Much-awaited draft guidelines on the grave risk exception of the Child Abduction Convention (Art. 13(1)(b)) have been submitted for approval

After years in the making, the revised HCCH draft Guide to Good Practice on Article 13(1)(b) of the Child Abduction Convention has been completed and is accessible here. It has been submitted to the governance body of the Hague Conference on Private International Law (*i.e.* the Council on General Affairs and Policy) for approval.

There are five exceptions under the Child Abduction Convention and this is one of them; see also Arts 12(2), 13(1)(a), 13(2) and 20 of the Convention. Under this exception, the judicial or administrative authority of the requested State *may* refuse to return the child to his or her State of habitual residence following a wrongful removal or retention.

According to the latest survey of the Hague Conference of applications made in 2015, the refusals on the basis of Article 13(1)(b) of the Child Abduction Convention amount to 18% of the total judicial refusals. Thus, this is the most frequently raised exception. Other grounds for judicial refusal relate to the scope of the Convention (such as the lack of habitual residence or rights of custody). See the survey available here (p. 15).

Article 13(1)(b) contains the following three different types of risk:

- a grave risk that the return would expose the child to physical harm;
- a grave risk that the return would expose the child to psychological harm; or
- a grave risk that the return would otherwise place the child in an intolerable situation.

Particularly useful for practitioners are the examples of assertions that can be

raised under this exception, which include but are not limited to (see paras 53-77):

- Domestic violence against the child and / or the taking parent
- Economic or developmental disadvantages to the child upon return
- Risks associated with circumstances in the State of habitual residence
- Risks associated with the child's health
- The child's separation from the taking parent, where the taking parent would be unable or unwilling to return to the State of habitual residence
- Separation from the child's sibling(s)

In my opinion, the Child Abduction Convention, and in particular this exception, can no longer be interpreted in a vacuum and one should also look to the human rights case law which is quickly developing in this area (in addition to the applicable regional regulations).

Out now: RabelsZ 83 (2019), Issue 1

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

Kutner, Peter, Recognition and Enforcement of Foreign Judgements – The Common Law's Jurisdiction Requirement, pp. 1 et seq

> *The "Dicey Rule" has been treated as canonical in England and elsewhere. However, it has changed over time, it has been based in part on UK legislation, and it does not reflect other possible bases of jurisdiction that have been accepted in some cases. This article will set forth what the common law (the law without specific alteration by statute) has been and now is on the subject of " jurisdiction in the international sense". Drawing on case law and authoritative writing from across the common law world, the article will identify and examine established and debatable grounds for jurisdiction and how they have been*

applied. As will be seen from references to cases in courts outside England and writings on conflict of laws in countries other than England, for some countries the law on jurisdictional "competence" is or may be different from what is stated in the current version of the Dicey Rule.

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

Increasingly, victims of global warming venture outside their own jurisdiction to sue polluters. Following the example of the United States, the phenomenon has now reached Europe. This article addresses the many questions raised by climate change litigation in a cross-border context. Starting from the treaty framework for greenhouse gas emissions, it analyses issues in respect of court jurisdiction and the applicable law from a European perspective. The authors argue for a balancing of the legitimate interests of, on one hand, private individuals who suffer the consequences of climate change and, on the other, industrial firms that have acquired and relied on emission rights. With regard to the competent court, they suggest limiting court jurisdiction under Art. 7(2) Brussels Ia Regulation to those places where it was foreseeable, from the perspective of the polluter, that damage would occur. With regard to the applicable law, they propose tempering Art. 7 Rome II Regulation by an analogous application of Art. 5(1) para. 2 of the same Regulation. While the victim can generally choose between the law of the country where the damage originated and where the damage occurred, the latter option should be restricted in the case of climate change litigation because the place of damage is typically unforeseeable for the tortfeasor. Furthermore, a valid authorization by the state of emission should be taken into account under Art. 17 Rome II Regulation insofar as appropriate. The law of the country where the damage occurred could apply to liability where an authorization does not exist, was obviously invalid, obtained by fraud or where such authorization has been consciously transgressed.

