1st Issue of Journal of Private International Law for 2025

The first issue of the Journal of Private International Law for 2025 was published today. It contains the following articles:

Pietro Franzina, Cristina González Beilfuss, Jan von Hein, Katja Karjalainen & Thalia Kruger, "Cross-border protection of adults: what could the EU do better?†"

On 31 May 2023 the European Commission published two proposals on the protection of adults. The first proposal is for a Council Decision to authorise Member States to become or remain parties to the Hague Adults Convention "in the interest of the European Union." The second is a proposal for a Regulation of the European Parliament and the Council which would supplement (and depart from, in some respects) the Convention's rules. The aim of the proposals is to ensure that the protection of adults is maintained in cross-border cases, and that their right to individual autonomy, including the freedom to make their own choices as regards their person and property is respected when they move from one State to another or, more generally, when their interests are at stake in two or more jurisdictions. This paper analyses these EU proposals, in particular as regards the Regulation, and suggests potential improvements.

Máire Ní Shúilleabháin, "Adult habitual residence in EU private international law: an interpretative odyssey begins"

This article examines the first three CJEU cases on adult habitual residence in EU private international law, against the background of the pre-existing (and much more developed) CJEU jurisprudence on child habitual residence. While the new trilogy of judgments provides some important insights, many questions remain, in particular, as to the scope for contextual variability, and on the role of intention. In this article, the CJEU's treatment of dual or concurrent habitual residence is analysed in detail, and an attempt is made to anticipate the future development of what is now the main connecting factor in EU private international law.

Felix Berner, “Characterisation in context – a comparative evaluation of EU law, English law and the laws of southern Africa”

Academic speculation on characterisation has produced a highly theorised body of literature. In particular, the question of the governing law is the subject of fierce disagreement: Whether the lex fori, the lex causae or an “autonomous approach” governs characterisation is hotly debated. Such discussions suggest that a decision on the governing law is important when lawyers decide questions of characterisation. Contrary to this assumption, the essay shows that the theoretical discussion about the governing law is unhelpful. Rather, courts should focus on two questions: First, courts should assess whether the normative context in which the choice-of-law rule is embedded informs or even determines the question of characterisation. Insofar as the question is not determined by the specific normative context, the court may take into account any information it considers helpful, whether that information comes from the lex fori, the potential lex causae or from comparative assessments. This approach does not require a general decision on the applicable law to characterisation, but focuses on the normative context and the needs of the case. To defend this thesis, the essay offers comparative insights and analyses the EU approach of legislative solutions, the interpretation of assimilated EU law in England post-Brexit and the reception of the via media approach in southern Africa.

Filip Vlcek, “The existence of a *genuine* international element as a pre-requisite for the application of the Brussels Ia Regulation: a matter of EU competence?”

Under Article 25(1) of the Brussels Ia Regulation, parties, regardless of their domicile, may agree on a jurisdiction of a court or the courts of an EU Member State to settle any disputes between them. The problem with this provision is that it remains silent on the question of whether it may be applicable in a materially domestic dispute, in which the sole international element is a jurisdictional clause in favour of foreign courts. Having been debated in the literature for years, the ultimate solution to this problem has finally been found in the recent judgment of the ECJ in Inkreal (C-566/22). This article argues that the ECJ should have insisted on the existence of a material international element in order for Article 25 of the Regulation to apply. This, however, does not necessarily stem from the interpretation of the provision in question, as Advocate General de la Tour

seemed to propose in his opinion in Inkreal. Instead, this article focuses on the principle of conferral, as the European Union does not have a legal base to regulate choice-of-court clauses in purely internal disputes. Accordingly, with the Regulation applying to legal relationships whose sole cross-border element is a prorogation clause, the Union legislature goes beyond the competence conferred on it by Article 81 TFEU. Such an extensive interpretation of the Regulation's scope, which is, in reality, contrary to the objective of judicial cooperation in civil matters, is moreover prevented by the principle of subsidiarity as well as the principle of proportionality. Finally, this approach cannot be called into question by the parallel applicability of the Rome I and II Regulations in virtually analogous situations as those Regulations become inherently self-limiting once the international element concerned proves to be artificial.

