Gender and PIL (GaP): A New Transdisciplinary Research Project

written by Ivana Isailovic & Ralf Michaels

We are excited to announce the launch of a new transdisciplinary research project, *Gender and Private International Law (GaP)*, based at the Max Planck Institute for Comparative and International Private Law (MPI).

This project is born out of a sense of scholarly and political urgency in a rapidly shifting world, where both conversations about gender equality and a powerful backlash against gender and LGBTQI justice are on the rise. Unlike other legal fields, private international law ("PIL") has for the most part been absent from this conversation, with some rare (here, here & here) exceptions (see also the panel on women & PIL). The field is almost never analyzed using the concept of 'gender', or using methodologies and ideas developed by gender studies scholars. Similarly, scholars working on gender and the law tend to overlook how PIL regulates gender and distributes power and privilege at the transnational level. Transnational studies focusing on gender, often prioritize human rights analyses, or cultural issues, ignoring how PIL techniques and practices interact with identity, and negotiate differences.

Our goal is to create a space for transdisciplinary research and cross-learning at the intersection of PIL and gender and feminist studies. Over the course of this academic year, we will put in place a series of discussion groups bringing together a diverse group of legal scholars working on gender, and PIL scholars interested in gender justice issues. Sessions, organized around short readings, will address methodological questions as well as some of the most pressing topics in PIL, such as the regulation of transnational surrogacy, the recognition of Islamic family law, or international abduction. Our goal with this project is also to give a platform to emergent scholars representing a diversity of voices and backgrounds.

This academic year, we plan to organize three types of events at the MPI in Hamburg.

- **The first one will be the kick-off event,** taking place on **Friday**, **Oct.**

25, from 2-5 pm. Ivana Isailovic (MPI and Northeastern University, US) and Roxana Banu (Western University, Ontario, and Queen Mary University, UK) will guide a discussion examining the connections between gender studies and PIL. The event will be followed by a brainstorming session on how to move the project further.

- Over the course of the Fall 2019, and possibly into the Spring, we will also organize **a series of intimate reading groups** around canonical texts in gender studies and PIL respectively. PIL scholars and scholars working on gender and law will meet to discuss these texts in an informal setting. More information about these reading groups will be available soon.
- **The final event for this academic year,** to take place in the Spring of 2020, will be **a full-day workshop with discussion groups** organized around several specific themes. Similarly to the kick-off event, each discussion will be guided by a PIL expert and gender and law scholars.

In order to ensure that cost is not a barrier for participants, travel reimbursements will be available for emerging scholars who could not otherwise attend.

If you want to attend the kick-off event, please write, by October 18, to veranstaltungen@mpipriv.de. For any general questions concerning the project, including the stipend, please write to gender@mpipriv.de.

We look forward to seeing you at the MPI in Hamburg!

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!

Talaq reloaded: Repudiation recognized if application filed by the wife

A bit more than a year ago, I posted here & here about a Greek ruling on the non-recognition of an Egyptian notarized talaq divorce. The same court rendered mid-July a new judgment related to the same case; this time recognition was granted! It is the first decision of this nature in Greece, which will hopefully pave the path for the future.

Apostolos Anthimos

THE FACTS

There is no need to repeat the facts which are already reported in my previous posts (see links above). There are however some novelties: The application for recognition concerned indeed the divorce between the same parties, as in the first case; however, this time the request referred to a judgment of the Abdeen Court of 1st Instance, which rectified the divorce issued before the notary public. In particular, the divorce was previously registered as of a revocable nature [revocable repudiation]. Given that the waiting period had expired, and the husband did not ask for his wife's return in the marital home, a new application was filed before the Abdeen court, aiming at the rectification of the registration, i.e. from revocable to an irrevocable divorce.

THE RULING

The court began with an analysis of the pertinent provisions, i.e. Article 780 Code of Civil Procedure, which is the rule for the recognition of foreign judgments issued in non-contentious proceedings, also covering foreign legal instruments. It first underlined the obvious difficulties in accepting a divorce by repudiation, which clearly violates the equality of sexes. However, *and this is the novelty of the ruling*, recognition may not be denied, if the applicant is the wife; otherwise, the public policy defence would cause unfair solutions in concreto.

The court entered then into the facts of the case. It first considered the Egyptian decision as similar to a Greek final and conclusive judgment. It then examined whether the foreign court applied the proper law. In this context, it made reference to Article 16, in conjunction with Art. 14.2 Greek Civil Code, which enumerates three options: The law of common nationality; the law of the last common residence; and the law with which the parties are in the closest possible connection. Since Cairo was the last common residence, the application of Egyptian law was the proper solution.

Coming back to the public policy issue, the Thessaloniki Court reiterated that the general approach goes indeed towards a public policy violation, given that repudiation runs contrary to the European Convention of Human Rights. However, in the case at hand, the applicant has fully accepted the dissolution of her marriage in this fashion; moreover, she was the one seeking the rectification in Egypt, and filing for the recognition of the talaq in Greece. A dismissal of the application would lead to an absurd situation, i.e. the existence of a marriage which none of the spouses wishes to maintain. In addition, forcing the applicant to initiate divorce proceedings in Greece would be costly and time-consuming.

For all the reasons aforementioned, the Thessaloniki court granted the application.

[CFI Thessaloniki, 17/07/2019, Nr. 8458/2019, unreported].

COMMENTS

The ruling of the Thessaloniki court is very welcome for the following reasons, which I listed in my last year's post:

1. It bypassed an Athens Court of Appeal judgement from the '90s, which ruled out any attempt to recognize a talaq, even if requested by the

spouse.
2. It took a firm stance, triggered by a 2016 ruling of the Supreme Court's Full Bench [Areios Pagos 9/2016], stating that the public policy clause is not targeting at the foreign legislation applied in the country of origin or the judgment per se; moreover, it focuses on the repercussions caused by the extension of its effects in the country of destination.
3. It made clear reference to the futility of fresh divorce proceedings in Greece, which would cause significant costs to the applicant and prolong the existence of a marriage no longer desired by any of the parties involved.

Call for participants: Second Meeting of the Young EU Private International Law Research Network

This spring, the first meeting of the newly established Young EU Private International Law Research Network was held at the University of Würzburg (please find more information about this event here). The first research project and meeting in Würzburg dealt with the "Recognition/Acceptance of Legal Situations" in the EU.