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

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

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

> *Even in the twenty-first century, financial claims after a broken engagement to marry play an important role and can cause difficulties, especially in cross-border relationships. Firstly, damages may be claimed for financial losses due to wedding and marriage preparations; secondly, the fate of engagement gifts,*

especially the ring, needs to be determined. This article examines engagement-related claims under German, French and English law, deriving a suggestion for useful contemporary rules from their comparison. A comparative inquiry into the conflict of laws rules then shows that the current rules pose various problems due to lacunae and disputes. The article develops a proposal to resolve these problems through clear, specifically engagement-related conflict of laws rules.

No violation of Article 8 ECHR by Greek authorities regarding the measures taken in a child abduction case

Almost a year ago, the European Court of Human Rights issued a very interesting judgment on the interpretation of Article 8 ECHR, involving a couple (husband Greek, spouse Romanian) living with their two children in the city of Ioannina, Greece. The case found no coverage in Greece (and elsewhere), probably because it was not translated in English. Crucial questions related to the operation of the 1980 Hague Child Abduction Convention and the Brussels II bis Regulation were elaborated by the Court, which ruled that Greek authorities did not violate Article 8 ECHR.

Case M.K. v. Greece (application no. 51312/16), available in French

A comment on the judgment in English has been posted by *Sara Lembrechts – Researcher at University of Antwerp & Policy Advisor at Children's Rights Knowledge Centre (KeKi), Belgium*.

Conference ‘Families Beyond Borders. Migration with or without private international law’, Ghent University, 28 and 29 March 2019 (start 28 March at 1 pm)

On 28 and 29 March 2019, the international conference ‘Families Beyond Borders. Migration with or without private international law’ will take place in Ghent at the Faculty of Law of Ghent University (Belgium). The conference, organised by Jinske Verhellen, will focus on the challenging interactions between private international law, migration law and human rights law.

Speakers will deal with legal problems encountered by refugees and migrants with regard to their personal status acquired in one country and taken along to another country. How do people prove their family ties? How can families be reunited? How do unaccompanied refugee and migrant children prove their minority? How do asylum and migration authorities assess foreign documents that relate to the personal status of refugees? What happens if no (authentic) documents can be presented? How to combat fraud relating to personal status documents in an efficient manner without depriving migrants of their right to family life? These are just some questions that will be discussed.

The conference will put the spotlight on the ‘people’ (subject of all kinds of legal procedures). Therefore, the programme will be centred around three groups of people: persons in need of international protection, refugee and migrant children, migrants and their families. Both academics and experts with experience from the field will take and share the floor.

Ghent University is very honoured to welcome the following keynote speakers: Prof. James C. Hathaway (University of Michigan Law School) and Judge Ksenija Turkovic (European Court of Human Rights).

Confirmed speakers and rapporteurs are: Prof. Laura Carpaneto (University of Genoa), Prof. Sabine Corneloup (Université Paris II), Judge Martina Erb Klünemann (Family Court Germany, EJN and International Hague Network of Judges), Katja Fournier (Coordinator Platform Minors in Exile), Dr. Susanne Gössl (University of Bonn), Steve Heylen (Vice-President European Association of Civil Registrars), Christelle Hilpert (Head of the French Central Authority – 1996 Hague Convention), Prof. Maarit Jänterä-Jareborg (Uppsala University), Prof. Fabienne Jault-Seseke (Université Versailles), Prof. Thalia Kruger (University of Antwerp), Dr. Andrea Struwe, (attorney), Lise Van Baelen (Restoring Family Links Officer, Belgian Red Cross), Dr. Hans van Loon (former Secretary General of the Hague Conference on Private International Law), Prof. Jinske Verhellen (Ghent University) and Prof. Patrick Wautelet (Université de Liège).

Prof. Jean-Yves Carlier (Université catholique Louvain) will draw the conference conclusions.

The full program and information on registration is available here.

Grand Chamber judgment: case of Molla Sali v. Greece (application no. 20452/14)

In a much anticipated outcome, the Grand Chamber of the European Court of Human Rights held unanimously that there had been a violation of Article 14 (prohibition of discrimination) of the European Convention on Human Rights, read in conjunction with Article 1 of Protocol No. 1 (protection of property) to the Convention.

The case concerned the application by the domestic courts of Islamic religious law (Sharia) to an inheritance dispute between Greek nationals belonging to the Muslim minority, contrary to the will of the testator (a Greek belonging to the Muslim minority, Ms Molla Sali's deceased husband), who had bequeathed his

whole estate to his wife under a will drawn up in accordance with Greek civil law.