Adrian Hemler, "Deconstructing blocking statutes: why extraterritorial legislation cannot violate the sovereignty of other states"

Blocking statutes are national provisions that aim to combat the legal consequences of foreign, extraterritorial legislation. They are often justified by an alleged necessity to protect domestic sovereignty. This article challenges this assumption based on an in-depth discussion of the sovereignty principle and its interplay with the exercise of state power regarding foreign facts. In particular, it shows why a distinction between the law's territorial scope of sovereign validity and its potentially extraterritorial scope of application is warranted and why, based on these foundations, extraterritorial legislation cannot violate foreign sovereignty. Since Blocking Statutes cannot be understood to protect domestic sovereignty, the article also discusses how they serve to enforce international principles on extraterritorial legislation instead.

Michiel Poesen, "A Scots perspective on *forum non conveniens* in business and human rights litigation: *Hugh Campbell KC v James Finlay (Kenya) Ltd*"

In Hugh Campbell KC v James Finlay (Kenya) Ltd the Inner House of the Court of Session, the highest civil court in Scotland subject only to appeal to the UK Supreme Court, stayed class action proceedings brought by a group of Kenyan employees who claimed damages from their Scottish employer for injuries

suffered due to poor labour conditions. Applying the forum non conveniens doctrine, the Court held that Kenya was the clearly more appropriate forum, and that there were no indications that the pursuers will suffer substantial injustice in Kenya. Campbell is the first modern-day litigation in Scotland against a Scottish transnational corporation for wrongs allegedly committed in its overseas activities. This article first observes that the decision of the Inner House offers valuable insight into the application of forum non conveniens to business and human rights litigation in Scotland. Moreover, it argues that the decision would have benefitted from a more rigorous application of the jurisdictional privilege in employment contract matters contained in section 15C of the Civil Jurisdiction and Judgments Act 1982

Hasan Muhammad Mansour Alrashid, "Appraising party autonomy in conflict-of-laws rules in international consumer and employment contracts: a critical analysis of the Kuwaiti legal framework"

Party autonomy plays a vital role in international contracts in avoiding legal uncertainty and ensuring predictability. However, its application in international employment and consumer contracts remains a subject of debate. Consumers and employees are typically the weaker parties in these contracts and often lack the expertise of the other party, raising questions about their autonomy to choose the applicable law. Globally, legal systems differ on this point with some permitting full party autonomy, others rejecting it outrightly and some allowing a qualified autonomy with domestic courts empowered to apply a different law in deserving cases to protect the employee or consumer. Kuwaiti law allows full autonomy only in international consumer contracts but prohibits it in international employment contracts. This paper critically analyses Kuwait's legal approach to find an appropriate balance between the principle of party autonomy in the choice of law and the protection of employees and consumers.

Alexander A. Kostin, "Recognition and enforcement of foreign judgments in bankruptcy and insolvency matters under Russian law"

This article addresses the role of certain Russian Federal Law "On Insolvency (Bankruptcy)" provisions (eg Article 1(6)) for resolving bankruptcy and insolvency

matters under Russian law. The author argues that the "foreign judgment on the insolvency matters" term covers not only the judgments on initiation of bankruptcy/insolvency, but also other related judgments like those on vicarious liability, avoidance of transactions and settlement agreements. The issues associated with enforcing foreign judgments on the grounds of reciprocity under Article 1(6) of the Federal Law "On Insolvency (Bankruptcy)" are being explored and valid arguments in favour of recognition simpliciter (recognition of foreign judgments without extra exequatur proceedings at the national level) are provided. The legal effects of foreign judgments on the initiation of bankruptcy/insolvency proceedings recognition are analysed as well as the interconnection between relevant provisions of the Russian legislation on lex societatis of a legal entity and the rules for recognising foreign judgments on the initiation of bankruptcy/insolvency proceedings.

