, Recognition of jurisdictional determinations by foreign courts

Parties have occasionally sought to use findings on jurisdiction made by a court in one country to preclude re-litigation of the same matter elsewhere. In common law countries the traditional means by which this tactic has been employed is the doctrine of issue estoppel. The aim of this article is to assess the extent to which jurisdictional determinations by foreign courts can have binding effects in other countries.

Ardavan Arzandeh, "Gateways" within the Civil Procedure Rules and the future of

service-out jurisdiction in England

For well over 150 years, the heads of jurisdiction currently listed within paragraph 3.1 of Practice Direction B, accompanying Part 6 of Civil Procedure Rules, have played a vital role in the English courts' assertion of jurisdiction over foreign-based defendants. These jurisdictional "gateways" identify a broad range of factual situations within which courts may decide to entertain claims against defendants outside England. However, the existing general framework for deciding service-out applications is increasingly vulnerable to attack. In particular, the greater prominence of the *forum conveniens* doctrine, but also problems arising from the gateways' operation, combine to cast doubt on their continued role (and relevance) in service-out cases. Against this backdrop, the article assesses the case for abandoning the gateway precondition. It is argued that rather than jettisoning the gateways, future revision of the law in this area should aim to minimise ambiguities concerning the gateways' scope and also ensure that they include only instances which connote meaningful connection between the dispute and England.

Liang Zhao, Party autonomy in choice of court and jurisdiction over foreign-related commercial and maritime disputes in China

Chinese civil procedure law provides the choice of foreign courts through jurisdiction agreements in foreign-related commercial and maritime disputes. In Chinese judicial practice, foreign jurisdiction agreements may be held null and void because of the lack of actual connection between the agreed foreign jurisdictions and the foreign-related disputes. Chinese courts may, therefore, have jurisdiction when China has actual connection with the dispute, in particular when Chinese parties are involved in disputes. However, the actual connection requirement does not apply to Chinese maritime jurisdiction when China has no actual relation with the maritime disputes. Chinese courts also have maritime jurisdiction in other special ways although foreign courts are designated in contract. Conflict of jurisdiction over foreign-related disputes is thus caused. This article analyses how party autonomy is limited by Chinese civil procedure law and how Chinese court exercise jurisdiction when Chinese courts are not chosen by parties. This article argues that the Hague Convention on Choice of Court Agreements should be adopted to replace the actual connection requirement under the Chinese civil procedure law and Chinese courts should respect party autonomy in respect of the choice of foreign court. It is also suggested that

Chinese courts shall apply *forum non conveniens*to smooth the conflict of jurisdiction between Chinese courts and foreign courts.

Maisie Ooi, Rethinking the characterisation of issues relating to securities

This article contends that there is a pressing need to rethink the characterisation of issues relating to securities, both complex and plain vanilla. It will demonstrate that the less than coherent choice-of-law process that exists for securities today is a consequence of courts utilising characterisation categories and rules that had not been designed with securities in mind and applying them in disregard of the new dimensions that securities and their transactions bring to characterisation. These have resulted in rules that do not provide certainty and predictability to participants in the securities and financial markets.
The thesis that this article seeks to make is that a new characterisation category is required that is specific to securities which will encompass both directly held and intermediated securities (possibly also crypto-securities), and address issues of property, contract and corporations together. This will have its own choice-of-law rules which will be manifestations of the *lex creationis*, the law that created the relevant res or thing that is the subject-matter of the dispute. The convergence of issues traditionally dealt with by separate categories and rules will simplify and make for more coherent choice-of-law for securities.

Chukwuma Samuel Adesina Okoli & Emma Roberts, The operation of Article 4 of Rome II Regulation in English and Irish courts

This article makes a critical assessment of the operation of Article 4 of Rome II in English and Irish courts measuring the extent to which judges of England and Wales (hereafter England) and Ireland are interpreting Article 4 of Rome II in accordance with what the EU legislator intended.

Onyoja Momoh, The interpretation and application of Article 13(1) b) of the Hague Child Abduction Convention in cases involving domestic violence: Revisiting X v Latvia and the principle of “effective examination”

A key interpretation and application issue in the scheme of Article 13(1) b) of the Hague Child Abduction Convention is whether judges should investigate first the merits of the defence before considering whether protective measures are adequate or whether they should first consider the adequacy of protective measures. There is no generally accepted international practice nor is there clear

authority on the appropriate or preferred approach. This article argues that judges should always undertake an effective examination of the allegations of domestic violence first before considering whether, if there is merit to the allegations and they are substantiated, adequate protective measures can sufficiently ameliorate the grave risk of harm.

Views and News from the 8th Journal of Private International Law Conference 2019 in Munich

From 12 to 14 September 2019, the Journal of Private International Law held its 8th Conference at the University of Munich, perfectly hosted and organized by our Munich-based colleague Anatol Dutta. Nearly 150 colleagues gathered from all over the world, amongst them many of the Conflictoflaws.net editors.

This was the perfect occasion to meet for us for dinner on the first evening. Some of our editors had never met personally before, and all of those present could exchange views and news on PIL as well as on the blog.

The bottom line of the meeting certainly was: onwards and upwards with our blog – it is worth it! The PIL community will have many occasions to get together in the near future, inter alia in Aarhus in May 2020. We will keep you posted!

For now, however, we are presenting to you our views and news from the Munich conference. The following short observations should give you some impressions of the fantastic panels and presentations. These are not meant to be a comprehensive conference report, all the more so, because there is one in the pipeline for the blog by Christiane von Bary, Research Fellow with Anatol.

Here we go:

Plenary Sessions (Friday)

Matthias Weller

The first of the plenary sessions was opened by Matthias Lehmann, University of Bonn, Germany. He presented on the complex relations between "Regulation, Global Governance and Private International Law" with a view to: "Squaring the Triangle". First of all, Lehmann explained the respective peculiarities of each of the poles of this triangle: PIL as an area of law that, as a reaction to cross-border legal relationships, is primarily rights-driven, based on a notion of equivalence of the selected laws, ideally resulting in multilateral connecting factors. And regulatory law as a reaction to public interests, managed by administrative agencies under a principally unilateral approach by territorially limited administrative acts or mandatory rules. Finally, both areas of law working together to achieve global governance of the respective subject-matters such as e.g. securities antitrust, data protection, environmental or cultural property protection law. Indeed, in all of these areas, the public-private divide is increasingly blurred (see also e.g. Burkhard Hess, The Private-Public Law Divide in International Dispute Resolution, Collected Courses of the Hague Academy of International Law 388, Boston 2018, http://dx.doi.org/10.1163/1875-8096_pplrdc_ej.9789004361201.C02). Lehmann then referred to central techniques of private international law to deal with regulatory rules such as e.g. Articles 3(3) and (4) or 9 of the Rome I Regulation and Article 14(2) of the Rome II Regulation. He also referred to Currie's governmental interest analysis and Ehrenzweig's local data theory, to a certain extent reflected by e.g. Article 17 Rome II Regulation. Lehmann pleaded in favour of overcoming (more strongly) the "public law taboo". As a consequence, a more sophisticated approach for the application of public law in cross-border settings would be needed, as Lehmann further explained, e.g., by making use of auto-limitations or by creating parallel connecting factors for public and private law aspects of the respective subject-matter. Lehmann presented Article 6(3) of the Rome II Regulation for antitrust matters as an example. All of that should be coordinated to serve the public interest. Under such an approach, the question may of course arise as to what extent notions of private enforcement come into play (on this aspect see e.g. Hannah Buxbaum, Regulation and Private Enforcement in a Global Economy: Strategies for Managing Conflict, Collected

Courses of the Academy 399, Boston 2019, https://conflictoflaws.de/2019/out-now-hannah-l-buxbaum-public-regulation-and-private-enforcement-in-a-global-economy-strategies-for-managing-conflict/).