The full text of the decision may be found here.

The press release of the Court is available here.

For the recent amendments in pertinent Greek legislation, see here.

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Prof. Jean-Yves Carlier (Université catholique Louvain) will draw the conference conclusions.

The full program and information on registration will soon be available here.

Movement of persons and their

personal status in a globalized world: Conference in Lyon (France) on 11-12 October 2018

The **University of Lyon III** will host the conference **“La circulation des personnes et de leur statut dans un monde globalisé”** on **11 and 12 October 2018**.

After a short introduction on the stakes and the historical aspects of the law on such movements, the first day will address the principles governing those movements (Human rights, EU rights, party autonomy and the States’ interests) and day two the diverse methods, traditional or in test, to regulate them (Conflict of laws v. Recognition ; Impacts of public order, fraud and abuse of rights; Documents, constitution, absence and effects).

The conference is also remarkable by its panels since more than 60 scholars and professionals (lawyers, notary public, international organizations) from 7 nationalities are announced lead by Profs. Hugues Fulchiron (Lyon III), Hélène Gaudemet-Tallon (Paris II), Jean Foyer (Paris II), Paul Lagarde (Paris I), Hans van Loon (Former Sec. Gen. of the Hague Conference) and Horatia Muir Watt (Science Po.).

Publication of all the interventions is also planned. More information is available here

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Genocide by Expropriation – New Tendencies in US State Immunity

Law for Art-Related Holocaust Litigations

On 10 July 2018, the United States Court of Appeals for the District of Columbia Circuit rendered its judgment in the matter of Alan Philipps et al. v. the Federal Republic of Germany and the Stiftung Preussischer Kulturbesitz.

This case involves a claim by heirs of Holocaust victims for restitution of the „*Welfenschatz*" (Guelph Treasure), a collection of medieval relics and devotional art housed for generations in the Cathedral of *Braunschweig* (Brunswick), Germany. This treasure is now on display at the *Kunstgewerbemuseum Berlin* (Museum of Decorative Arts) which is run by the Stiftung Preussischer Kulturbesitz. The value of the treasure is estimated to amount to USD 250 million (according to the claim for damages raised in the proceedings).

The appeal judgment deals with, inter alia, the question whether there is state immunity for Germany and the Stiftung respectively. Under the US Federal Sovereign Immunities Act, foreign sovereigns and their agencies enjoy immunity from suit in US courts unless an expressly specified exception applies, 28 U.S.C. § 1604.

One particularly relevant exception in Holocaust litigations relating to works of art is the „expropriation exception", § 1605(a)(3). This exception has two requirements. Firstly, rights in property taken in violation of international law must be in issue. Secondly, there must be an adequate commercial nexus between the United States and the defendant:

> „A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States."

According to the Court's recent judgment in Holocaust litigation against Hungary

(Simon v. Republic of Hungary, 812 F.3d 127, D.C. Cir. 2016), intrastate expropriations in principle do not affect international law but are internal affairs of the acting state vis-à-vis its citizens. However, if the intrastate taking amounts to the commission of genocide, such a taking subjects a foreign sovereign and its instrumentalities to jurisdiction of US courts (Simon v Hungary, op.cit.).

This leads to the question of what exactly is „genocide" in this sense. The Court in Simon adopted the definition of genocide set forth in Article II lit. c of the Convention on the Prevention of the Crime of Genocide of 9 December 1948, 78 U.N.T.S. 277, (signed by the USA on 11 December 1948, ratified on 25 November 1988), i.e. „[d]eliberately inflicting" on "a national, ethnical, racial or religious group … conditions of life calculated to bring about its physical destruction in whole or in part". Thus, the Court in Philipps, as it observed, was „asked for the first time whether seizures of art may constitute 'takings of property that are themselves genocide' ". "The answer is yes" (Philipps v. Germany, op.cit.).

The Court prepared this step in Simon v. Hungary:

> „The Holocaust proceeded in a series of steps. The Nazis achieved [the "Final Solution"] by first isolating [the Jews], then expropriating the Jews' property, then ghettoizing them, then deporting them to the camps, and finally, murdering the Jews and in many instances cremating their bodies".