The cooperation involving the young generation of private international lawyers is intended to be continued with annual conferences. The next meeting of the network will take place at **ELTE Eötvös Loránd University,Budapest** on 20 March 2020. The conference will focus on **overriding mandatory provisions**with particular regard to national legislation and court practice outside the scope of application of the EU private international law regulations. The provisions of the EU private international law regulations, and in particular the Rome I and II Regulations, on overriding mandatory provisions and the

related case law received considerable attention among commentators. However, less attention has been devoted to the treatment of overriding mandatory provisions in the law of the Member States outside the scope of application of the EU private international law regulations. The areas concerned may include property law, family law, company law, etc. A comprehensive comparative study is missing in this field. In order to map the similarities and differences of the approaches of the private international law of the Member States, national reports will be prepared. Based on these national reports, a general report will be produced.

The conference will consist of a morning session where overriding mandatory rules will be discussed in a general way (e.g., the appearance of overriding mandatory provisions in property law, family law, arbitration, their interconnection with human rights, etc.) and an afternoon workshop where participants will discuss the outcome of the national reports and the conclusions of the general report.

If you are interested in the research project or the activity of the Young EU Private International Law Research Network, please do not hesitate to contact us (youngeupil@gmail.com).

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2019: Abstracts

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

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

A new trend is emerging in continental Europe: several states have taken the

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

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

Conflict rules for same-sex marriages are as hotly disputed as the legal treatment of such marriages in general. The German rules on the topic contain multiple inconsistencies. This is true even after the latest amendments to the relevant statute (EGBGB) entered into force in January 2019. Things become even more problematic when the German rules are seen in conjunction with Rome III as well as the two EU Regulations on matrimonial property regimes and on property consequences of registered partnerships, both of which are applicable since January 29, 2019. Some instruments do treat same-sex marriages as marriages, others – notably the EGBGB – do not. Curiously, this leads to a preferential treatment vis-à-vis opposite-sex marriages. The EU Regulation on matrimonial property regimes does not define the term marriage and provides for participating member states to do so. At the same time, the ECJ extends its jurisdiction on recognition of personal statuses to marriages. Given all these developments, one might want to scrutinize the existing conflict rules for marriages as provided for in the EGBGB.

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

The Court of Justice has rendered yet another decision on the place of the damage

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

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

The question whether or not a contractual jurisdiction clause entails an agreement of the parties to restrict the ability to declare a set-off in court proceedings to the forum prorogatum has been repeatedly dealt with by German courts. In a recent judgement – commented on below – the Oberlandesgericht München in a case between a German plaintiff and an Austrian defendant has held that the German courts may well have international jurisdiction under Article 26 of the Brussels Ia-Regulation also for the set-off declared by the defendant, even if the underlying contract from which the claim to be set-off derived contained a jurisdiction clause for the benefit of the Austrian courts. However, the Oberlandesgericht München has taken the view that the jurisdiction clause for the benefit of the Austrian courts would have to be interpreted to the effect that it also contains an agreement of the parties not to declare such set-off in proceedings pending before the courts of another jurisdiction. That agreement would, hence, render the set-off declared in the German proceedings as impermissible. The judgment seems to ignore the effects of entering into appearance according to Article 26 of the Brussels Ia-Regulation. That provision must be interpreted to the effect that by not contesting jurisdiction despite a contractual jurisdiction clause for the claim to be set-off, any effects of the jurisdiction clause have been repealed.

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

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

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

The application of foreign overriding mandatory provisions is one of the most discussed topics in private international law. Article 9 (3) Rome I- Regulation allows the application of such provisions under very restrictive conditions and confers a discretionary power to the court. The Oberlandesgericht Frankfurt a.M. had to decide on a case where an Israeli passenger sought to be transported from Frankfurt a.M. to Bangkok by Kuwait Airways, with a stop over in Kuwait City. The Court had to address the question whether to apply such an overriding mandatory provision in the form of Kuwait’s Israel-Boycott Act or not. It denied that because it considered the provision to be “unacceptable”. However, the Court was not precluded from giving effect to the foreign provision as a matter of fact, while applying German law to the contract. Since the air transport contract had to be performed partly in Kuwait, the Court considered the performance to be impossible pursuant to § 275 BGB. The judgement of the Court received enormous media coverage and was widely criticized for promoting discrimination against Jews.

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

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

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

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

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

Where does the relevant damage occur under Article 7 (2) of the Brussels I recast Regulation (Article 5 (3) of the Brussels I Regulation), when a third party induces a contracting party to ignore a choice of law agreement and to sue in a place different from the forum prorogatum? The UK Supreme Court held that under Article 5 (3) of the Brussels I Regulation, the place where the damage occurs is not the forum prorogatum, but is where the other contracting party had to defend the claim. This case note agrees, but argues that the situation is now different under the Brussels I recast Regulation because of changes made to strengthen choice of court agreements. Thus, under the recast Regulation, the place where the damage occurs is now the place of the forum prorogatum. Besides the main

question, the decision deals implicitly with the admissibility for claims of damages for breach of choice of law agreements and injunctions that are not antisuit injunctions. The decision also raises questions about the impact of settlement agreements on international jurisdiction.

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

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

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

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

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

This contribution provides an overview over the Private International Law Act of the Republic of Croatia of 2017, which applies from January 29, 2019. The Act contains conflict-of-law rules as well as rules on procedure. In comparison to the previous Act on Resolution of Conflicts of Laws with Provisions of Other States in Certain Matters which had been taken over after independence from former Yugoslavia in 1991, nearly everything is new. Full EU-harmonization was a key

purpose of the reform. The 2019 Act also refers to a number of Hague Conventions. Habitual residence has been introduced as a main connecting factor. Renvoi is as a rule excluded. Many issues are addressed for the first time. For the recognition of foreign judgments, the reciprocity requirement has been abandoned.

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

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

Fellowship at the Käte Hamburger Center for Advanced Study “Law as Culture”

The **Käte Hamburger Center for Advanced Study “Law as Culture”** invites academics of excellent standing to apply for a fellowship or junior fellowship for a maximum of 12 months (for the research period from April 1, 2020, to March 31, 2022) on the subject:

Law and Community

Subsequent to developing the “Law as Culture” paradigm in the first funding phase (2010-2016), the Center will now direct its attention to the interaction between law and other cultural spheres in the second funding phase (2016-2022). During the stated research period, the Center is dedicated to examining the relationship between Law and Community. Within this research area, the **diversity of cultures of family law and societal forms globally** will be examined. Research projects shall also be oriented towards one of the Center’s three traversal dimensions, namely “Cultures of Differentiation and Comparing Legal Cultures,” “Human Rights and Autonomy,” or “The Binding Force and the Emotive Foundations of the Law.”