In the following session, Ralf Michaels, Hamburg, and Verónica Ruiz Abou-Nigm, Edinburgh, posed the question "Is Private International Law International?". The presenters envisaged a kind of "invisible college" along the lines of Oscar Schachter, The Invisible College of International Lawyers, 72 Nw. U. L. Rev. 217 (1977 – 1978), perhaps in contrast to the somewhat disillusioned "Divisible College of International Lawyers" by Anthea Roberts, Is International Law International?, Oxford University Press 2017, Chapter 1 – another contribution to which the presenters made reference. Against this background, the "Private International Law for Laypersons Project" (PILL) was explained, on the premise that any non-PIL lawyer counts as a layperson in this sense. Within the project, interviews with PIL lawyers were conducted, including questions like "what belongs to PIL" or "what is the question of PIL". All of that and more should result in (re-) building a truly international community, after phases of division and "parochialization" during the conflicts revolution in the USA, as well as later in EU PIL. Such a community may meaningfully devote itself to both a deep analysis of foundations as well as to working on practical solutions for cross-border settings. Otherwise, it was suggested, diplomatic conferences such those at The Hague on PIL projects and its preparatory works would suffer too much from a lack of common language for successful discourse and negotiation. The audience was pleased to be informed that a conference like the one on which this post is reporting may well count as an almost ideal "invisible college".

Máire Ní Shúilleabháin, Dublin, presented on "Habitual Residence in Private International Law: Core Elements and Contextual Variability". According to her analysis of the respective EU instruments and the case law, the term "habitual residence" strongly depends on its context, and these contextual elements are not sufficiently taken into consideration, which in turn leads to "mechanical" and irrational results. As an example, she referred to the English case of *Marinos v. Marinos* [2007] EWHC 2047 (see e.g. https://www.familylawweek.co.uk/site.aspx?i=ed907) a divorce proceeding under the Brussels II bis Regulation between a Greek husband and an English wife in which the question arose whether there could be two places of habitual residence. Shúilleabháin then identified a set of "context dependent elements" of the notion

of habitual residence such as e.g. exclusivity, voluntariness, absence of any habitual residence etc., that should be applied as appears appropriate in differing normative contexts (e.g. divorce, child abduction, succession etc.).

Finally, Dicky Tsang, Hong Kong, gave a fascinating presentation about an ongoing empirical review of Chinese court practice in respect of choice of law. The underlying assumption of the project is, as was explained by the presenter, that Chinese courts do not apply foreign law, at least as long as there is no agreement on the choice of foreign law by the parties. Tsang introduced the audience to the respective steps of Chinese legislation on PIL over the years and could indeed show that not more than around 1.3% of all the cases reviewed with a foreign element so far applied foreign law and, to date, all of these cases relied on a choice of law agreement. Tsang called for improvement and considered new guiding principles by the Supreme People's Court of China (SPC), which are guidelines for interpretation of an authoritative character. Such guidelines could bring about a more appropriate interpretation of openly-worded connecting factors such as e.g. the characteristic performance or the closest connection.

Giesela Rühl

The first of the Friday afternoon plenary sessions was devoted to an unprecedented and largely unexplored topic: Women in Private International Law. In fact, while gender issues have been studied widely in other disciplines, there is a striking gap in the private international law literature. Is this because the field has been predominantly shaped by men (in both scholarship, jurisprudence and practice)? Or is this because private international law, as a discipline, does not need a gender / feminist perspective, because it is, traditionally, understood to be neutral and detached from substantive policies and values?

The impressive panel of five female private international law scholars – Roxana Banu (University of Western Ontario, Canada), Mary Keyes (Griffith University, Queensland, Australia), Horatia Muir Watt (Ecole de droit Sciences-po, Paris, France), Yuko Nishitani (Kyoto University, Japan) and Marta Pertegás Sender (University of Antwerp, Belgium, and University of Maastricht, The Netherlands) – set out to answer these and related questions. And, in so doing, they did a remarkable job in demonstrating that private international law is not – and has never been – gender neutral. Roxana Banu and Mary Keyes, for example, showed how gender archetypes shaped traditional private international law, notably in the

use of connecting factors in family law. And Horatia Muir Watt, Yuko Nishitani and Marta Pertegás Sender demonstrated how a feminist perspective, including through critical theory, can shed new light on private international law and help to better understand our discipline.

After the session attendants agreed that they had just witnessed something very special, something that might well one day be remembered as the birthdate of gender studies / feminist legal theory in private international law. In any event, the panel made clear that gender and feminist issues belong on the agenda of private international law. It is, therefore, to be hoped that after this conference scholars from across the board (women and men) will jump on the bandwagon to embark on a challenging journey that promises unexpected and fascinating insights into an old discipline.

Saloni Khanderia

The second of the Friday afternoon sessions comprised of a mixed range of contemporary issues that have been attracting considerable attention among policy-makers at the transnational level. The first two discussions chiefly concerned the challenges involved in the recognition and enforcement of foreign judgments in other jurisdictions. Adeline Chong from the Singapore Management University asserted that there were certain commonalities in the rules on the subject among the member countries, in which divergences were in terms of interpretation rather than principle. While there some other significant differences, namely the requirement of reciprocity and the status of foreign non-monetary judgments, she argued that the harmonisation of conflict-of-law rules on the recognition and enforcement of foreign judgments among the ASEAN countries was feasible. In doing so, Chong illustrated the application of the rules in Indonesia, Thailand, Singapore, Malaysia, Laos, Myanmar and India, to name a few.

In a related vein, Nadia de Araujo and Marcelo De Nardi from PUC-Rio / UNISINOS Brazil, focused their discussion on the significance of the Hague Judgments Project on the development of the Brazilian law on the recognising and enforcement of foreign judgments. Based on a survey conducted by De Araujo and De Nardi among arbitrators, judges and academics, the study depicted the broad ranging benefits for the jurisdiction in ratifying the Hague Conference’s Draft Convention on the Recognition and Enforcement of Civil and Commercial

Judgments after its coming into effect. The third presentation in the session pertained to the Control of Foreign Direct Investments and Private International Law where Peter Mankowski from the University of Hamburg drew attention to the implications of the Rome Regulation (EU) 2019/452 for the screening of FDI into the Union. The fourth and last presentation of the Plenary session in the afternoon by Gerald Mäsch from the University of Münster was devoted to the complexities in the ascertainment of the applicable law to a Decentralised Autonomous Organisation.

Rui Dias

As was already discussed by *Saloni Khanderia*, the third presentation in the session pertained to the Control of Foreign Direct Investments (FDI) and Private International Law. The following lines add some additional thoughts to this session where Peter Mankowski from the University of Hamburg drew attention to Regulation (EU) 2019/452, on the basis of which the notion of FDI was defined (see Art. 2 pt. (1)). While in the past FDIs were widely welcome, with many host States even supporting FDIs through substantial subsidisation of private foreign investors, we seem to be witnessing a change in perspective with the growing presence and importance of State funds, state owned enterprises and enterprises instrumentalised for State purposes. Needless to say, trade wars and political antagonisms play an important role in this context. That is why some counter reactions are taking place, in the form of a rising level of control, namely in regards to key industries and strategic industries of host States.

After giving a concise but broad panorama of existing control regimes in national laws, Professor Mankowski addressed Regulation (EU) 2019/452 as a European framework setting a uniform screening template, even though the content of this screening will hinge on national laws. The last part of the presentation analysed the subject from the perspective of PIL, noting how FDI control law is typically a case of internationally mandatory laws, as defined in Art. 9(1) of the Rome I Regulation. Whereas there seems to be a clear case for the application of a Member State's own *lois de police* as a host State, according to Art. 9(2), the application of other State's law is more doubtful, given Art. 9(3) of the Rome I Regulation, where questions arise in the determination of the place of performance, particularly in share deals, as well as in the assessment of the fulfilment of the illegality requirement, after an actual interdiction is in place.

The fourth and last presentation of the Plenary session in the afternoon, by Gerald Mäsch from the University of Münster, was devoted to the complexities in the ascertainment of the applicable law to a DAO, an abbreviation for Decentralised Autonomous Organisation. Professor Mäsch explained how a DAO literally lived in the ether, meaning on the blockchain of Ethereum, one of bitcoin's rival crypto currencies. Interested investors sent digital coins to the fund and voted on whether money should be put in a given project, so that funds would flow automatically to that project after the approval of a proposal.

The fact that decision-making took place in cyberspace, totally decentralized, under no corporate structure, where governance rules were automated and enforced using software, in particular smart contract code, raises difficult localization issues, and thus puzzle even the most skilful private international lawyers. In fact, it is not clear which law should be applicable to ae DAO: an exercise of characterization might lead us to identify a partnership, a company (but where is the seat or the place of incorporation of this ethereal entity?), or even a contract (even though Art. 1 (2) f of the Rome I Regulation might leave it out of its scope of application). If for the actual, original DAO a trust company was incorporated in Switzerland, not every future DAO will have the same specifics, which leaves us all with the defying question: are there law-free corners in cyber space?