Report of the Oxford Conference on "Characterisation in the Conflict of Laws"

The author of this report is Meltem Ece Oba (Koç University, Istanbul). The post is being published simultaneously on Conflictoflaws.net and on the EAPIL blog.

On 20-21 March 2025, a conference on “Characterisation in the Conflict of Laws” was convened at St Hilda’s College, Oxford. Under the auspices of the Institute of European and Comparative Law in the Law Faculty of the University of Oxford, the conference was jointly organised by Dr **Johannes Ungerer** (University of Oxford and Notre Dame University in England), Dr **Caterina Benini** (Catholic University of Sacred Heart, Milan) and PD Dr **Felix Berner** (University of Tübingen). The conference brought together scholars and practitioners from several jurisdictions around the world.

The conference’s topic, characterisation, is the process for identifying the nature or category of a particular cause of action (for instance contractual, tortious, proprietary, corporate, matrimonial), so that the correct connecting factor can be employed which then points to the applicable law or to the competent court. Characterisation poses difficulties where the action is domestically unknown or falls in-between two categories and could thus be potentially litigated in different fora or under different laws, leading to different outcomes. Different methods proposed for characterisation make this process even more complex. In this conference, participants explored characterisation from historical, methodological, critical, practical, and further perspectives with the aim to shed light on some of the most pressing and controversial issues of what arguably is the most crucial step for a court when determining its international jurisdiction and the applicable law.

Following the opening remarks by the three organisers, the first presentation addressed the history of characterisation. Professor **Martin Gebauer** (University of Tübingen) explored three main themes: striking parallels in time and content, strong contrasts, and finally the tensions in characterisation. Gebauer initially touched upon the ‘discovery’ of characterisation as ‘a child of the nineties of the 19th century’ in the works of Franz Kahn and Etienne Bartin. This was followed by the examination of the internationalist approaches. This led him to discuss autonomous characterisation and functional comparative law approaches as the ‘third direction’ through the work of Scipione Gemma and the changed views of Franz Kahn. Gebauer highlighted that the doctrinal views in this decade reflected

the ideological battles over the foundations of private international law. He further discussed the developments in characterisation in the 20th century, such as the developments in comparative law and Rabel's approach to characterisation. Finally, Gebauer considered characterisation in transnational and European law and its contribution to the homogenous understanding of conflict-of-laws rules within the EU. In the discussion following his presentation, the challenges of comparative law methodology and the need to consider a range of perspectives on characterisation (instead of a single one) were debated amongst other aspects.

The following presentations were dedicated to the process and particular problems of characterisation. The paper given by Professor **Andrew Dickinson** (University of Oxford) raised the question of "Is there any magic in characterisation?" with a focus on the courts of England and Wales. He provided seven steps of dealing with how the courts must engage with characterisation. Using a metaphor, he compared the attempts of describing the characterisation process to an attempt of describing the elephant in the Indian parable of 'blind men and an elephant'. In this regard, Dickinson underlined that one can only provide an informative tool kit and cannot describe a full process of characterisation. He emphasised that all parts of a given rule and most importantly its purpose must be taken into account when characterising it. In this regard, he explained that 'substance' should be valued higher than 'form' and that 'labels' should not play a major role. Dickinson considered characterisation as being more of a practical issue from the common law perspective, and a process of interpreting a rule or a particular subset of settings; he thus concluded that there is no 'magic' in characterisation. Participants used the subsequent discussion for instance to contrast the Common law position with the Civilian approaches and to question the role of the judge and the parties when characterising a claim.