The tensions described and analyzed as contradictions of normative orders in theories of legal pluralism can only be understood with view to the social communities hiding behind these with their respective religious, indigenous, local, and regional claims. In this context, the question of how these social communities are held together requires closer examination, as does their relationship to secondary, superordinate, and subordinate legal ties. Concretely speaking, ideas of superior or even universalist legal communities, such as the European Legal Community or a Human Rights Community, should be explored while bearing in mind the normative and emotionally affective boundaries of community building.

Shaped by social proximity and emotional entanglement, the family continues to be regarded as a central place where societal values are reproduced, goods are distributed, and mutual responsibility is assumed. The longstanding principle of

family solidarity is reflected in numerous legal orders. At the same time, however, family law also mirrors changing family forms and family ideals. A wideranging transformation of society and its normative foundations manifests in the pluralization of family forms. It is precisely on the basis of that which constitutes the normative character of the family that constructions of “us” and “them” become clear. In cases involving foreign elements, for example, the law of the “other” is applied using private international family law; exceptions based on public policy nevertheless call for a “we.”

In addition to the comparison of family law cultures, the research area Law and Community seeks the comparison of (legal) cultures at the level of other forms of community and their connection to applicable law: Which social norm systems form traditional local neighborhoods, modern clan structures, or “post-traditional communities” in contemporary subcultures, and what is their relationship to state law? How are these particular claims to universal validity conveyed? To what extent is valid law accepted by them or pragmatically integrated, and do they attempt to enforce the ideas of norms beyond their own group boundaries?

The Käte Hamburger Center for Advanced Study “Law as Culture” offers a creative research atmosphere for various disciplines in the cultural and legal sciences. Academics of excellent standing are invited to apply by **July 15, 2019**. Applications should include a résumé, project description (5-10 pages), and selected publications, as well as list the applicant’s availability during the research period. They should be submitted preferably by email (kaesling@uni-bonn.de) or, alternatively, by mail:

Directorate of the Käte Hamburger Center for Advanced Study “Law as Culture”
c/o Dr. Katharina Kaesling
Research Coordinator
Konrad-Zuse-Platz 1-3
53227 Bonn
Germany

Further information can be found here.

First Meeting of the Young Private International Law Research Network

Maximilian Schulze, an assistant of Dr. Susanne Gössl, LL.M. (Tulane), University of Bonn, has kindly provided us with the following report.

On 5 April 2019, the first meeting of the newly established research network "Young Private International Law in Europe" took place at the University of Würzburg, Germany. The network intends to create a Europe-wide exchange at 'junior faculty' level (predoc/postdoc) in the context of various comparative Private International Law (PIL) projects. The first research project and meeting in Würzburg deal with the "Recognition/Acceptance of Legal Situations". This topic was selected in view of the recent series of decisions by the CJEU regarding international name law (see, e.g. CJEU C-148/02 – *Garcia Avello*) and, most recently, same-sex marriage (CJEU C-673/16 – *Coman*)) and a parallel discussion which evolved in the context of the case law of the ECtHR, in particular regarding the recognition of adoptions, same-sex marriages and surrogacy. In order to contribute to a pan-European understanding of 'acceptance' of legal situations related to a person's status in a cross-border context to enhance the free movement of EU citizens and protect their fundamental rights regarding private and family life, the aforementioned first project of the research network compares the reception and implementation of the CJEU and ECtHR case law in 16 EU Member States (Austria, Belgium, Bulgaria, Croatia, Czech Republic, Estonia, France, Germany, Hungary, Italy, Latvia, Lithuania, Poland, Romania, Spain, and Sweden).

The meeting, organised by *Susanne Lilian Gössl*, Bonn, and *Martina Melcher*, Graz, comprised a public and a workshop session. The meeting was kindly supported by the German Research Foundation (Deutsche Forschungsgemeinschaft – DFG) as well as by the prior meeting of the German "Conference for Young PIL scholars" at the University of Würzburg.

The public session

Martina Melcher and *Susanne Lilian Gössl* opened the public session with an

overview of the project and outlined the results of the comparative study. Martina Melcher highlighted the aim of the project as an "academic offspring" for young scholars to facilitate their comparative law and PIL research interests by setting up a network for young scholars. Methodologically, the network selects a specific topic – in this project/meeting the "Recognition/Acceptance of Legal Situations" – on which participants first submitted national reports, which then led to a comprehensive comparative report and analysis, which will be finalized and published in 2020. Susanne Gössl further specified the network's approach on how the individual reports are to be composed. This is to take CJEU and ECtHR case law in all fields of the law where member states' awareness is high (e.g. name law, surrogacy and same-sex marriage) as a starting point and then look at the individual states' implementations, including in particular the recognition by judgments and by rules of PIL. As the network is not limited to international family law, future meetings and comparative reports will also deal with commercial law topics.

Marion Ho-Dac, Valenciennes, then set out the methodological approaches to recognition. She highlighted the increasing importance of cross-border continuity of status in view of the circulation of people and recent refugee movements. When looking at the Member States' approaches, she stressed two considerations one has to bear in mind: the legal technique of recognition and the underlying legal policy thereof. She then set of the three different approaches: traditional PIL methods, procedural recognition and alternative methods (e.g. uniform law on supranational level or a mutual recognition system at EU level). However, she concluded that none of these were perfect methods. In his responsio, *Tamás Szabados*, Budapest, doubted that legislators always have a clear methodology in mind. He exemplified this by the Hungarian PIL Act, in effect since 2018, in which no general theory of recognition is followed, although the responsible committee was aware of the recognition questions discussed.

Sarah den Haese, Gent, then referred to a 2014 academic proposal on the recognition of names that was not acted upon by the Commission and analysed its weaknesses which need addressing for a future proposal to be successful. Firstly, any proposal would require a harmonisation of conflict of laws rules. Secondly, she proposed recognition without a conflict of laws test and no control of the substantive law subject to a very narrow public policy exception only. *Tena Hoško*, Zagreb, responded by setting out the conflict rules implemented in

Croatia. Although academic proposals had been submitted, the Croatian legislator did not follow them but rather opted to copy the German conflicts rule (Art. 10 EGBGB). Although she exemplified certain weaknesses in this newly implemented approach (i.e. the issues of dual citizenship and renvoi), she concluded that the new rules are a huge step forward.

The workshop session

The public session was followed by a workshop session in which the preliminary results of the draft comparative report on "Recognition/Acceptance of Legal Situations" were discussed among the project participants and a few other interested parties. The workshop contained four parts, each initiated by a short introduction summarising the major findings and followed by an in-depth discussion among the participants.