Parallel Sessions (Thursday and Saturday)

On Thursday as well as on Saturday, there was a large number of parallel sessions, and we collected the following selected views and news:

Corporate Social Responsibility

Adeline Chong

This session dealt with a very timely topic given greater awareness on issues such as climate change and the exploitation of workers in developing countries. Three papers explored the relationship between private international law and corporate social responsibility (CSR). The first paper by Bastian Brunk of the University of Freiburg looked at "Private International Law for Corporate Social Responsibility" and focussed particularly on violations of human rights. Brunk discussed the modes by which the CSR agenda could be implemented (eg, by international soft law regulation) and grappled with issues arising from the fact that CSR is not a

separate category in the conflict of laws. The second paper by Nguyen Thu Thuy of Nagoya University considered transnational corporations and environmental damages in Vietnam. Vietnamese law has provisions dealing with environmental pollution, but enforcement of the law is not robust. Vietnamese law also does not have any rules dealing with the piercing of the corporate veil which may enable local victims to sue non-Vietnamese parent companies. She suggested several ways in which the law could be reformed to ensure better protection for local residents against environmental pollution by transnational corporations. The last paper was by Eduardo Alvarez-Armas of Brunel Law School. He considered the significant case of *Lliuya v RWE* in which a Peruvian farmer sued RWE, a German energy company, in Germany, claiming that RWE's contributions to global warming contributed to the melting of a glacial lake near his home. Alvarez-Armas highlighted the impact of Article 17 of the Rome II Regulation on climate change litigation, which may enable defendants to escape or reduce their liability. A lively discussion followed the papers raising thought-provoking questions such as the extent to which each of us, as fellow contributors to climate change, ought to be held responsible, and the proper balance to be struck between the rights of victims of climate change and the rights of energy corporations who are, after all, producing a necessary resource.

Child Abduction

Apostolos Anthimos

In one of the morning sessions, chaired by Prof. Nishitani, Kyoto University, Child Abduction was scrutinized from a different perspective by Prof. Lazic, Utrecht University & T.M.C. Asser Institute, and Dr. Jolly, South Asian University New Delhi. Prof. Lazic elaborated on the expected repercussions of the forthcoming Regulation 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction
(Brussels II bis Recast), whereas Dr. Jolly focussed on the situation in her jurisdiction, explaining the reasons why India has still not ratified the Hague Convention.

In the ensuing discussion, Prof. Beaumont expressed in an adamant fashion his reservations in regards to the added value of Chapter III (Articles 22-29) of the new Regulation. Practical aspects of the interdependence between relocation and

child abduction were also debated, on the occasion of a very recent ruling of the Greek Supreme Court on the matter.

ADR

Apostolos Anthimos

The noon session, chaired by Prof. de Araujo, Pontifical Catholic University, Brazil, included four presentations on ADR issues. *Dr. Lederer,* Hogan Lovells, Munich, presented the recent efforts of the EU in the field of ODR. Dr. Meidanis, Meidanis Seremetakis & Associates, Athens, and Ms. Saito, Kobe University, examined the issue of the recognition and enforcement of mediation settlement agreements in the EU and the Hague Judgments Convention respectively. Finally, Dr. Walker, Warwick University, focussed on the interrelationship between ADR & Hague Children's Conventions. In addition, she reported on the treatment of the subject matter from a UK perspective.

The nature of MSA (Mediated Settlement Agreements) monopolized the ensuing discussion. Interesting interventions and insightful views were voiced by Prof. Pertegás Sender, Maastricht University, and Prof. Hau, Munich University.

"Technology 1"

Ivana Kunda

Technology was one of the common denominators for the presentation in the last Thursday term for parallel sessions. Chaired by Prof. Matthias Weller, University of Bonn, this session touched upon three different technology-related topics. The first one, presented by the author of these lines, attempted to raise awareness about the lack of PIL in the EU Digital Single Market strategy. This being said, the development on the PIL plane are increasingly related to digital environment, and especially internet, which is intrinsically cross-border. Following the chair's question, the conclusion was that an integral approach is warranted particularly because the traditional connecting factors often lead to illogical results or are impossible to apply altogether. This has been confirmed also by Prof. Koji Takahashi, Doshisha University, who analysed in depth the issue of Blockchain-based crypto-assets from the PIL perspective. He discussed contractual issues, in particular difficulties related to characterisation and characteristic performance, and tort and quasi-delicts focusing on the constant problems of localisation. He

was reluctant to accept localisation of the platform's by the owners' headquarters, as suggested from the audience in the course of discussion. Further, he pointed to the property-related dilemmas in the context of bankruptcy which came into spotlight due to the Tokyo District Court case *Mt. Gox*, and restitution claim subsequent to theft. Last speaker Dr. Marko Jovanovic, University of Belgrade, reopened the issue of online defamation, providing a fresh look at some policy aspects thereof. He rejected the link to the tortfeasor arguing that will result in statute shopping. He also addressed the pros and cons of the place where the damage occurs, place of the victim's habitual residence, and the centre of interest of the victim (borrowed it from the jurisdiction area, what is the already practiced by the Dutch courts as prof. Aukje van Hoek, University of Amsterdam, commented). One of the points raised concerned also the role of the private acts of harmonisation, which the online platforms seem to be relying on.

"Jurisdiction V"

Ekaterina Pannebakker

The last and actually fifth parallel session on Jurisdiction, chaired by Alexander Layton QC, started with an overview of the new PIL rules in Japan, South Korea and China, including the Japanese Civil procedure law of 2012, Korean Private International Law act of 2018, the Legal Assistance project in Japan and others. In her overview, Eonsuk Kim from Bunkyo Gakuin University, Tokyo, traced down the borrowings between these countries' PIL laws and – most interestingly – the influence of the uniform EU PIL rules on the developments of PIL in these countries. Thereafter, Alexander Layton QC, in his capacity as the chair of the session, presented the paper prepared by Dr. Ling Zhu from Hong Kong Polytechnic University, who could not attend the conference. Dr. Ling Zhu's contribution addressed the conflicts between the jurisdiction of the maritime Courts and the People's Courts in China. Finally, it was my own turn to zoom in on the nuances in the definition of the autonomous concept of 'habitual residence of the child' in the rules on jurisdiction in matters of parental responsibility of Brussels IIa.

The "Jurisdiction" Track of the Conference ("Jurisdiction I to V")

Tobias Lutzi

Many of the parallel sessions were held together by a common thread, allowing

participants to put together a relatively coherent line of panels, if they so wished. This concept certainly worked very well as far as the "jurisdiction" track of the conference was concerned, which connected a series of five panels in total. They created highly stimulating discussions and a genuinely fruitful exchange of ideas between panelists and members of the audience, many of whom consequently found themselves in the same room more often than not.

The discussion was particularly lively in those panels that managed to bring together multiple papers engaging with the same or similar questions, such as the two panels on jurisdictions clauses (which offered theoretical analysis (Brooke Marshall, who took a deep dive into the possible conceptual bases, and Elena Rodriguez Pineau), new angles (Sharar Avraham-Giller and Rui Dias, who addressed the particularities of intra-corporate litigation), and numerous national perspectives (Inez Lopes, Valesca Raizer, Tugce Nimet Yasar, and Biset Sena Gunes) or the panel on the Brussels Ia Regulation (combining a discussion of recent trends in its interpretation by the CJEU (Michiel Poesen, regarding Art 7(1), and Laura van Bochove, regarding Art 7(2)) with somewhat more basic questions as to its interplay with national law (my own paper).

Two further panels then added a large variety of additional aspects and ideas, including *inter alia* a discussion of the need for, and adequacy of, the so-called gateways for service-out jurisdiction in English law (Ardavan Arzandeh), the new Israeli legislation on international jurisdiction (Iris Canor), the apparent convergence of international discussions in Japan and Korea (Eonsuk Kim), the elusive concept of the habitual residence of the child in the Brussels IIa Regulation (Ekaterina Pannebakker), and the future work of the HCCH with regard to "direct" jurisdiction (Eva Jueptner; as opposed to "indirect" jurisdiction in the sense of the 2019 Convention).