The next presentation was delivered jointly by Associate Professors **Brooke Marshall** and **Roxanna Banu** (both University of Oxford) on characterisation's role in the jurisdictional inquiry in English courts. They began with an overview of the instances where the choice of law questions are raised at the jurisdictional stage in the context of granting permission for service out of the jurisdiction,

exploring the relevant gateways in the Practice Direction 6B of the Civil Procedure Rules. Marshall critically examined the UK Supreme Court decision in *UniCredit Bank v RusChemAlliance,* demonstrating how the choice of law matters affect the international jurisdiction of English courts. Banu, from a more theoretical point of view, then discussed the *a priori* application of the *lex fori* to jurisdictional matters and the importance of theorising characterisation to understand the reasons why jurisdiction and substance are to be distinguished. The presentation was followed by a fruitful discussion which, among other issues, highlighted the problematic circular reasoning employed at the intersection of choice of law and jurisdictional characterisation.

The last paper of this session was presented by Professor **Pietro Franzina** (Catholic University of Sacred Heart, Milan) on '*renvoi de characterisation*', that is, characterisation for the purposes of *renvoi*. At the beginning, he set the scene with regard to the meaning of *renvoi* and characterisation as well as the distinction between primary and secondary characterisation. Franzina explained that where the private international law of the forum contemplates the possibility of *renvoi*, the conflict of laws conceptions of a foreign applicable law should also be appreciated. In that regard, Franzina demonstrated through examples how the 'second characterisation' should reflect the taxonomy of the designated legal system (and, in some instances, the taxonomy of the different system specified under the conflict-of-laws rules of the latter system). He explained that characterisation for the purposes of *renvoi* is not given as much attention today as it used to receive, especially due to the greater weight that substantive policy considerations have progressively gained in private international law. The subsequent discussion addressed concerns over consistency in the interpretation of connecting factors in jurisdictional and applicable law matters.

The next session of the conference consisted of four presentations on challenges of characterisation in specific areas. The first speaker, Assistant Professor **Joanna Langille** (University of Western Ontario), focused on the distinction between substance and procedure. In this regard, Langille critically examined the use of the traditional common law distinction of rights and remedies for characterisation purposes. She took a Kantian rights-based approach to explain

that the idea of right and remedy essentially merged or 'shaded into' one another. Langille argued for an alternative distinction between substance and procedure based on the nature of private rights. The adjudication process through which that determination is made should be subjected to the *lex fori* as the law of the community. In that sense, she viewed procedural law as being about publicity or the capacity of the courts to make law for the community as a whole and hence operating on a vertical plane. On the other hand, where the court is faced with a question that relates only to the horizontal relationship and, thereby, the reciprocal rights and duties between the two parties, foreign substantive private law should apply. Accordingly, the 'provisions that are determinative of the rights of both parties' were considered as substantive, whilst 'the machinery of the forum court' as procedural. She exemplified her views by reference to statutes of limitation. Among the issues raised during the subsequent discussion were the role of procedural law and of the *lex fori* in light of state sovereignty as well as the transcending boundaries of substance and procedure in instances like limitation statutes.

The next paper was delivered by Professor **Yip Man** (Singapore Management University) on the characterisation of equitable doctrines. While characterisation might have to start from a domestic law understanding, she embraced a functional approach in characterisation and argued for the pursuit of uniformity with an internationalist spirit and therefore against being constrained by domestic law notions. In that regard, she emphasised the importance of understanding the function of equity in arriving at the appropriate category. The conceptual diversity and complexity of equitable doctrines in Common law systems both in conflict of laws and domestic laws were discussed. Yip Man highlighted the objective of identifying the predominant characteristic of a legal institution, which she illustrated by reference to both remedial and institutional features. The relationship between the parties underlying the equitable obligations and remedies were also discussed as possibly being the predominant features to be taken into account. Finally, Yip Man analysed two recent decisions, *Xiamen Xinjingdi Group Co v Eton Properties* of the Hong Kong Court of Final Appeal and *Perry v Esculier* of the Singapore Court of Appeal. The discussion addressed the challenge of characterising equitable doctrines in Civilian courts, possible advantages when differentiating between substance and procedure when

characterising equitable concepts, and the ‘fusion’ approach.