In the first part, the general awareness was addressed. In her introduction, *Giulia Vallar*, Milan, pointed out an academic awareness in many Member States that a comprehensive overhaul of the rules of PIL is required. This awareness is also registered by the legislator, however mostly by countries that were involved in CJEU cases. She went on to set out the areas of law in which awareness for recognition is high (e.g. name law and same-sex marriages or partnerships). She concluded that based on their awareness of the issue, the analysed Member States can be subdivided into those involved in CJEU cases, those indirectly influenced by CJEU case law and those influenced by the ECtHR.

The second part, focusing to the legal methodology employed for recognition, was introduced by *Katarzyna Miksza*, Vilnius. She pointed out and illustrated the huge variety of methods of recognition detected by the draft comparative report by reference to national laws. In the subsequent discussion it was pointed out that it would be rather difficult to reconcile the different kinds of approaches to recognition.

Thirdly, the substantive requirements for recognition were discussed. In their presentation, *María Asunción Cebrián Salvat* and *Isabel Lorente Martínez*, Murcia, highlighted the (general) prohibition of a *revision au fond* as a starting point before outlining three hotspots of the public policy exception (surrogacy, same sex marriages or civil partnerships, and name law) and further challenges for recognition, in particular *fraus legis* and the legitimate expectations of the

parties, in the various countries. In the subsequent discussion it was pointed out that the comparative report also shows that the public policy exception does not only function as a bar to recognition, but can, as well as human rights, require and facilitate recognition.

Finally, the formal requirements for recognition were discussed. *Florian Heindler*, Vienna, initially drew attention to the difficulty of distinguishing between formal and substantive requirements and stated the definition of the comparative report of the former as requirements relating to form (i.e. of documents) as well as procedural requirements (regarding certain additional procedural steps). Also in the subsequent discussion the challenging identification and categorisation of requirements was brought up.

In the final discussion, it was immediately agreed that the project was until now only able to scratch the surface of the issues and further work and discussions were required and promising. Therefore, a continuation of the project was agreed on and a further meeting is already being planned.

UK Supreme Court decision in Vedanta: Finding a proper balance between Brussels I and the English common law rules of jurisdiction

Written by Ekaterina Aristova, PhD in Law Candidate at the University of Cambridge. She is currently working towards preparing for submission her thesis on the tort litigation against English-domiciled parent companies and their foreign subsidiaries for the human rights violations arising in the subsidiaries' operations.

On 10 April 2019, the UK Supreme Court passed its long awaited decision in *Vedanta v Lungowe* confirming that Zambian citizens, who have suffered from the environmental pollution caused by mining operations in Zambia, can pursue in England claims against Vedanta Resources Plc, an English-domiciled parent company, and Konokola Copper Mines plc, its foreign subsidiary and the owner of the mine ("**Vedanta**" and "**KCM**"). The decision, which has been an object of intense interest in the last weeks, sets important guidelines on the appropriate jurisdictional limits of pursuing claims against English-based transnational corporations ("**TNCs**") in the English courts and the substantive standards of parent company liability. In 2015, Zambian villagers commenced proceedings in the English courts against Vedantaand KCM alleging personal injury, damage to property, loss of income, and loss of amenity and enjoyment of landcaused by the toxic emissions from a mine operated by KCM in Zambia. The jurisdiction of the English courts was obtained by virtue of Article 4 of the Brussels I Regulation recast ("**Brussels I**"). KCM – the owner and operator of the mine **–** was brought in the English courts under the 'necessary or proper' party gateway. In 2016, the High Court allowed claims against both companies to be heard in England (see author's previous blog for further details). The Court of Appeal later has entirely upheld a High Court ruling (also analysed by the author). The Supreme Court has also confirmed jurisdiction of the English courts to try the case on the merits arguing that claimants will not obtain substantial justice in Zambia. The judgement addressed four principal issues which are summarised below.

Abuse of EU law

Corporate defendants argued that claimants' attempt to litigate the case in Englandamountsto an abuse of EU law since they have brought ill-founded claims before the English courts against English-domiciled parent company as a local defendant solely for the purposes of joining a foreign-domiciled subsidiary as a co-defendant. So far, an abuse of EU law argument in the context of Brussels I has been only made in relation to Article 8(1) of Brussels I (former Article 6(1)), which permits the joining of connected claims against persons domiciled in different Member States in one jurisdiction to avoid the risk of irreconcilable judgments resulting from separate proceedings. Uncertainty remained, however, over whether the exercise of mandatory jurisdiction under Article 4 of Brussels I could ever be challenged on the grounds that it amounts to an abuse of EU law. The Supreme Court acknowledged the possibility of using the abuse of EU law

principle in cases, where Article 4 is used as a means of circumventing or misusing another EU principle or (as was the case in *Vedanta*) the English common law rules of jurisdiction over foreign defendants. The narrow scope of an abuse of EU law test was also confirmed. In particular, the Supreme Court relied on the factual findings made by the lower courts that (i) the claimants established that there was a real issue to be tried against Vedanta; and (ii) the claimants had a genuine desire to obtain a judgment for damages against Vedanta and not merely KCM. Consequently, the abuse of EU law issue was resolved in favour of the claimants.

Parent company's duty of care

The Supreme Court has also made several important findings on the scope of the duty of care of the English-domiciled parent companies in relation to the operation of its foreign subsidiaries. First, it was unequivocally held that intervention of the English-domiciled parent companies in the management of the subsidiaries' operations and their human rights and environmental performance may give rise to a duty of care to third parties, such as local communities. Second, tort litigation against legal entities of TNCs does not involve assertion of a new category of common law negligence liability or amount to novel disputes (as was argued by the corporate defendants). Third, the Supreme Court refused to stick all the cases of parent company liability into specific categories based on the fact that organisational and management structures of corporate groups vary significantly. Fourth, issuance by the parent company of the group-wide policies may give rise to a duty of care, if the parent company takes active steps to their implementation in the subsidiaries' operations by training, supervision and enforcement. Finally, the Supreme Court claimed that omissions to supervise subsidiaries' operations contrary to the public statements made by the parent company may also lead to the breach of duty of care.