It is hardly surprising that this wide panorama of international jurisdiction featured many cases and controversies that had also been discussed on this blog, including, for example, the Canadian Supreme Court's decision in *Haaretz.com v Goldhar* (https://conflictoflaws.de/2018/supreme-court-of-canada-israel-not-ontario-is-forum-conveniens-for-libel-proceedings/) (discussed by Stephen Pitel), the UK Supreme Court's decision in *Brownlie v Four Seasons* (https://conflictoflaws.de/2018/uksc-on-traditional-rules-of-jurisdiction-brownlie-v-four-seasons-holdings-incorporated/) (discussed by Ardavan Arzandeh) or the

European Court of Justice's decisions in *Feniks* (https://conflictoflaws.de/2018/forcing-a-square-peg-into-a-round-hole-the-actio-pauliana-and-the-brussels-ia-regulation/) (discussed by Michiel Poesen) and *Schrems* (https://conflictoflaws.de/2018/fifty-shades-of-facebook-blue-ecj-renders-decision-on-consumer-jurisdiction-and-assigned-claims-in-case-c-49816-schrems-v-facebook/) (discussed by Laura van Bochove).

Outlook

The 8th Conference of the Journal of Private International Law again was a great success, both scholarly as well as socially. The next conference in 2021 will be hosted by one of the blog's editors Adeline Chong in Singapore. We are looking forward to it!

A Resurrection of Shevill? – AG Szpunar's Opinion in Glawischnig-Piesczek v Facebook Ireland (C-18/18)

Written by Anna Bizer

Anna Bizer, doctoral candidate at the University of Freiburg, has kindly provided us with her thoughts on AG Szpunar's opinion in the case of Glawischnig-Piesczek v Facebook Ireland (C-18/18).

Since the EP-proposal from 2012, the European Union has not shown any efforts to fill the gap still existing in the Rome II Regulation regarding violations of personality rights (Article 1(2)(g)). However, Advocate General Szpunar has just offered some thoughts on the issue in his opinion on the case of *Eva Glawischnig-Piesczek v Facebook Ireland Limited* (C-18/18) from 18 June 2019.

Eva Glawischnig-Piesczek, an Austrian politician, claimed that a Facebook user had violated her personality right by posting a defamatory comment on the social network. She sued Facebook Ireland for the removal of the publication in question as well as other identical and/or equivalent publications. The commercial court in Vienna granted a corresponding injunction and Facebook Ireland did indeed disable access to the publication – but only in Austria by means of geo-blocking. Hereafter, the Austrian Supreme Court referred various questions to the CJEU regarding the interpretation of Article 15(1) of the e-Commerce Directive (Directive 2000/31) which prohibits the imposition of a general monitoring obligation on host providers. While the details of the responsibility of host providers regarding their users' activities are certainly interesting, this comment focuses on the territorial dimension of the provider's obligation to delete certain online content. So, the crucial question is whether an Austrian court may oblige Facebook Ireland to make a user's comment globally inaccessible or whether the injunction is limited to the respective state of the court.

First of all, the AG addresses the issue of jurisdiction by referring to the CJEU's *eDate* decision (C-509/09, C-161/10): *„the court of a Member State may, as a general rule, adjudicate on the removal of content outside the territory of that Member State, as the territorial extent of its jurisdiction is universal. A court of a Member State may be prevented from adjudicating on a removal worldwide not because of a question of jurisdiction but, possibly, because of a question of substance."* (para. 86) This statement is, in fact, convincing as the CJEU decided in *Bolagsupplysningen* (C-194/16, para. 48) that the removal of content is a single and indivisible application which can only be made by a court with "universal" jurisdiction (see our earlier posts here and here).

AG Szpunar further states that the territorial dimension of an injunction cannot be determined by Articles 1, 7 and 8 of the Charter of Fundamental Rights because the original claim was not based on EU law and was therefore outside the scope of the Charter (para. 89). In addition, neither did the claimant invoke the European law on data protection (para. 90) nor does the Brussels I*bis* Regulation require that an injunction issued by the court of a Member State also has effects in third states (para. 91). Thus, the AG's – convincing – result is that EU law does not regulate the question of the territorial scope of an injunction regarding the violation of personality rights (para. 93).

However – and now the interesting part begins – AG Szpunar elaborates on the

question of assessing cross-border violations of personality rights in case the CJEU did not agree with the inapplicability of EU law (para. 94-103). These considerations are not based on any legal text as, according to the AG, the question is not regulated by EU law.

Generally, AG Szpunar is not comfortable with a worldwide obligation to remove an online publication, "*because of the illegality of that information established under an applicable law,* [such an obligation] *would have the consequence that the finding of its illegality would have effects in other States. In other words, the finding of the illegal nature of the information in question would extend to the territories of those other States*" (para. 80). To avoid this effect, a worldwide obligation of removal could only be justified when all potentially applicable laws agree. Of course, this leads to disadvantages: "*should a claimant be required, in spite of the practical difficulties, to prove that the information characterised as illegal according to the law designated as applicable under the conflict rules of the Member State in which he brought the action is illegal according to all the potentially applicable laws?*" (para. 97). AG Szpunar leaves this question unanswered and continues to focus on the freedom of information: „*the legitimate public interest in having access to information will necessarily vary, depending on its geographic location, from one third State to another. Thus, as regards removal worldwide, there is a danger that its implementation will prevent persons established in States other than that of the court seised from having access to the information*." (para. 99)

To avoid this conflict between the freedom of information and personality rights, AG Szpunar recommends the following: "*However, owing to the differences between, on the one hand, national laws and, on the other, the protection of the private life and personality rights provided for in those laws, and in order to respect the widely recognised fundamental rights, such* ***a court must****, rather,* ***adopt an approach of self-limitation****. Therefore, in the interest of international comity […] that court should, as far as possible, limit the extraterritorial effects of its junctions concerning harm to private life and personality rights. The implementation of a removal obligation should not go beyond what is necessary to achieve the protection of the injured person. Thus, instead of removing the content, that court might, in an appropriate case, order that access to that information be disabled with the help of geo-blocking*." (para. 100) "*Those considerations cannot be called into question by the applicant's argument that the*

geo-blocking of the illegal information could be easily circumvented by a proxy server or by other means." (Rz. 101)

First, it is noteworthy that the AG strongly emphasizes the freedom of information. So far, this aspect has been rather neglected in the discussion on violations of personality rights compared to freedom of speech and freedom of the press. However, including freedom of information in the balancing of interest reflects that a publication necessarily requires to be noted by at least one other person to have defamatory effects.

Second, the AG sees the solution in geo-blocking. This solution can of course be considered worthy to be debated further as geo-blocking is already a popular means used amongst host providers. However, it is not clear from the AG's statement why the risk of circumvention should not be considered, although any order by a court to protect personality rights ought to be effective. In any case, this approach conflicts with the efforts of the European Union to restrict geo-blocking within the internal market (Regulation (EU) 2018/302) and should thus not be supported.

Third, the AG's approach leads to a rather unsatisfactory result for the claimant. One should not forget how the internet generally and social media especially operate: interesting content will be shared and disseminated again and again. These new publications, however, will not be restricted by geo-blocking unless the host provider actively intervenes.

Fourth, it is doubtful if the AG's approach is fit for reality: the idea of an approach of self-limitation for the courts based on the question "What is really necessary?" appears rather vague and not helpful for the deciding judges. This question is of a fundamental nature and requires an evaluative assessment. In order to achieve legal certainty, this crucial question of necessity should be answered by the legislature or at least the CJEU and should not be decided on a case-by-case-basis.

Fifth, one has to consider the effects of this proposal in the context of conflict of laws in a technical sense: if a claimant wanted Facebook to delete a publication globally and a court had "universal" jurisdiction according to *eDate* and *Bolagsupplysningen*, the court – in accordance with the suggestion of the AG – would have to apply the laws of each state from which the publication is still accessible. To make a long story short: Adopting the AG's proposal means

resurrecting the mosaic approach in conflict of laws! This appears to be a step backwards. Not only are the disadvantages of the mosaic principle in times of the internet commonly known, but also this approach contradicts the CJEU's rejection of the mosaic principle regarding the question of jurisdiction in actions for the removal of publications (*Bolagsupplysningen*).