Moving on to the insightful presentations by two academically distinguished practitioners, Dr **Alex Critchley** (Westwater Advocates, Edinburgh) spoke about the characterisation of contractual arrangements in the context of family law where some of the most challenging questions arise. Critchley focused on two main issues, namely the way family law agreements differ from other contracts (or as to whether they can be characterised as contracts at all) and the extent to which they relate to other fields of law such as company law. In this context, he explained the international framework for contracts in international family law by exploring the EU and HCCH rules. He then exemplified family law agreements and their different forms such as nuptial agreements, care arrangements for children or agreements addressing corporate or property relationships between family members. This led to a discussion among all participants about choice of law rules for nuptial agreements, the characterisation of maintenance agreements, the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations, and case law referenced by Critchley, such as *F v M* 2021 SLT 1121.

Looking at a very different area of law, Dr **Thomas Klink** (Higher Regional Court of Stuttgart) addressed characterisation in international M&A disputes, where issues arise in judicial practice especially when the purchase agreement did not contain a relevant and valid choice of law clause. In his presentation Klink initially examined the characterisation of purchase agreements both in the form of a ‘share deal’ or – less common – an ‘asset deal’. He hinted at the tricky ramifications if the selling shareholder is a natural person and could be considered to be a consumer for the purposes of Article 6 of the Rome I Regulation. He then moved on to characterisation challenges encountered in the preparation of the transaction and in respect of non-disclosure agreements/letters of intent, access to information, exclusivity, and the issues arising from the termination of negotiations such as break-up fees. Klink also touched upon company law issues such as the transfer of shares. Post-M&A disputes such as fraud cases were also addressed. Looking ahead, he expressed his expectation that the number of M&A disputes in the newly established International Commercial Courts will increase, which was then also discussed further by the

conference participants. Other issues in the discussion included the consumer status of investors, the parallels between choice of law and jurisdictional characterisation in M&A disputes, and the latest case-law developments on concurrent claims. This concluded a day full of fruitful debates.

The second day of the conference began with a session on what the organisers had termed rethinking characterisation, exploring novel and more critical approaches to characterisation.

The first speaker in this session was Professor **Jeremy Heymann** (University of Lyon III Jean Moulin). Heymann's presentation was entitled 'characterisation from a unilateralist perspective'. He outlined the approach of unilateralism in contrast to multilateralism. Heymann argued that, from a methodological point of view, it is necessary to first identify a 'legal order of reference' and then to determine if the legal issue at hand and the facts of the case fall under the scope of this 'legal order of reference'. Whilst indicating that the 'legal order of reference' of the judge should be the *lex fori* in most instances, he also highlighted that the law to be taken into account should correspond to the expectation of the parties. Through this conception of unilateralism Heymann argued that the law applicable to characterisation should be 'much more the *lex causae* than *lex fori*'. In the subsequent discussion, the designation of the 'legal order of reference' was debated in addition to the challenges of taking into account the expectations of the parties. Heymann further commented on how some EU Regulations might provide for unilateral rules on certain private international law matters, such as the GDPR and the Air Passenger Regulation.

The second presentation in this session was delivered jointly by **Philomena Hindermann** and Professor **Ralf Michaels** (both Max Planck Institute for Comparative and International Private Law, Hamburg) with the provocative title 'Against Characterisation?'. Michaels began the paper with a critique of the current approach to characterisation with reference to the English decision in *Macmillan v Bishopsgate Investment Trust*. He explained how such a methodology in fact conceals the real essence of legal reasoning behind characterisation. He

then touched upon the attempts of the American Conflicts Revolution to overcome characterisation through interest analysis. Whilst acknowledging that overcoming characterisation is not possible, he argued for taking account of the policies behind legal rules in the process of characterisation. In this regard, Michaels criticised a process of characterisation through preliminary categories and argued instead that characterisation should be an 'end result'. Building on this finding, Hindermann continued with the question as to whether there could be such a thing as 'post-categorical characterisation'. She also criticised characterisation as reflecting certain presumptions and as omitting the policies and various functions of legal rules. Considering characterisation as an epistemological process she then questioned the need for categories and advocated for embracing a non-exhaustive / post-categorical functional approach. Therefore, instead of reducing characterisation to a pre-determined taxonomy, she argued that categories should be built based on each case by way of looking at the functions of the legal institution at hand. Participants to the discussion engaged with the reasons why the American realist thinking approach might or might not be compelling and also deepened the discussion from an EU perspective. The idea of categories under national laws having an open-ended nature as opposed to close-ended categories was further discussed on the one hand, as well as the concerns of legal uncertainty on the other hand.