Therefore, actions taken on the level of first steps towards genocide are themselves genocide if later steps result in genocide even if these first measures as such, without later steps, would not amount to genocide. To put it differently, this definition of genocide includes expropriations that later were escalated into genocide if already these expropriations were „deliberately inflicted" „to bring about … physical destruction in whole or in part" (see again Art. II lit. c Prevention of Genocide Convention).

It will be a crucial question what the measures and means of proof for such an intent should be. In this stage of the current proceedings, namely on the level of appeal against the decision of first instance not to grant immunity, the Philipps Court explained, in its very first sentence of the judgment, that the claimants' submissions of facts have to be laid down as the basis for review:

> „Because this appeal comes to us from the district court's ruling on a motion to dismiss, we must accept as true all material allegations of the complaint,

> drawing all reasonable inferences from those allegations in plaintiffs' favor."

However, the position of the US Congress on the point is clear: As the Philipps Court explains,

> "[i]n the Holocaust Expropriated Art Recovery Act (HEAR Act 2016), which extended statutes of limitation for Nazi art-looting claims, Congress 'f[ound]' that 'the Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe as part of their genocidal campaign against the Jewish people and other persecuted groups', see Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2, 130 Stat. 1524, 1524."

It will be another crucial question, what „expropriation" exactly means in the context of the Holocaust. It is common ground that the unlawful taking of property from persecuted persons not only took place by direct taking but also and structurally through all sorts of transactions under duress. However, the exact understanding of what constitutes such "forced sales" – and thereby "expropriation" – seems to differ substantially. Some argue that even a sale of art works at an auction in a safe third state after emigrating to that state constitutes a forced sale due to the causal link between persecution, emigration and sale for making money in the exile. Under Art. 3 of the US Military Law No. 59 of 10 November 1947 on the Restitution of Identifiable Property in Germany, there was a „presumption of confiscation" for all transfers of property by a person individually persecuted or by a person that belonged to class of persecuted persons such as in particular all Jews. This presumption could be rebutted by submission of evidence that the transferor received a fair purchase price and that the transferor could freely dispose of the price. It is not clear whether this standard or a comparable standard or another standard applies in the case at hand. Irrespective of this legal issue, the claimants submit on the level of facts that the purchase price was only 35% of the fair market value in 1935. This submission was made in the following context:

Three Jewish art dealers from Frankfurt am Main, ancestors to the claimants, acquired the Guelph Treasure in October 1929 from the dynasty of Brunswick-Lüneburg shortly before the economic crisis of that year. The agreed price was 7.5 million Reichsmark (the German currency of the time). The estimations of the value prior to the acquisition seem to have ranged between 6 and 42 million

Reichsmark. The sales contract was signed by the art dealers „J.S. Goldschmidt“, „I. Rosenbaum“ und „Z.M. Hackenbroch“. These dealers and others formed a “consortium“ with further dealers to be able to raise the money (the whereabouts of the contract for this consortium and thus the precise structure of this joint-venture is unknown up to now).

According to the sales contract, the buyers were obliged to resell the Treasure and share profits with the seller if these profits go beyond a certain limit. The contract expressly excluded the possibility for the buyers to keep the Treasure or parts of it. Rather, the buyers were to take „every effort” to achieve a resale.

In the following years, the consortium undertook many steps to sell the Treasure in Germany and in the USA. However, according to the German Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property (i.e. the alternative dispute resolution body established by the German government in order to implement the non-binding Washington Principles on Nazi Confiscated Art of 3 December 1998, on which 44 states, including Germany and the USA agreed), it was common ground that the economic crisis reduced means and willingness of potential buyers significantly. In 1930/1931, the dealers managed to sell 40 pieces for around 2.7 million *Reichsmark* in total. After displaying for sale in the USA, the remaining 42 items were stored in Amsterdam. In 1934, the Dresdner Bank showed interest as a buyer, acting on behalf of the State of Prussia. The bank apparently did not disclose this fact. In April of 1935, the consortium made a binding offer for 5 million Reichsmark, the bank offered 3.7 million, the parties ultimately agreed upon 4.25 million, to be paid partly in cash (3.37 million), partly by swap with other works of art to be sold abroad in order to react to foreign currency exchange restrictions. The sales contract was signed on 14 June 1935 by the dealers and the bank, acting on behalf of the State of Prussia whose Prime Minister was Hermann Göring at the time. In July 1935, (almost) the full price was paid (100.000 Reichsmark were kept as commission). The 42 objects were transferred to Berlin. The consortium seemed to have been able to freely dispose of the money that they received at that time and pay it out to the members of the consortium. Later, all but one of the dealers had to emigrate, the one remaining in Germany came to death later (apparently under dubious circumstances, as is submitted by the claimants).