Finally, the question of the direct consequences of this opinion remains. It is likely that the CJEU will follow the first proposal of AG Szpunar that the question of the territorial dimension of an injunction for the violation of personality rights is not regulated by EU law and can thus not be decided by the CJEU. However, the AG's opinion offers a new and interesting perspective on the issue of cross-border violations of personality rights which might give a boost to achieve international harmonisation.

JPIL 15 (2019), Issue 1

Issue 1 of the *Journal of Private International Law* is now available. It contains the following articles:

Rhona Schuz, Choice of law in relation to matrimonial property in the 21st century, pp. 1-49

Abstract: *The traditional lack of consensus in relation to the choice of law rule/s governing matrimonial property has become topical and relevant over the last few years. The European Union, concerned about the impact of the disparities between the laws of Member States in this field, in the light of increasing divorce and migration, embarked on an initiative to harmonize private international law rules in relation to matrimonial property. However, the Regulation which it produced did not command universal support. Moreover, the recent demographic changes in Europe have added a new dimension to the problem. To date, relatively little attention has been paid to the choice of law implications of migration from non-Western States, in which religious or customary law governs the economic consequences of marriage and which typically have separate property systems which discriminate against*

women. The mass migration into Europe from such States over the past few years makes it imperative to consider the implications of the choice of law rules in relation to matrimonial property for migrants from non-Western States.

Accordingly, in the light of these developments, there is a need to revisit critically the issues involved and the different approaches to choice of law in relation to matrimonial property in the light of modern choice of law theory. This article meets this need by analysing the extent to which the various approaches best promote central choice of law objectives. In addition, insights are gleaned from the experience of the Israeli legal system in relation to couples migrating from Islamic States. The conclusions drawn from this analysis, which are significantly different from those which informed the EU Regulation, will be of value to law and policymakers throughout the world, when facing the challenge of making decisions pertaining to choice of law in relation to matrimonial property in the twenty-first century.

Liam W. Harris, Understanding public policy limits to the enforceability of forum selection clauses after *Douez v Facebook,* pp. 50-96

Abstract: *This article explores the nature of public policy limits to the enforcement of forum selection clauses, recently considered by the Supreme Court of Canada in Douez v Facebook. The public policy factors relied on by the plurality of the Court, inequality of bargaining power and the quasi-constitutional nature of the right at issue, possess neither the doctrinal clarity nor the transnational focus necessary to guide the deployment of public policy in this context. Here, I argue for a public policy exception to the enforcement of forum selection clauses based on the doctrine of mandatory overriding rules. This approach would focus on whether a forum selection clause has the effect of avoiding the application of local norms intended to enjoy mandatory application in the transnational context. This conception of public policy would be a more coherent guide to the exercise of courts' discretion to enforce forum selection clauses in cases like Douez.*

Adeline Chong & Man Yip, Singapore as a centre for international commercial litigation: party autonomy to the fore, pp 97-129

Abstract: *This article considers two recent developments in Singapore private*

international law: the establishment of the Singapore International Commercial Court and the enactment of the Hague Convention on Choice of Court Agreements 2005 into Singapore law. These two developments are part of Singapore's strategy to promote itself as an international dispute resolution hub and are underscored by giving an enhanced role to party autonomy. This article examines the impact of these two developments on the traditional rules of private international law and whether they achieve the stated aim of positioning Singapore as a major player in the international litigation arena.

Muyiwa Adigun, Enforcing ECOWAS judgments in Nigeria through the common law rule on the enforcement of foreign judgments, pp. 130-161

Abstract: *The ECOWAS Court was established by the Revised ECOWAS Treaty. By virtue of that treaty, the Court has assumed an existence at the international plane and has delivered a number of judgments. This study therefore examines the enforcement of the judgments of the ECOWAS Court in Nigeria as a Member State. The study finds that Nigeria has not been enforcing the judgments of the Court like other Member States. The study further finds that there are five sources of international law namely: treaties, custom, general principles of law recognised by civilised nations, judicial decisions and the writings of the most qualified publicists and that while Nigerian law has addressed domestic effect of treaties and custom, that of other sources most notably the decisions of international tribunals has not been seriously addressed. The study therefore argues that the common law on the enforcement of foreign judgments can be successfully adapted to give domestic effect to the judgments of the ECOWAS Court as an international tribunal in Nigeria. The study therefore recommends that the Nigerian judiciary should take the gauntlet to make the judgments of the ECOWAS Court effective in Nigeria.*

Justin Monsenepwo, Contribution of the Hague Principles on Choice of Law in International Commercial Contracts to the codification of party autonomy under OHADA Law, pp. 162-185

Abstract: *The Organization for the Harmonization of Business Law in Africa (hereinafter referred to as OHADA) was created on 17 October 1993 to foster economic development in Africa by creating a uniform and secure legal*

framework for the conduct of business in Africa. In an effort to reform the law of contracts in its Member States, OHADA has prepared the Preliminary Draft of the Uniform Act on the Law of Obligations (hereinafter referred to as the Preliminary Draft). Several provisions of the Preliminary Draft set forth general principles concerning choice of law in international commercial contracts. Indeed, the Preliminary Draft encompasses innovative provisions on party autonomy in international contracts, such as the explicit recognition of the right of parties to choose the law applicable to their contracts and the inclusion of limited exceptions to party autonomy (overriding mandatory rules and public policy). Yet, it still needs to be improved in respect of various issues, including for instance the ability of parties to choose different laws to apply to distinct parts of their contract and the possibility for the parties to expressly include in their choice of law the private international law rules of the chosen law. This paper analyses the provisions of the Preliminary Draft in the light of the Hague Principles on Choice of Law in International Commercial Contracts (hereinafter referred to as the Hague Principles). More particularly, it explores how the Hague Principles can help refine the rules on party autonomy contained in the Preliminary Draft to enhance legal certainty and predictability in the OHADA region.

Jeanne Huang, Chinese private international law and online data protection, pp. 186-209

Abstract: *This paper explores how Chinese private international law responds to online data protection from two aspects: jurisdiction and applicable law. Compared with foreign laws, Chinese private international law related to online data protection has two distinct features. Chinese law for personal jurisdiction is still highly territorial-based. The "target" factor and the interactive level of a website have no play in Chinese jurisprudence. Regarding applicable law, Chinese legislators focus more on the domestic compliance with data regulations rather than their extra-territorial application. Moreover, like foreign countries, China also resorts to Internet intermediaries to enhance enforcement of domestic law. These features should be understood in the Chinese contexts of high-level data localization and Internet censorship.*

Giorgio Risso, Product liability and protection of EU consumers: is it time for a

serious reassessment? pp 210 – 233

Abstract: *The European Union (EU) has not enacted a coherent and fully-fledged product liability regime. At the substantive level, the Product Liability Directive – adopted in 1985 – is the only piece of legislation harmonising the laws of the Member States. At the private international law level, the special choice-of-laws provision in the Rome II Regulation coexists with the general rules in the Brussels I-bis Regulation. Cross-border product liability cases are therefore subject to different pieces of legislation containing either "general" or "specific" provisions. In turn, such general and specific provisions do have their own rationales which, simplistically, can be inspired by "pro-consumer", "pro-producer", or more "balanced" considerations, or can be completely "indifferent" to consumer protection. This article examines the interactions between the Directive, the Rome II and the Brussels I-bis Regulations in cross-border product liability cases. The aim of this article is to assess whether the piecemeal regime existing at the EU level risks undermining the protection of EU consumers. The analysis demonstrates that the regime is quite effective in guaranteeing an adequate level of consumer protection, but reforms are needed, especially to address liability claims involving non-EU manufacturers or claims otherwise connected to third States, without requiring a complete overhaul of the EU product liability regime.*

Guangjian Tu, The flowing tide of parties' freedom in private international law: party autonomy in contractual choice of law in China, pp. 234-240 (Review Article)

Summer School on Transnational

Tort Litigation

Written by Michele Angelo Lupoi, Civil Procedural Law and European Judicial Cooperation, University of Bologna

The Department of Juridical Sciences of the University of Bologna, Ravenna Campus, has organized a Summer School on *Transnational Tort Litigation: Jurisdiction and Remedies*, to be held in Ravenna, on July 15-19, 2019.