England as a proper forum

The Supreme Court was also faced with the necessity to identify whether England was a proper forum for litigating the case. This question forms part of the *forum conveniens*inquiry for exercising discretion to permit service on a foreign subsidiary as a necessary or proper party. Both the High Court and the Court of Appealconcluded that the existence of an arguable claim against Vedanta made England the most appropriate place for trying the claims against KCM. The

courts' reasoning was grounded on the desire to avoid parallel proceedings on similar facts in two jurisdictions. The Supreme Court has, however, took a different view and argued that the purpose of avoiding irreconcilable judgements should be balanced against other connecting factors which link the case with the foreign forum. The Supreme Court further held that – in light of Vedanta's consent to submit to the jurisdiction of the Zambian courts – the claimants have a choice of whether or not to sue Vedanta in England at the risk of irreconcilable judgments. In other words, the risk of irreconcilable judgments ceases to be a "*trump card*" and decisive factor in determining the appropriateness of the forum. Overall, Zambia was identified as the proper forum for pursuing claims against both co-defendants on the basis of several factors (the alleged acts and omissions primarily occurred in Zambia; the claimants are Zambian citizens; the mine is located and operated in Zambia; the damages were sustained by the claimants in Zambia; the majority of the witnesses and the evidence are likely to be based in Zambia, etc).

Access to justice considerations

Even though the Supreme courtconcludedthat the natural forum for the dispute was not England, that wasnot the end of the matter. Under the second limb of *forum conveniens* test, the English courts consider if they should nevertheless exercise jurisdiction in cases when the claimants would be denied justice in the foreign forum. There is no exhaustive list of factors that can be taken into account in this analysis. In Vedanta, the Supreme Court acknowledged that there is a real risk that substantial justice will be unobtainable in Zambia based on two principal grounds. First, securing funding for pursuing proceedings in Zambia was a serious problem for the rural villagers. Second, the "unavoidable" complexity of the case means that it would be litigated in Zambia on a simpler and more economical scale than in England. As a result, the Supreme Court allowed claims against both defendants to be tried in England on the substantial justice issue.

Practical implications of the Supreme Court decision

The ruling of the Supreme Court in *Vedanta* has been already called the*"the most important judicial decision in the field of business and human rights since the jurisdictional ruling of the United States Supreme Court in Kiobel v Royal Dutch Petroleum in 2013"*. Indeed, it will undoubtedly have several important implications in litigating cases on the human rights performance of TNCs. First,

the Supreme Court's unequivocal acknowledgement of the existence of duty of care by the parent companies is an important step towards enhancing corporate accountability for human rights violations. Although there are concerns as to whether the ruling will be a disincentive for parent companies to get actively involved in the supervision of the subsidiaries' operations, the risk of liability for the English-based multinationals is topical more than ever and will (hopefully) result in the concrete steps by businesses and their lawyers in identifying the risks of human rights violations in their foreign operations. Second, allowing claims against Vedanta and KCM to be heard in England is a promising move towards increasing access to justice for the underprivileged claimants coming from the jurisdictions with weak governance. In light of the most recent study on access to legal remedies for victims of business-related human rights abuses conducted for the European Parliament, it is pivotal to ensure that home state courts continue to remain an available forum for commencing proceedings in relation to the worldwide operations of the TNCs.

The Supreme Court's approach to the identification of the proper forum, however, raises reasonable concerns about the future of litigating negligence claims against English-domiciled parent companies in the English courts. Until recently,claimants from the host states have relied heavily on the mandatory nature of Article 4 of Brussels I to bring claims against English-based parent companies as anchor defendants so as to allow the joinder of a foreign subsidiary under common law. The policy of avoiding parallel proceedings in both states resulting in duplication of cost and the risk of inconsistent judgments hadmore force in the jurisdictional analysis than the existence of any territorial connections between England and claims against the foreign subsidiary. It washighly unlikely that a claim against the foreign subsidiary will be stayed on *forum conveniens*grounds if the courts have already decided that there is an arguable claim against an English-domiciled parent company and the foreign subsidiary is a necessary or proper party to the English proceedings. In effect, thejurisdiction over an arguable claim against the parent company also resolved the issue of jurisdiction over the foreign subsidiary. Following, the Supreme Court decision this practice will change and the English courts will look at the balance of connecting factors to decide where the proper forum for litigating claims against the foreign subsidiary is. Overall, the rules of jurisdictional will remain a hurdle for the claimants seeking recourse in the English courts and the outcome of the jurisdictional inquiry will now depend on whether or not the access to justice is

available in the host states.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2019: Abstracts

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

*R. Wagne*r: **Twenty Years of Judicial Cooperation in Civil Matters**

With the Treaty of Amsterdam entering into force on 1 May 1999 the European Union has obtained the legislative competence concerning the judicial cooperation in civil and commercial matters. This event’s 20th anniversary gives ample reason to pause for a moment to briefly appreciate the achievements and to look ahead. This article follows the contribution of the author in this journal in regard to the 15th anniversary of the entry into force of the Treaty of Amsterdam (IPRax 2014, 217).

E. Jayme/C.F. Nordmeier: **The Freedom to Make a Will as a European Human Right? – Critical Considerations on the West Thrace Decision of the European Court of Human Rights**

The article critically examines the decision of the ECHR of 19 December 2018, Molla Sali v. Greece, which deals with the special legal regime applicable to Muslims in West Thrace, a region in northern Greek. The Court considers Art. 14 ECHR in conjunction with Art. 1 of the Additional Protocol No. 1 to be violated if the will of a Muslim testator of this region, drawn up according to Greek state law, is measured against religious law. The authors are of the opinion that a human rights-protected election to state law is not permissible for individual

areas of law or single legal questions. It opens up an arbitrary mixture of state and religious law, which can lead to inconsistent overall results. This is particularly the case when legal positions of third parties are affected. In addition, overarching political aspects of the protection of minorities, especially in Western Thrace, are not sufficiently taken into account in the decision.

J. Schulte: **A Wii bit illegal? International jurisdiction and applicable law for the infringement of a Community Design by several tortfeasors (ECJ C-24, 25/16 – Nintendo)**

On 27 September 2017 the European Court of Justice decided on the international jurisdiction and applicable law with regards to the infringement of a unitary Community intellectual property right, when Nintendo Inc. sued a mother and a daughter company for replicating, advertising and selling Wii console accessories. The Court's judgement clarifies many important issues ranging from the member state courts' scope of competence in case of several defendants, to the difficult relationship between Rome II's conflict of law rules and the ones in the regulations on Community intellectual property rights as well as to the applicable law for infringing acts via the internet. Most notably, the ruling establishes a central act theory in case of multiple places of acts of infringements in the sense of Art. 8(2) Rome II.