On the merits, the courts will have to take a decision on the central point of this

case whether these facts, as amended/modified in the further proceedings, amount to “expropriation” and, if so, whether this expropriation was intended to „deliberately inflict … conditions of life calculated to bring about … physical destruction in whole or in part” (see once more Article II lit. c of the Convention on the Prevention of the Crime of Genocide).

On a principal level, the Federal Republic of Germany argued that allowing this suit to go forward will “dramatically enlarge U.S. courts’ jurisdiction over foreign countries’ domestic affairs” by stripping sovereigns of their immunity for any litigation involving a “transaction from 1933–45 between” a Nazi-allied government and “an individual from a group that suffered Nazi persecution.” In addition to that, the principal line of argument would certainly apply to other cases of genocide and preparatory takings of property. The Court was not impressed:

> “Our conclusion rests not on the simple proposition that this case involves a 1935 transaction between the German government and Jewish art dealers, but instead on the heirs’ specific—and unchallenged—allegations that the Nazis took the art in this case from these Jewish collectors as part of their effort to drive [Jewish people] out of their ability to make a living.”

Even then, the enlargement of jurisdiction over foreign states by widening the exceptions to state immunity under the concept of genocide by expropriation appears to be in contrast to the recent efforts by US courts to narrow down jurisdiction in foreign-cubed human rights litigations under the ATS and in general.

However, the Federal Republic of Germany does no longer need to worry: The Court held that the second requirement of the expropriation exception is not fulfilled because the Guelph Treasure is not present in the United States in connection with a commercial activity carried on by the foreign state in the United States. In fact, it is not present in the USA at all but still in Berlin.

Yet, in respect to the Stiftung Preussischer Kulturbesitz, the suit will continue: For a state agency it seems sufficient that the property in question is owned or operated by that agency or instrumentality of the foreign state if that agency or instrumentality is engaged in a commercial activity (not necessarily in connection with the property in question) in the United States. The ratio of this rule is

difficult to understand for outsiders and appears not to be in line with the overall developments of (personal) jurisdictional law in the USA, and if at the end of the day there is a judgment against the Stiftung to return the Treasure there will of course be the issue of recognition and enforcement of that judgment in Germany – including all political implications and considerations of public policy.

The parties may want to think about arbitration at some point. That was the way out from lengthy court proceedings and delicate questions on all sorts of conflicts of laws in the famous case of Maria Altmann v. Republic of Austria that likewise turned, inter alia, on issues of state immunity for foreign states and their agencies or instrumentalities. In general, it seems that arbitration could play a larger role in art-related disputes (see e.g. the German Institution for Arbitration's Autumn Conference on 26 September 2018 in Berlin).

Islamic Marriage and English Divorce – a new Decision from the English High Court

In England, almost all married Muslim women have had a nikah, a religious celebration. By contrast, more than half of them have not also gone through a separate civil ceremony, as required under UK law. The often unwelcome consequence is that, under UK law, they are not validly married and therefore insufficiently protected under UK law: they cannot claim maintenance, and they cannot get a divorce as long as the marriage is viewed, in the eyes of the law, as a nullity.

The government has tried for some time to remedy this, under suspicious gazes from conservative Muslims on the one hand, secularists on the other. A 2014 report (the 'Aurat report'), which demonstrated, by example of 50 cases, the hardships that could follow from the fact that nikahs are not recognized, found attention in the government party. An independent review into the application of

sharia law in England and law, instigated by Theresa May (then the Home Secretary) in 2016 and published earlier this year, recommended to ensure that all Islamic marriages would also be registered; it also recommended campaigns for increased awareness.

Such steps do not help where the wedding already took place and has not been registered. A new decision by the High Court brings partial relief. Nasreen Akhter (who is a solicitor and thus certainly not an uneducated woman ignorant of the law) asked to be divorced from her husband of twenty years, Mohammed Shabaz Khan. Khan's defense was that the marriage, which had been celebrated as a nikah in west London, existed only under Islamic, not under UK law, and therefore divorce under UK law was not possible. Indeed, up until now, the nikah had been considered a non-marriage which the law could ignore, because it did not even purport to comply with the requirements of English law. The High Court was unwilling to presume the lived marriage as valid. However, drawing at length on Human Rights Law, it declared the marriage void under sec 11 of the Matrimonial Causes Act 1973 and granted the wife a decree of nullity. This has important consequences: Unlike a non-marriage, a void marriage allows a petitioner to obtain financial remedies.