The last speaker of this session was Professor **Veronica Ruiz Abou-Nigm** (University of Edinburgh). Her presentation covered characterisation as a tool to manage diversity and hence she focused on an epistemic change of perspectives in characterisation. Her paper started off with an explanation of the creation of a new delict under Scottish substantive law in relation to domestic violence. Furthermore, Ruiz Abou-Nigm considered a possible interplay with the 1980 Child Abduction Convention where under Article 13(1)(b) domestic abuse might constitute a reason to refuse the return of a child. Recognition and enforcement of civil protection orders were also discussed through this lens. As a conclusion Ruiz Abou-Nigm called for an internationalist approach to characterisation that takes into account feminist perspectives as well as the interplay of cultures. Ruiz Abou-Nigm argued that instead of taking the *lex fori* as a starting point, one should embrace an epistemological and pluralistic approach. In her view, the 'order of reference' of the judge in characterising a matter should be much more

complex and international than the categories under the *lex fori*. Participants asked her how this inter-cultural approach should affect the application of the new Scottish law in a cross-border setting and raised the problem that embracing an inter-cultural approach might not appear to be supportive of a feminist normative approach. Participants also suggested ways that might foster pluralistic thinking with a feminist approach and commented on how the Istanbul Convention on Preventing and Combating Violence Against Women and Domestic Violence could be used for characterisation or interpretation.

The last session of the conference focused on the interplay of private and public international law. Professor **Alex Mills** (University College London) spoke about private international law treaty interpretation and characterisation. He started by examining the English common law approach to characterisation in order to draw comparisons between the methodology in the common law regarding the characterisation and the interpretation of international treaties. He explained that, since treaties are implemented through national laws in dualist systems, statutory interpretation is needed in their application whilst principles of international treaty interpretation are also taken into account. Mills argued that international treaty interpretation has commonalities with the common law approaches to characterisation, but that the judge should acknowledge where choice of law rules belong to an international body of law. He used the 2019 Hague Judgments Convention as an example and pointed to its explanatory report which indicates the 'international spirit', echoing the English common law approach. In the subsequent discussion, the internationalist interpretation was generally welcomed but its practical implications were questioned. The idea that international treaty interpretation was reflecting the common law approach was challenged by Civilian representatives, though Continental European approaches could also be understood as being too 'rigid' from the point of view of the English common law doctrine. Participants also pointed to the process in which the 2005 and 2019 Hague Conventions were drafted and how the consistency in the internationalist approach in both Conventions reflected a common understanding of the drafters.

The final paper of the conference was delivered by Professor **Marta Pertegás**

Sender (Maastricht University and the University of Antwerp) discussed how characterisation questions were addressed at the Hague Conference for the purposes of drafting Conventions. Three main examples were given: first, Pertegás Sender explained that drafters increasingly employ provisions that regulate the scope of a Convention. As a second example of instances where the HCCH takes into account characterisation matters, she demonstrated how rather broad terms are preferred in the drafting of Conventions' provisions that would establish a common ground for contracting states. Finally, she pointed out the fact that there does not exist a *lex fori* for the drafters of such international Conventions. Sender also highlighted that especially in the last two decades all of the Conventions emphasise the autonomous interpretation and the promotion of uniformity in their application. The preference for broad terms was challenged in the subsequent discussion as being too vague, especially in the absence of a special court system for the interpretation of HCCH Conventions. Interestingly, the consequences of 'negative characterisation' were discussed in relation to the aspects which are kept outside of the scope of the HCCH Conventions, in contrast to a true or 'positive characterisation' of what is within the scope of a particular Convention.