P. Mankowski: **Choice of law clauses in the Standard Terms and Conditions of airlines**

Choice of law clauses in the Standard Terms and Conditions of airlines are commonplace in international air travel. Art. 5 (2) subpara. 2 Rome I Regulation "limits" freedom of choice in passenger contracts. Yet the CJEU's Amazon judgment has raised questions whether choice of law clause in Standard Terms and Conditions might also be challenged under the aegis of the Unfair Contract Terms Directive.

B. Heiderhoff: **Jurisdiction based on Art. 12 (3) Brussels IIbis and its consequences**

The Saponaro judgment concerns the judicial authorisation for a renouncement of succession by the parents of a minor heir whose habitual residence is not within the state of the succession proceedings. The Court confirmed that this issue falls within the scope of the Brussels IIbis Regulation and gave details on the

prerequisites of jurisdiction under Art. 12 (3) Brussels IIbis Regulation. In particular, the ECJ needed to clarify the meaning of the requirement of having been "accepted expressly or otherwise in an unequivocal manner by all the parties". As Greek law, in order to secure the rights of the child, provides that a prosecutor is a party to the proceedings, the ECJ held that the acceptance of the prosecutor is necessary. The Court does not, however, even mention the necessity of the agreement of the child, an omission which must be criticised. This contribution additionally raises the question of the applicable law. Here, we see a number of difficulties. Firstly, the prorogated jurisdiction under Art. 12 (3) Brussels IIbis Regulation poses problems for the synchronous operation of the Brussels IIbis Regulation and the 1996 Hague Convention. Secondly, the approval procedure is a constellation where the distinction between protective measures (under Article 15 of the 1996 Convention) and the exercise of parental responsibility (under Article 17 of the 1996 Convention) becomes necessary. Thirdly, the strong interlinkage between the substantive law of parental responsibility and the procedural measures to protect the child make it very complicated to combine the approaches that the different legal systems take. All in all, it generally seems easier to institute the judicial authorisation in the state of the child's habitual residence.

U.P. Gruber: **The habitual residence of infants and small children**

The ECJ has stressed in several decisions that for the purpose of Article 8(1) of Regulation No 2201/2003, a child's place of "habitual residence" has to be established by considering all the circumstances specific to each individual case. However, in a new case, the ECJ has opted for a more conclusive weighing of selected criteria. The ECJ based its assessment on the fact that the child was permanently resident in Belgium. Furthermore, the ECJ pointed to the fact that the mother, who – in practice – had custody of the child, and also the father, with whom the child also had regular contract, both lived in Belgium. Other circumstances were expressly deemed to be "not decisive", especially the stays of mother and child in Poland in the context of leave periods or holidays, the mother's cultural ties to Poland and her intention of settling in Poland in the future. In summary, it can be said that for a rather typical fact pattern, the ECJ has given valuable guidance as to where the habitual residence of children is located.

U.P. Gruber/L. Möller: **The admissibility of a custody order after the return**

of the child under the Hague Abduction Convention

The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction seeks to provide a rapid procedure for the return of the child to the country of the child's former residence. Pursuant to Art. 16 of the Convention, a court in the state of refuge is not permitted to decide on the merits of any custody issue until it has been decided that there exists a reason for not ordering the return of the child, or the application for the return of the child is not lodged within a reasonable time. This provision is based on the assumption that a procedure dealing with custody issues in the state of refuge might delay or otherwise impair the procedure on the return of the child in that state. The OLG Bremen had to decide whether Art. 16 of the Convention was still applicable when the conclusive order to return the child had already been carried out, i.e. the child had been given back to the holder of the right of custody and had returned to its state of residence prior to its removal. The court concluded that in this situation the prohibition in Art. 16 of the Convention had ceased and that therefore German courts could decide on the rights of custody. The decision is correct: When the status quo ante has been fully restored, the objectives of the Convention have been reached; therefore, there is no more need to protect the procedure on the return of the child against influences of parallel proceedings on custody issues. Subsequently, the court also assumed jurisdiction as, under German law, jurisdiction can be based solely on the German nationality of the child. At closer look, the case illustrates that German jurisdictional rules are not well-suited for child abduction cases and there is need for reform.

K. Siehr: **International jurisdiction of German courts to take measures in order to enforce the right of access of the mother to meet her children living abroad**

A German couple had two sons. The couple divorced and the father got custody for the two children and moved with them to Beijing/China. The Magistrate Court of Bremen (Amtsgericht Bremen) awarded to the mother, still living in Germany, rights of access to the children and obliged the father to cooperate and send the children from Beijing to Germany in order to visit their mother. The father did not cooperate and did not send the children to Germany. The Magistrate Court of Bremen fixed a monetary penalty (Ordnungsgeld) of e 1000,00 in order to sanction the father's misbehavior. The father lodged an appeal against this decision and the Court of Appeal of Bremen (Oberlandesgericht Bremen) vacated

the decision of the Magistrate Court because of lack of international jurisdiction. The Federal Court for Civil and Criminal Matters (Bundesgerichtshof) corrected the Court of Appeal of Bremen and upheld the order for monetary penalty awarded by the Magistrate Court of Bremen. German courts are allowed to sanction their decision by awarding monetary penalties against a party living abroad.

P. Kindler/D. Paulus: **Entry of Italian partnerships into the German land register**

Under German law, following a judgment of the Federal Court of Justice (BGH) of 29 January 2001, even non-commercial partnerships (the „Gesellschaft bürgerlichen Rechts", GbR) under certain circumstances – and without being regarded a legal entity – have an extensive legal capacity. On 4 December 2008, in a second step, the Federal Court of Justice held that a GbR can not only acquire ownership of land or other immovable property or rights but may also be entered in the German land register (Grundbuch – „formelle Grundbuchfähigkeit"). Subsequently, as of 18 August 2009, the German legislator implemented a new § 899a to the German Civil Code (BGB) as well as a new section 2 to § 47 of the German Land Register Code (GBO), stating that if a GbR is to be registered, its partners must also be entered into the land register. In its judgment of 9 February 2017 concerning an Italian società semplice, the

German Federal Court of Justice held that also foreign non-commercial partnerships can be entered into the German land register. Prerequisite for this is not a full legal capacity but only that the respective partnership, according to its company statute, at least has a partial legal capacity with regard to the acquisition of real estate („materielle Grundbuchfähigkeit"). In order to determine this, a judge has to investigate foreign law ex officio. This includes not only the determination of the law itself but also of its concrete application in the respective foreign legal practice. To this end, the judge must make full use of the legal sources available to him. The authors share the position of the German Federal Court of Justice but point out that the applicable Italian law of business associations even provides for a full legal capacity of non-commercial partnerships.