The Summer School deals with transnational jurisdiction, private international law and remedies available in tort cross-border litigation, with both a theoretical and a practical approach. The Faculty includes experts from US and EU in order to provide a comparative perspective to the participants.

The US perspective will be centered on procedural remedies for mass-torts (class actions) and on the assumption of jurisdiction in transnational toxic tort litigation (e.g. asbestos and tobacco tort disputes). The EU part of the programme will address the Brussels I-bis Regulation as regards jurisdiction in tort claims, and the Rome II Regulation, in relation to the law applicable to transnational tort disputes.

The Summer School is aimed at law students as well as law graduates and lawyers who want to obtain a specialised knowledge in this area of International Civil Procedure.

Deadline for inscriptions: **28 June 2019**. Programme and further information can be found here

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Patience is a virtue – The third party effects of assignments in

European Private International Law

Written by Leonhard Huebner, Institute for Comparative Law, Conflict of Laws and International Business Law (Heidelberg University)

The third-party effects of the assignment are one of the "most discussed questions of international contract law" as it concerns the "most important gap of the Rome I Regulation". This gap is regrettable not only for dogmatic reasons, but above all for practical reasons. The factoring industry has provided more than 217 billion euros of working capital to finance more than 200,000 companies in the EU in 2017 alone. After a long struggle in March of 2018, the European Commission, therefore, published a corresponding draft regulation (COM(2018)0096; in the following Draft Regulation). Based on a recent article (ZEuP 2019, 41) the following post explores whether the Draft Regulation creates the necessary legal certainty in this economically important area of law and thus contributes to the further development of European private international law (see also this post by Robert Freitag).

Legal background and recent case law

Although Article 14 of the Rome I Regulation provides for a rule governing the question regarding which law is applicable to the voluntary assignments of claims, it is the prevailing opinion that the third party effects of assignments are not addressed within the Rome I Regulation. According to Article 27 (2) of the Rome II Regulation, the European Commission was under the obligation to submit a report concerning the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person. Said report should have been published no later than 17 June 2013. In March 2018, almost nine years after the Rome I Regulation came into force, the Commission finally presented said report in form of the Draft Regulation subject to this article. The practical importance and the need for a harmonized European approach have also been demonstrated by recent case law proving the rather unsatisfactory status quo in European PIL. Two recent decisions of the Higher Regional Court of Saarbrücken (dated 8 August 2018 – 4 U 109/17) and of the Norwegian Supreme Court (see IPRax 2018,

539) gave striking examples of how the diverging requirements for the effectiveness of the assignment vis-à-vis third parties lead to different solutions within the respective PIL rules of the member states. The preliminary reference to the ECJ of the Higher Regional Court of Saarbrücken concerns a multiple assignment, while the ruling of the Norwegian Court of Justice deals with the question whether unsecured creditors of the assignor can seize the allegedly assigned claims of the assignor in insolvency (see also this post by Peter Mankowski).

The material scope of the proposed regulation

Art. 5 of the Draft Regulation determines the material scope of application of said Draft Regulation with regard to the effectiveness of an assignment as well as its priority vis-à-vis third parties. The effectiveness vis-à-vis third parties is regularly determined by registration or publication formalities (lit. a), while priority conflicts for the assignee arise vis-à-vis various persons. Lit. b) concerns multiple assignments, while lit. c) regulates the priority over the rights of the assignor's creditors. In addition, lit. d) and e) assign priority conflicts between the assignee and the rights of the beneficiary of a contract transfer/contract assumption and a contract for the conversion of debts to the Draft Regulation.

In essence, Art. 5 of the Draft Regulation covers notification requirements to the assignee. Most legal systems require a publicity act for binding effects vis-à-vis third parties and the debtor, such as a notice of assignment to the debtor or a registration in a public register. Whereas under German law the assignment becomes effective immediately between the assignor and the assignee as well as against third parties, in other jurisdictions this only applies once the debtor has been notified of the assignment (*signification* in French law pursuant to former Art. 1690 of the Code civil or within the framework of legal assignment in the UK).

Connecting factor: habitual residence of the assignor combined with sectorial exceptions

The connecting factors employed by current national PIL rules considerably vary between the member states. In principle, three connecting factors compete with each other: the habitual residence of the assignor, the law applicable to the transfer agreement (assignment ground statute) and the law applicable to the

transferred claim. Furthermore, the law at the debtor's domicile might also be considered an important factor.

Art. 4 (1) of the Draft Regulation unties this gordic knot as it specifies the law of the country in which the assignor has his habitual residence "at the relevant time" as the primary connecting factor. The goal of the European Commission is to create legal certainty and, above all, to promote cross-border trade in claims. By way of sectoral exceptions, the law of the transferred claim is to be applied if either (i) "cash collateral" credited to an account or (ii) claims from financial instruments are transferred (Art. 4 (2) of the Draft Regulation).

A downside of the link to the law of habitual residence is its changeability, which may lead to a *conflit mobile*. By altering the connecting factor, the applicable law may also change leading to legal uncertainty. To overcome such conflict, so called meta conflict of laws rules are also provided for in the Draft Regulation. In this case, it is a matter of determining the relevant point in time in order to make a viable connection. This rule has been implemented in Art. 4 (2) of the Draft Regulation.

An unsolved problem is the determination of the "material point in time" cited in Art. 4 (1) of the Draft Regulation. Accordingly, the third parties' effects are determined by the assignor's habitual residence at the relevant time. However, neither a recital nor the catalogue of Art. 2 of the Draft Regulation give an adequate definition of this relevant point in time so far. It is therefore advisable to replace the term "at the relevant time" with "at the time of conclusion of the assignment contract" in the final regulation. This is also reflected in the EP's legislative resolution of 13 February 2019 (P8_TA-PROV(2019)0086, p. 12). The advantage of this clarification would be that the same point in time would be relevant in the legal systems of the member states which follow the principle of separation as well as those which follow the principle of unity.

A step forward?

The Draft Regulation would represent a major step forward in the trade of cross-border receivables in the EU. It closes a large gap within European PIL, while at the same time aiding EU member states to partly adapt their domestic legal system accordingly. Even if the European Commission did not comply with the (unrealistic) deadline for the review cited in Art. 27 (2) of the Rome I Regulation,

the legal debate made this essential progress possible demonstrating the EU's ability to reach compromises. Although the Draft Regulation solves many problems, it may also raise new ones. That is again good news for lawyers interested in PIL. Nevertheless, the enactment of the Draft Regulation would eventually answer "one of the most frequently discussed questions of international contract law". The old saying "patience is a virtue" would be proven right again.

This blog post is a condensed version of the author's article in ZEuP 2019, 41 et seqq. which explores the new Draft Regulation in more detail and contains comprehensive references to the relevant literature.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2/2019: Abstracts

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

H.-P. Mansel/K. Thorn/R. Wagner: **European conflict of laws 2018: Final Spurt!**

This article provides an overview of developments in Brussels in the field of judicial cooperation in civil and commercial matters from January 2018 until December 2018. 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 both important decisions and pending cases before the CJEU as well as important decisions from German courts pertaining to the subject matter of the article. In addition, the article treats current projects and the latest developments

at the Hague Conference of Private International Law.

C. Kohler: **Lis pendens of a complaint seeking to join a civil claim for damages to criminal proceedings before the investigating magistrate**

Case C-523/14 raised the issue whether a complaint seeking to join a civil claim for damages to criminal proceedings before the investigating magistrate is lis pendens in respect of subsequent proceedings brought in another Member State involving the same cause of action. The ECJ held at the outset that such a complaint falls within the scope of Regulation No 44/2001 in so far as its object is to obtain monetary compensation for harm allegedly suffered by the complainant. On the point of lis pendens the ECJ ruled that under Art. 27(1) of the Regulation proceedings are brought when the complaint seeking to join the civil action has been lodged with an investigating magistrate, even though the judicial investigation of the case at issue has not yet been closed. The Court further held that according to Article 30 of the Regulation, where the complaint seeking to join a civil action is initiated by lodging a document which need not, under the applicable national law, be served before that lodging, the relevant time for holding the investigating magistrate to be seised is the time when the complaint was lodged. The author approves the ECJ's interpretation of the relevant provisions of Regulation No 44/2001. However, he considers that the rule which gives jurisdiction to the court seised of criminal proceedings to rule on a civil claim for damages deserves criticism. That rule is an alien element within the Brussels-Lugano system which favours the plaintiff whereas the defendant may be sued in exorbitant jurisdictions and cannot oppose the recognition and enforcement of the civil judgment given by the criminal court.