The decision represents a huge step towards the protection of women whose Islamic marriages are not registered. It makes it harder for men to escape their obligations under civil law. At the same time, the decision is not unproblematic: it refuses recognition of an Islamic marriage as such, while at the same time, under certain conditions, treating it like a recognized marriage. In all likelihood, only registration will create the needed certainty.

The decision is here.

The “Coman” Case (C-673/16): Some reflections from the point of view of private international law

Written by Dr. iur. Baiba Rudevska (Latvia)

On 5 June 2018, the ECJ rendered a judgment in the *Coman* case (C-673/16). For the first time the ECJ had the opportunity to rule, on the concept of ‘*spouse*’ within the meaning of the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Directive 2004/38) in the context of a same-sex marriage. Even if the Directive only covers questions related to the entry and residence in the European Union (EU), this judgment could be of interest for Private International lawyers as well.

Main Facts:

Mr Coman (a Romanian and American citizen), and Mr Hamilton (an American citizen) met in the United States and lived there together. Mr Coman later took up residence in Belgium while Mr Hamilton continued to live in the US. In 2010 they got married in Belgium. In 2012 they contacted the competent Romanian authority to request information on the conditions under which Mr Hamilton, a non-EU citizen, could obtain the right to reside in Romania for more than three months. The Romanian authority replied that Mr Hamilton had only a right of residence for three months because, according to the Romanian Civil Code, marriage between two persons of same sex was not recognised. The case went up to the Constitutional Court, which decided to make the request for a preliminary

ruling. One of the questions referred to the ECJ was as follows:

Does the term “spouse” in Article 2(2)(a) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter, include the same-sex spouse, from a State which is not a Member State of the European Union, of a citizen of the European Union to whom that citizen is lawfully married in accordance with the law of a Member State other than the host Member State?

Only this question is of interest for private international law (hereinafter referred to as “PIL”). Let us take a look at the decision and at the reasoning of the ECJ.

Decision of the ECJ:

The ECJ decided that:

1. In a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, in accordance with the conditions laid down in Article 7(1) of Directive 2004/38 in a Member State other than that of which he is a national, and, whilst there, has created and strengthened a family life with a third-country national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex.
2. Article 21(1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months. That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38.

As we can see from the operative part, the ECJ does *not* impose the recognition of same-sex marriages in all the Member States.

Main Reasoning of the ECJ:

The first important thing to be noted is that the ECJ only uses the term "recognition of marriage" (paras. 36, 40, 42, 45, 46 of the judgment) whereas the Advocate General only referred to the term "autonomous interpretation" (paras. 33-58 of the opinion). And *vice versa*– the ECJ does not directly mention the term "autonomous interpretation" and the Advocate General does not analyse the "recognition of marriage". This raises an interesting question: what exactly was the method used by the ECJ in this case? Autonomous interpretation and recognition are two different methods; the former is widely used both in EU law (in general) and in international human rights law, whereas the latter is typical of PIL. Only in the second case (if we recognise that the ECJ has applied the recognition method) will this judgment be important and have a considerable impact in the field of PIL.

Here is my opinion on how this judgment should be construed:

1. The ECJ starts its reasoning by *de facto* using the method of autonomous interpretation:

(a) The term 'spouse' refers to a person joined to another person by the bonds of marriage (para. 34 of the judgment).

(b) The term 'spouse' within the meaning of Directive 2004/38 is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned (para. 35 of the judgment).

(c) Article 2(2)(a) of that directive, applicable by analogy in the present case, does not contain any reference with regard to the concept of 'spouse' within the meaning of the Directive. It follows that a Member State cannot rely on its national law as a justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another Member State in accordance with the law of that state (para. 36 of the judgment).

However, after that, the ECJ switches to the term 'recognition of marriage' (paras. 35 et seq.). Does the ECJ switch to recognition or is it still using autonomous interpretation with different words?