K. Duden: **Jurisdiction in case of multiple places of performance: preparatory work vs. its implementation on site**

In the case of a contract for the provision of services, Art. 7 (1) (b) of the Brussels Ibis Regulation establishes jurisdiction at the place where the service is provided. In light of a decision of the Austrian Supreme Court on an architect's contract this paper analyses how jurisdiction at a single place of performance can be identified if the performance actually is provided in several places. In doing so, it is argued that a distinction should be drawn between services that have an internal as opposed to an external variety of places of performance. Regarding architects' contracts the author agrees with the Austrian Supreme Court that the courts at the building site have jurisdiction as the courts at the place of the main performance. Furthermore, the paper discusses where jurisdiction generally should be located for services that consist of extended preparatory work at one place that culminates in its implementation at another place, but where those services do not necessarily have a comparatively strong link with the place of implementation. Finally, cases will be considered in which the place where the service is mainly provided cannot be determined. It is argued that amongst the approaches taken in such cases by the ECJ it is more convincing to grant the claimant a choice amongst the places which could be considered as the place of main performance, rather than give preference – amongst various potential places of main performance – to the jurisdiction at the seat of the characteristic performer.

L. Hübner: **Existential disputes as a case for Art. 24 no. 2 Brussels 1a Regulation – the doctrine of fictivité in the European law of jurisdiction**

The decision of the Cour de cassation deals with the exclusive jurisdiction for company-related disputes in Art. 24 No. 2 Brussels 1a Regulation. The Cour de cassation confirms the strict interpretation in accordance with the parameters of the ECJ. The subject-matter of the action is not a dispute regarding deficiencies in resolutions, which frequently is the subject-matter of action in connection with Art. 24 (2) Brussels 1a Regulation, but a so-called existential dispute arising from the French doctrine of fictivité.

P. Schlosser: **Prescription as Lack of jurisdiction of an arbitral tribunal**

In view of the expropriation of gold mines the claimant instituted arbitral proceedings on the basis of the Bilateral Agreement between Canada and Venezuela according to the Additional Facility Rules of the Word Bank Centre. The Canadians were successful. The Cour d'Appel de Paris, however, invalidated

the calculation of the award, but not the further elements of the ruling. The reason therefor was a term in the Bilateral Investment Treaty, that the tribunal had only competence to consider events no more than three years prior to the institution of arbitral proceedings. In validating the damage of the Canadians, however, the tribunal had taken into consideration events of a prior occurrence. Normally the claimant had to institute new proceedings because in France the case cannot be referred back to the arbitrators. But since the parties had found a settlement agreement no further proceedings were necessary.

Regulating International Organisations: What Role for Private International Law?

Written by Dr Rishi Gulati, LSE Fellow in Law, London School of Economics; Barrister, Victorian Bar, Australia

The regulation of public international organisations (IOs) has been brought into sharp focus following the landmark US Supreme Court ruling in *Jam v International Finance Corporation586 US (2019)* (Jam). Jam is remarkable because the virtually absolute immunities enjoyed by some important IOs have now been limited in the US (where several IOs are based), giving some hope that access to justice for the victims of institutional action may finally become a reality. Jam has no doubt reinvigorated the debate about the regulation of IOs. This post calls for private international law to play its part in that broader debate. After briefly setting out the decision in Jam, a call for a greater role for private international law in the governance of IOs is made.

The Jam decision

The facts giving rise to the Jam litigation and the subsequent decision by the US Supreme Court has already attracted much discussion by public international lawyers, including by this author here. Only a brief summary is presently

necessary. The International Finance Corporation (IFC), the private lending arm of the World Bank which is headquartered in the US entered into a loan agreement with Coastal Gujarat Power Limited, a company based in India, to finance the construction of a coal-fired power plant in Gujarat. The plaintiffs sued the IFC (including in tort) in a US Federal District Court asserting that pollution from the plant harmed the surrounding air, land, and water. The District Court found that the IFC was absolutely immune under the *US International Organisations Immunities Act 1945* (IOIA). The DC Circuit affirmed that decision. For an analysis of those decisions, see previous posts by this author here and here.

However, in its landmark ruling in Jam, the US Supreme Court reversed the decision of the court below, significantly affecting the potential scope of IO immunities. The IOIA, which applies to the IFC, grants international organizations the 'same immunity from suit…as is enjoyed by foreign governments' (22 U. S. C. §288a(b). The main issue in Jam concerned how the IOIA standard of immunity is to be interpreted. Should it be equated with the virtually absolute immunity that states enjoyed when the IOIA was enacted? Or should the IOIA standard of immunity be interpreted by reference to the restrictive immunity standard (immunity exists only with respect to non-commercial or public acts)? This latter standard is now enshrined in the *US Foreign Sovereign Immunities Act 1976* (s 1605(a)(2), FSIA). By seven votes to one (with Breyer J dissenting) the US Supreme Court has now given a definitive answer. The majority of the court concluded that the IOIA grants immunity with reference to the FSIA standard of immunity, stating:

In granting international organizations the "same immunity" from suit "as is enjoyed by foreign governments," the Act seems to continuously link the immunity of international organizations to that of foreign governments, so as to ensure ongoing parity between the two. The statute could otherwise have simply stated that international organizations "shall enjoy absolute immunity from suit," or specified some other fixed level of immunity. Other provisions of the IOIA, such as the one making the property and assets of international organizations "immune from search," use such noncomparative language to define immunities in a static way…Or the statute could have specified that it was incorporating the law of foreign sovereign immunity as it existed on a particular date…Because the IOIA does neither of those things, we think the "same as" formulation is best

understood to make international organization immunity and foreign sovereign immunity continuously equivalent (Jam, pp. 9-10).

The result is that the IFC (and similarly situated organisations) only possess immunities in respect of their non-commercial or public transactions. While the limiting of IO immunities is to be welcomed for it can only go towards enhancing access to justice for the victims of institutional conduct, the decision in Jam raises more questions than it perhaps answers.

Firstly, how can the decision in Jam be accommodated with the international law notion of IO immunities that finds its basis in the theory of 'functionalism'? The idea being that IOs need immunities to avoid an intrusion into their independence by host states/national courts. Instead of clarifying what this functional standard actually means and how it interacts with the commercial v non-commercial distinction, in Jam, the Supreme Court chose to simply engage in an exercise of statutory interpretation taking a parochial approach (Jam, p. 12). So, there now exists a schism in the international and national (at least in the US) law on IO immunities (see here). Other commentators have tried to provide some indications on how functionalism can be translated to the commercial v non-commercial distinction for the purposes of determining IO immunities, without however providing an answer that will generate any certainty. For the moment, it is simply noted that a transaction that may be within the scope of functional immunities may also be a classically commercial transaction making it difficult to precisely determine what ought to be immune.