Concluding the conference proceedings, the three organisers expressed their gratitude to all speakers for their papers and to all attendees for their fruitful contributions to the discussion.

Dutch Journal of PIL (NIPR) – issue 2024/4

The latest issue of the Dutch Journal on Private International Law (NIPR) has been published.

EDITORIAL

M.H. ten Wolde / p. 626-628

ARTICLES

A. Mens, De kwalificatie en de rechtsgevolgen van de erkenning van een kafala op grond van het Nederlandse internationaal privaatrecht/ p. 628-649

Abstract

This article focuses on the qualification and legal consequences of recognising a kafala under Dutch private international law. A kafala is a child protection measure under Islamic law, which entails an obligation to care for, protect, raise, and support a child, but without any implications for lineage or inheritance rights. The main conclusion is that a kafala generally constitutes both a guardianship and a maintenance decision. Consequently, the recognition of a foreign kafala in the Netherlands essentially entails the recognition of both the guardian's (kafil) authority over the child (makful) and the recognition of the guardian's maintenance obligation towards the child.

B. van Houtert, The Anti-SLAPP Directive in the context of EU and Dutch private international law: improvements and (remaining) challenges to protect SLAPP targets / p. 651-673

Abstract

While the scope of the Anti-SLAPP Directive is broad, this paper argues that the criteria of 'manifestly unfounded claims' and the 'main purpose of deterrence of public participation' may challenge the protection of SLAPP targets. The Real Madrid ruling should nonetheless play an important guiding role in all Member States; the legal certainty and protection for SLAPP targets will increase by

applying by analogy the factors of the Real Madrid ruling established by the CJEU to assess whether there is a manifest breach of the right to freedom of expression. Although the Anti-SLAPP Directive provides various procedural safeguards for SLAPP victims, it does not prevent SLAPP targets from being abusively sued in multiple Member States on the basis of online infringements of personality rights or copyrights. The recast of the Brussels Ibis and Rome II should alleviate this negative effect of the mosaic approach by adopting the 'directed activities' approach.
While the public policy exception in Dutch PIL already has a great deal of potential to refuse the recognition and enforcement of third-country judgments involving a SLAPP, the grounds in Article 16 Anti-SLAPP Directive provide legal certainty, and likely have a deterrent effect on claimants outside the EU. As EU and Dutch PIL generally do not provide a venue for SLAPP targets to seek compensation for the damage and costs incurred regarding the third-country proceedings initiated by the SLAPP claimant domiciled outside the EU, the venue provided by Article 17(1) Anti-SLAPP Directive improves the access to Member State courts for SLAPP targets domiciled in the EU. However, although Articles 15 and 17 Anti-SLAPP Directive aim to facilitate redress for SLAPP victims, the re-sulting Member State judgments may not be effective in case these are not recognised and enforced by third states. Hence, international cooperation is important to combat SLAPPs worldwide.

V. Van Den Eeckhout, Rechtspraak van het Hof van Justitie van de Europese Unie inzake internationaal privaatrecht anno 2024. Enkele beschouwingen over de aanwezigheid, de relevantie en de positie van internationaal privaatrecht in de rechtspraak van het Hof. Een proces van inpassing? Over de gangmakersfunctie van het ipr / p. 675-693