S. Kurth: **Determining the habitual residence of a testator who alternately lived in two states**

The article critically analyses the decision of the German Higher Regional Court (Oberlandesgericht) Hamm (reference number: 10 W 35/17) on the interpretation and application of the habitual residence concept to establish jurisdiction under Art. 4 (EU) Regulation No 650/2012. The Court relies on the concept to determine the habitual residence of a German testator who for several decades spent extended periods of time on the Spanish Costa Brava and in the German backcountry. The author argues for an autonomous interpretation of the Regulation and expresses regret over the approach taken by which the "habitual

residence of the deceased" as the connecting factor under the Regulation is construed in line with national law. Moreover, the article examines the two definitions of habitual residence used by the Court and demonstrates that on closer scrutiny none of them is persuasive in light of the established canons of interpretation. The author argues to instead define the habitual residence of the deceased as the place where he is primarily integrated as well as regularly and consistently spends time. Further, the article criticises the Court's findings on circumstantial evidence and, among others, demonstrates the importance of the deceased's re-lationships with family and friends as pieces of circumstantial evidence neglected by the Court.

D. Coester-Waltjen: **Marriages of Minors – Against the Legislative Furore**

The German law against "child marriages" of 2017 was the subject matter of some recent court decisions. The German Supreme Court doubts in its decision the constitutionality of the "Law against Child Marriages" regarding the invalidation of marriages validly formed under the applicable foreign law, but void under the new German law in case one of the spouses was below the age of fourteen at the time of formation. The other cases concerned marriages each validly formed under the applicable law by two EU citizens in their respective home country. Since the bride in both cases was only 16, respectively 17 years old, the new German law obliges the German courts to invalidate these marriages, unless under extraordinary circumstances such invalidation would cause extreme hardship to the still minor spouse (or the spouse has reached majority and wants to stay in the marriage). Only in those cases, by way of exception, no invalidation should take place. Despite the pitfalls of the new law the courts succeed in reaching a sensible and adequate result. This article analyses how the courts struggle with the interpretation of the relevant provisions. Emphasis is placed on the European dimension of the topic as well as on the constitutional aspects in the relevant situations.

C. Benicke: **The need for Adaptation (Anpassung) to cure deficiencies in the protection of the child's financial interests caused by the parallel application of German inheritance law and English child custody law**

The decision of the Munich Higher Regional Court raises the question of the extent of the father's power of representation for his minor son under English law when he sells the interest in a German partnership which the son has inherited

under German law. The parallel application of English law for the parental responsibility issues on the one hand and of German law as inheritance law for the acquisition of the partnership interest on the other hand leads to a legal gap in respect to the provisions aiming at the protection of the child's financial interests. As German law regulates this issue in its child custody law through provisions limiting the extent of the parents' powers to act as legal representatives, and English law protects the child's interests in its inheritance law through provisions about the administration of the estate, neither of these provisions are invoked by the relevant choice of law rules. This raises the question of adaptation (Anpassung) as an instrument of private international law to avoid outcomes that are inconsistent with both legal orders at stake.

L. Rademacher: **Multilocal Torts, Favor Laesi, and Renvoi**

In the case of a multilocal tort, the defendant commits the tortious act in a state different from the state in which the claimant suffers the resulting injury. In such a scenario, identifying the applicable law can prove difficult. Under Art. 4 para. 1 Rome II Regulation, the defendant's liability is determined by the law of the state in which the claimant was injured. By contrast, Art. 40 para. 1 sent. 1 EGBGB (Introductory Act to the German Civil Code) relies on the location of the defendant's tortious act as the relevant connecting factor. The injured party, however, can demand the application of the law of the state where the injury was sustained according to Art. 40 para. 1 sent. 2 EGBGB. Since the codification of German international tort law in 1999, it has been in dispute whether in the case of a multilocal tort the references in Art. 40 para. 1 EGBGB encompass a foreign legal system's conflict-of-laws rules or refer to foreign substantive law only. This case note, on the occasion of a decision of the Higher Regional Court of Hamm, critically evaluates the arguments for and against the acceptance of renvoi in this context. Contrary to the court, it argues in favour of a reference that includes foreign private international law. It is submitted that only this view can be reconciled with the general rule on renvoi laid down in Art. 4 EGBGB and with the absence of a strict notion of favor laesi in Art. 40 para. 1 EGBGB.

P. Hay: **Foreign Law as Fact in American Litigation – Foreign Government's Interpretation of Its Own Law is Not Conclusive**

The U.S. Supreme Court confirmed unanimously that foreign law is to be treated as fact, not law, in federal civil litigation. In determining the content and in

interpreting foreign law, the lower court may consider all relevant materials. The interpretation of the foreign government of its own law is to be received with respect under principles of comity, but it is not conclusive. The Court reversed and remanded an appellate court's decision that had concluded that courts were "bound to defer" to the "reasonable" interpretation of the Chinese government of its own law. The Supreme Court ruled that Federal Rule of Civil Procedure 44.1 does not go this far, but continues to embody the traditional American fact-orientation with regard to foreign country law.

M. Stürner/A. Hemler: **Recognition of a French astreinte in California**

The French astreinte is a private penalty payable to the creditor designed to bend the debtor's will. In the case discussed, the U.S. Court of Appeals for the Ninth Circuit examines the enforceability of a French judgement condemning Californian editor Wofsy to pay an astreinte in favour of French publisher de Fontbrune. First, the Court of Appeals considers the determination of foreign law in accordance with Rule 44.1 FRCP, which permits the decision on foreign law using "any relevant material or source", thus classifying it as "question of law". Given this explicit departure from the question of fact doctrine, the Court of Appeals holds that the ascertaining of foreign law is permitted outside the pleading stage as well. Since foreign penal judgements are not enforceable under Californian law, the Panel also examines whether the astreinte is punitive in nature. In view of its characterisation as predominantly inter partes and its connection to the fulfilment of the debtor's obligation, the Court of Appeals concludes that the enforcement of the astreinte in question cannot be denied.

Out now: RabelsZ 83 (2019), Issue 1

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

Kutner, Peter, Recognition and Enforcement of Foreign Judgements – The

Common Law's Jurisdiction Requirement, pp. 1 et seq

> *The "Dicey Rule" has been treated as canonical in England and elsewhere. However, it has changed over time, it has been based in part on UK legislation, and it does not reflect other possible bases of jurisdiction that have been accepted in some cases. This article will set forth what the common law (the law without specific alteration by statute) has been and now is on the subject of " jurisdiction in the international sense". Drawing on case law and authoritative writing from across the common law world, the article will identify and examine established and debatable grounds for jurisdiction and how they have been applied. As will be seen from references to cases in courts outside England and writings on conflict of laws in countries other than England, for some countries the law on jurisdictional "competence" is or may be different from what is stated in the current version of the Dicey Rule.*

Lehmann, Matthias and Eichel, Florian, Globaler Klimawandel und Internationales Privatrecht – Zuständigkeit und anzuwendendes Recht für transnationale Klagen wegen klimawandelbedingter Individualschäden (Climate Change and Private International Law – Jurisdiction and Applicable Law in Transnational LitigationConcerning Individual Losses Caused by Global Warming), pp. 77 et seq

> *Increasingly, victims of global warming venture outside their own jurisdiction to sue polluters. Following the example of the United States, the phenomenon has now reached Europe. This article addresses the many questions raised by climate change litigation in a cross-border context. Starting from the treaty framework for greenhouse gas emissions, it analyses issues in respect of court jurisdiction and the applicable law from a European perspective. The authors argue for a balancing of the legitimate interests of, on one hand, private individuals who suffer the consequences of climate change and, on the other, industrial firms that have acquired and relied on emission rights. With regard to the competent court, they suggest limiting court jurisdiction under Art. 7(2) Brussels Ia Regulation to those places where it was foreseeable, from the perspective of the polluter, that damage would occur. With regard to the applicable law, they propose tempering Art. 7 Rome II Regulation by an analogous application of Art. 5(1) para. 2 of the same Regulation. While the victim can generally choose between the law of the country where the damage*

originated and where the damage occurred, the latter option should be restricted in the case of climate change litigation because the place of damage is typically unforeseeable for the tortfeasor. Furthermore, a valid authorization by the state of emission should be taken into account under Art. 17 Rome II Regulation insofar as appropriate. The law of the country where the damage occurred could apply to liability where an authorization does not exist, was obviously invalid, obtained by fraud or where such authorization has been consciously transgressed.