2. It seems that the ECJ continues to applyautonomous interpretation of the term ‘spouse’, as the Advocate General did in his observations. In fact, the use of the words ‘recognition of marriage’ must be understood within the context of Romanian domestic law (Civil Code) according to which marriages between persons of the same sex entered into or contracted abroad by Romanian citizens or by foreigners are not recognised in Romania (paras. 8, 36 of the judgment). From the point of view of PIL, it is important to point out that this Romanian legal provision already contains the Romanian public policy clause; in other words, the public policy exception is already integrated in this legal norm.

Why Autonomous Interpretation?

Both the Advocate General and the ECJ stressed that Article 2(2)(b) of the Directive 2004/38 refers to the conditions laid down in the relevant legislation of the Member State to which that citizen intends to move or in which he intends to reside, but Article 2(2)(a) of that Directive, applicable by analogy in the present case, does not contain any such reference with regard to the concept of ‘spouse’ within the meaning of the Directive. Consequently, the Member State cannot rely on its national law as a justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another Member State in accordance with the law of that state (para. 36 of the judgment; paras. 33, 34 of the opinion).

The Advocate General points out that the terms of a provision of EU law without express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the EU (para. 34 of the opinion). The method of autonomous interpretation (qualification *lege communae*) is the only alternative to a reference to domestic law (qualification *lege fori*or *lege causae*). There are no other alternatives, even if in practice the ECJ does not clearly emphasise the application of this method [Audit M. L’interpretation autonome du droit international privé communautaire // *Journal du droit international*, 2004, n° 3, p. 799].

The use of the Advocate General’s opinion in the reasoning of the ECJ leads to the conclusion that the ECJ has applied the method of autonomous interpretation (rather than recognition) of a precise term to construe, namely ‘spouse’ (Article

2(2)(a) of the Directive).

Why Not Recognition?

The method of recognition is one of the methods used within the framework of PIL. However, as Professor Lagarde has shown, this method can be applied in primary EU law and not in secondary law (like directives or regulations) [Lagarde P. La reconnaisance. Methode d'emploi. In: Vers de nouveaux équilibres entre ordres juridiques. *Mélanges en l'honneur de H.Gaudemet-Tallon*. Paris: Dalloz, 2008, p. 483].

Therefore, in cases like *Grunkin Paul*(C-353/06) and *Bogendorff von Wolffersdorff*(C-438/14) we see the application of this method to names, according to provisions of TFEU (see operative parts of both judgments). The application of recognition also implies some changes in the civil registers of the Member States. On the other hand, what had been requested in the *Coman*case was the interpretation of Article 2(2)(a) of the Directive and not a ruling on the recognition of same-sex marriages within the EU. The sole context of the word 'recognition' can be found in the relevant provision of Romanian law, excluding the recognition of foreign same-sex marriages. One can only guess, but it seems that the confusion of two methods – "autonomous interpretation" and "recognition" – has been ultimately inspired by the wording of the Romanian legal provision.

Conclusions:

The interpretation and application of the judgment in the *Coman* case is narrower than it seems at the first glance. In reality, the ECJ has applied the method of autonomous interpretation of the term 'spouse' used in Article 2(2)(a) of the Directive 2004/38. According to the ECJ, this term is gender-neutral and must be understood as encompassing same-sex spouses – but only in the context of the Directive.

Therefore, this judgment does not impose the recognition of foreign same-sex marriages within the EU. It only means that Romania must grant entry and residence permits to same-sex spouses too. In such situations Romania must apply the autonomous interpretation of the term 'spouse' instead of a domestic legal norm prohibiting the recognition of foreign same-sex marriages in Romania. In other words, Article 21(1) TFEU must be seen as precluding a Member State from

applying its domestic law on this particular point, and the domestic public policy exception cannot be applied either. However, this interpretation relates only to the Directive. The qualification *lege communae* of the term ‘spouse’ shall prevail over its qualification *lege fori*. No more and no less.

An additional remark: see the new Regulation (EU) 2016/1191 of the European Parliament and of the Council on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 [OJ L 200, 26.7.2016, pp. 1-136]. Article 2(4) of this Regulation states that it does not apply to the recognition, in a Member State, of legal effects relating to the content of public documents (including public documents establishing the fact of marriage, capacity to marry, and marital status; Article 2(1)(e)), issued by the authorities of another Member State.