Secondly, leaving to one side the schism between the international and national understanding of IO immunities now created, the difficulty in distinguishing between commercial and non-commercial activity itself must not be understated. Webb and Milneshave stated that 'IOs with links to the US like the World Bank face the daunting prospect of litigation in the US Courts exploring the extent and limits of what is "commercial". In state immunity law, this exception has been broadly defined, essentially as comprising the type of activity in which private actors can engage (in contradistinction to the exercise of public power), and its outer boundaries remain unmarked.' Just like the distinction has given significant challenges in the state immunity context (whether the focus should be on the nature of the transaction or its purpose), the difficulty will be even greater in the IO context only creating further uncertainties. As Breyer J pointed out in his dissent:

> *As a result of the majority's interpretation, many of the international organizations to which the United States belongs will discover that they are now exposed to civil lawsuits based on their (U. S.-law-defined) commercial activity. And because "commercial activity" may well have a broad definition, today's holding will at the very least create uncertainty for organizations involved in finance, such as the World Bank, the Inter-American Development Bank, and the Multilateral Investment Guarantee Agency. The core functions of these organizations are at least arguably "commercial" in nature; the organizations exist to promote international development by investing in foreign companies and projects across the world…The World Bank, for example, encourages development either by guaranteeing private loans or by providing financing from its own funds if private capital is not available (Jam, p. 29).*

The justifiable concerns pointed to by Breyer J require a comprehensive response falling nothing short of treaty reform. In fact, the majority of the Supreme Court in Jam observed that treaty amendment was one method to resolve any real or perceived difficulties for IOs in so far as the scope of their immunities is concerned. In rejecting IFC's argument that most of its work of entering into loan agreements with private corporations was likely commercial activity; and the very grant of immunities becomes meaningless if it can be sued in respect of claims arising out of its core lending activities (Jam, p. 15), the court said:

The IFC's concerns are inflated. To begin, the privileges and immunities accorded by the IOIA are only default rules. If the work of a given international organization would be impaired by restrictive immunity, the organization's charter can always specify a different level of immunity. The charters of many international organizations do just that…Notably, the IFC's own charter does not state that the IFC is absolutely immune from suit (Jam, pp. 17-8).

Treaty reform is obviously demanding and time-consuming. Jam nevertheless provides the impetus to pursue it with vigour. Such reform is required not only for organisations such as the IFC, but also IOs more generally.

The need for real and meaningful reform: a role for private international law

Clearly, Jam demonstrates the particular difficulties in assessing the scope of the

IFC's immunities. In answering questions of IO immunities, the tension is between two values: maintaining an IO's functional independence and securing access to justice for the victims of IO action. This tension is not only manifest vis-à-vis the IFC in particular, but exists for all IOs in general. As this author discussed in another work, regardless of the subject matter of a dispute or the gravity of harm, the location of the affected party or the identity of the IO, the public visibility of a dispute or its inconspicuousness, we live in a 'denial of justice age' when it comes to the pursuit of justice against IOs. The victims (including families of the more than 9000 individuals who lost their lives) of cholera introduced in Haiti by UN peacekeepers in 2010 are still awaiting effective justice. The victims of the Srebrenica genocide of 1995 for which the UN assumed moral responsibility have not yet been compensated, with no such compensation in sight. When hundreds of Roma suffered serious harm due to lead poisoning caused by the apparent negligence of the UN Mission in Kosovo in placing vulnerable communities next to toxic mines, the UN belatedly set up a Human Rights Advisory Panel; its adverse findings have gone unenforced to this day. There are countless other disputes, including, contractual, tortious, employment and administrative, where a denial of justice is much too common.

If the balance between IO independence and access to justice is to be better and properly struck, fresh thinking is needed that underpins any reform process. Of course, each IO is different from one another, and the shape that any reforms that may take will need to be particularised to the circumstances of the concerned organisation. Nevertheless, IOs constitute international legal persons with significant commonalities, and there ought to be certain foundational reforms that are equally applicable to most if not all organisations. Private international law can play a major role in any such foundational reform process.

Specifically, as I showed elsewhere, there exists a 'regulatory arbitrage' in the governance of IOs. This arbitrage results in victims of IO conduct slipping through legal loopholes when seeking to access justice. One manifestation of the regulatory arbitrage is provided by the law on IO immunities, including how it is interpreted and/or applied. As is much too common (see for example the Haiti Cholera Litigation), despite lack of access to justice within the institutional legal order which IOs are required to provide under international law, by and large national courts refuse to limit IO immunities interpreting functional immunities as de facto absolute. Therefore, (a) immunities that were always intended to be

limited by functionalism are overextended; and (b) immunities are not made contingent on the provision of access to justice at the institutional level. The balance between perceived institutional independence and access to justice has leaned towards the former. The result is a denial of justice at multiple levels.

For some victims, Jam may ultimately correct the exploitation of this arbitrage in respect of claims pursued against organisations such as the IFC for lending by that organisation is likely to constitute commercial and therefore non-immune. However, other victims will continue to be denied justice due to ambiguous and broad wording used in constituent instruments providing for IO immunities (such as the immunities of the UN). IOs will continue to exploit the prevailing regulatory arbitrage to avoid liability. Unless the exploitation of the regulatory arbitrage is tackled, the denial of justice age cannot be brought to an end. To address this arbitrage, private international law techniques can be used to balance often competing but legitimate values. For example, conceptualising question of IO immunities in terms of 'appropriate' forum can be a useful method to coordinate the exercise of jurisdiction between the IO and national legal orders that co-exist in a pluralist legal space. Here, what should determine whether a national court ought to take jurisdiction over an IO is whether access to justice consistently with fair trial standards is available or can be adequately provided within the IO legal order? This must be determined following a specific and nuanced inquiry as opposed to a tick the box exercise (for employment claims, see a detailed study here).

Further, focusing on the rules on jurisdiction, choice of law and the recognition and enforcement of foreign judgments (the three aspects of private international law), the individual right to access justice can be secured without compromising IO independence for private international law is perfectly suited to slice regulatory authority across legal orders with much precision. This author has called for the Hague Conference on Private International Law to initiate discussions about the negotiation of a global treaty that enshrines the private international law rules applicable between states and IOs. The regulatory framework that must govern IOs is one which involves public, institutional and private international law benefiting from each other's strengths.