Wendelstein, Christoph, „Menschenrechtliche“ Verhaltenspflichten im System des Internationalen Privatrechts (The Role of Human Rights in Private International Law), pp. 111 et seq

The article examines the significance of human rights in the field of private law and conflict of laws. The author points out that human rights per se have no relevance in the field of private law. However, human rights are suitable for modifying the content and scope of subjective private rights, particularly through the (judicial) elaboration of behavioural duties. With regard to Art. 4(1) Rome II Regulation and the question of determining the place where the damage occurs, the author proposes to distinguish between “subjective private rights with a physical reference object defined also via the duty side” (e.g. property) and “subjective private rights without a physical reference object defined only via the duty side” (e.g. personality rights). As to the former, rights are located at the place where one finds the reference object (e.g. “things” in the case of property law). As to rights associated with the latter, a further distinction is offered: (i) If the duty limits another subjective right having a physical reference object, the non-objective subjective private right is located at the place where the reference object of the restricted subjective right is found. (ii) If the duty limits a subjective right without a physical reference object, the habitual residence of the bearer of the right should be decisive. A deviation from the designated law through escape clauses (Arts. 4(3), 17 Rome II Regulation), the public policy exception (Art. 26 Rome II Regulation) or mandatory rules (Art. 16 Rome II Regulation) is excluded for methodological reasons. Moreover, a correction is not required as the connecting factor of Art. 4(1) Rome II Regulation leads to just and reasonable results even in constellations with a link to human rights.

Rupp, Caroline S.,Verliebt, verlobt, rückabgewickelt? – Ansprüche bei der Auflösung von Verlöbnissen aus grenzüberschreitender Perspektive (Enamoured, Engaged, Annulled – Broken Engagement Claims from a Cross-Border Perspective), pp. 154 et seq

Even in the twenty-first century, financial claims after a broken engagement to marry play an important role and can cause difficulties, especially in cross-border relationships. Firstly, damages may be claimed for financial losses due to wedding and marriage preparations; secondly, the fate of engagement gifts, especially the ring, needs to be determined. This article examines engagement-related claims under German, French and English law, deriving a suggestion for useful contemporary rules from their comparison. A comparative inquiry into the conflict of laws rules then shows that the current rules pose various problems due to lacunae and disputes. The article develops a proposal to resolve these problems through clear, specifically engagement-related conflict of laws rules.

CJEU provides guidance as to how to identify an OMP

In *Agostinho da Silva Martins v Dekra Claims Services Portugal SA* (C-149/18), between Mr Agostinho da Silva Martins, who suffered damages in a car accident, and the insurance company Dekra Claims Services Portugal SA, the CJEU was called to rule on two different issues of qualification: one related to the interpretation of Article 16 of the Rome II Regulation on overriding mandatory provisions and the other related to interpretation of Article 28 of Directive 2009/103 on protection of victim in case of a motor vehicle accident.

Regarding the overriding mandatory provisons under the Rome II Regulation, the CJEU refers to the definition in Article 9(1) of the Rome I Regulation and reasons that in order to qualify a national rule on statutory limitation period as an overriding mandatory the national court has to be satisfied that there exist "particularly important reasons, such as a manifest infringement of the right to an effective remedy and to effective judicial protection arising from the application of the law designated as applicable". The relevant part of the CJEU holding uses careful phrasing suggesting restrictive interpretation of overriding mandatory rules: a rule

> *cannot be considered to be an overriding mandatory provision, […] unless the court hearing the case finds, on the basis of a detailed analysis of the wording, general scheme, objectives and the context in which that provision was adopted, that it is of such importance in the national legal order that it justifies a departure from the law applicable.*

Regarding the conflict of law nature of Article 28 of Directive 2009/103, which regulates the Member States' obligation to provide measures guaranteeing that the victim of a road traffic accident and the owner of the vehicle involved in that accident are protected, the CJEU states that this is not the conflict-of-law provision and that, consequently, it does not take precedence over the Rome II Regulation under Article 27 of the latter.

After the Romans: Private International Law Post Brexit

Written by Michael McParland, QC, 39 Essex Chambers, London

On 10 December 2018 the Ministry of Justice published a draft statutory instrument with the pithy title of "*The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2018*". This indicates the current intended changes to retained EU private international

law of obligations post Brexit.

These draft 2018 regulations are made in the exercise of the powers conferred by section 8(1) of, and paragraph 21(b) of Schedule 7 to, the European Union (Withdrawal) Act 2018 in order to "*address failures of retained EU law to operate effectively and other deficiencies… arising from the withdrawal of the UK from the European Union*". It is intended they will come into force on exit day.

Part 2 contains amendments to existing primary legislation in the UK. These include amendments to the Contracts (Applicable Law) Act 1990, the UK statute that implemented the 1980 Rome Convention on the law applicable to contractual obligations. The Explanatory Memorandum now declares that "*the United Kingdom will no longer be a contracting party* [to the Rome Convention]*after exit day*". This is modestly surprising, given that the Rome Convention was not actually part of the Community *acquis*in the first place (see **Michael McParland, *"The Rome I Regulation on the Law Applicable to Contractual Obligations",*** para. 1.99). But the current desire to disentangle the UK entirely from any vestiges of things European appears to be overwhelming. Consequently, the draft 2018 regulations convert the most of the rules found into the Rome Convention into UK domestic law, and declare that they will continue to apply them to contracts entered into between 1st April 1991 and 16th December 2009 in the same way as they have done since the arrival of the Rome I Regulation. Further amendments are also made to the Prescription and Limitation (Scotland) Act 1973 and the Private International (Miscellaneous Provisions) Act 1995, the pre-Rome II statute which contains the UK's rules on choice of law in tort and delict.

Part 3 deals with amendments to secondary legislation which had been originally created to deal with the coming into force of the Rome I and Rome II Regulations.

Part 4 is entitled "*Amendment of retained EU Law*", this new legal category that will see EU law as at the date of the UK's departure from the EU transposed into domestic law. Part 4 deals with the proposed substantive amendments to the enacted text of both the Rome I and Rome II Regulation which are considered necessary or appropriate to take account of the UK ceasing to be an EU Member State. The full impact of the changes will have to be considered in detail against the original texts, but some brief comments can be made.

Some changes are mere housekeeping. For example, in the "universal application" provisions found in Article 2 (Rome I) and Article 3 (Rome II) which declares that "any law specified by this Regulation shall be applied whether or not it is the law of a Member State", are to be amended with reference to "a Member State" being replaced with "*the United Kingdom or a part of the United Kingdom*".

Others involve updating references to rules found in Directives to their current equivalent sin UK domestic law. So, for example, Article 4(1)(h) of the Rome I Regulation currently provides for the applicable law in the absence of choice for:

> *(h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.*

The draft regulations will now replace the reference to "by Article 4(1), point (17) of Directive 2004/39/EC" with "… *in Part 1 of Schedule 2 to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001"* which as a footnote notes is S.I.2001/544, though the relevant Schedule 2 was substituted by S.I. 2006/3384 and this itself was subsequently amended by the Financial Services and Market Act 2000 (Regulated Activities) (Amendment) S.I. 2017/488 (which took effect from 1 April 2017 and which includes a whole raft of definitional changes).

Other changes deal with the fact that exit day will formally cut the UK's version of these Regulations off from any future changes made by the EU legislator to either of those Regulations.

Part 4 of the Regulation also revokes Regulation EC No. 662/2009 which established the procedure for the negotiation and conclusion of agreements between EU Member States and third countries on the law applicable to contractual and non-contractual obligations (see ***McParland***, para. 2.100).

Potentially more interesting changes are made to the Rome II Regulation, especially in relation to Article 6(3)(b) (unfair competition and acts restricting free competition), and Article 8 (infringement of intellectual property rights).

The changes to the Rome I Regulation and their implications will feature in the second edition to my book on the subject which I am currently working on.

The Ministry of Justice’s web-site can be accessed here.