Abstract

With the increase in the number of European regulations on Private International Law, increasing attention has been paid by scholars to issues of consistency between different private international law regimes. The foregoing also includes attention to the position of the Court of Justice of the European Union with regard to (un)harmonised interpretation when answering preliminary questions on the interpretation of those regimes.
This contribution examines a number of current developments concerning the 'PIL case law' of the Court, viewed from the perspective of consistency, albeit in a

broad sense: it examines aspects of judgments of the Court that lend themselves to highlighting various facets and dimensions of consistency. As a matter of fact, current case law and developments invite those who wish to pay attention to issues of consistency regarding the Court's PIL case law to adopt a broad perspective and, while discussing aspects of consistency, to highlight points of attention regarding the presence, the relevance and the position of PIL in the Court's case law, going along with issues of 'fitting in' of case law.
The paper includes a discussion of aspects of, i.a., C-267/19 and C-323/19 (joined cases Parking and Interplastics), C-774/22 (FTI Touristik), C-230/21 (X v. Belgische Staat, Refugiee mineure mariee), C-600/23 (Royal Football Club Seraing), C-347/18 (Salvoni) and C-568/20 (H Limited).

M.H. ten Wolde, Oude Nederlandse partiële rechtskeuzes en het overgangsrecht van artikel 83(2) Erfrechtverordening / p. 695-702

Abstract

On 9 September 2021, the ECJ ruled in case C-277/20 (UM) that Article 83(2) of the Regulation on succession does not apply to a choice of law made in an agreement as to succession in respect of a particular asset of the estate. Such a choice of law does not concern the succession in the estate as a whole and therefore falls outside the scope of the said provision, the Court stated. The question arises whether such partial choices of law made before 17 August 2015 have been voided with the CJEU's ruling now that they likewise concern only certain assets and not the estate as a whole.

CASE NOTE

B. Schmitz, Artikel 6 lid 2 Rome I-Verordening en het Duitse Bundesgerichtshof. Bundesgerichtshof 15 mei 2024 – VIII ZR 226/22 (Teakbomen) / p. 703-709

Abstract

The German Federal Court of Justice (BGH) has ruled in its recent decision that Article 6(2) Rome I Regulation contains the preferential law approach. In its reasoning, the court specifically refers to three recent CJEU judgements to support this view. However, this case note argues that these CJEU judgements are not a valid basis for such reasoning. Instead, the BGH should have turned to

Article 8 Rome I Regulation and its case law to apply the Gruber Logistics ruling by analogy.

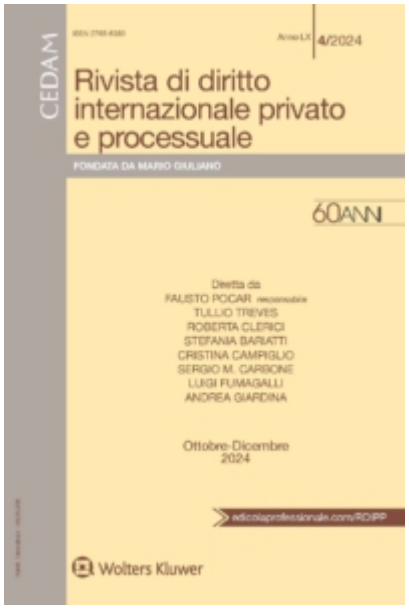
LATEST PHDS

B. Schmitz, Rethinking the consumer conflict rule – Article 6(2) Rome I Regulation and party autonomy in light of principles, efficiency, and harmonisation (dissertation, University of Groningen, 2024) (Summary) / p. 711-714

BOOK ANNOUNCEMENT

M.H. ten Wolde, book announcement: Chr. von Bar, O.L. Knöfel, U. Magnus, H.-P. Mansel and A. Wudarski (eds.), Gedächtnisschrift für Peter Mankowski [A Commemorative Volume for Peter Mankowski], Tübingen: Mohr-Siebeck 2024, XIV + 1208 p. / p. 715-717

Rivista di diritto internazionale privato e processuale (RDIPP) No 4/2024: Abstracts



The fourth issue of 2024 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released. It features:

Francesca C. Villata, Professor at the University of Milan, **On the Track of the Law Applicable to Preliminary Questions in EU Private International Law** [in English]

Silenced, if not neglected, in (most) legislation and practice, the issue of determining the law applicable to preliminary questions is a constant feature in the systematics of private international law ("p.i.l.").

In legal doctrine, in a nutshell, the discussion develops along the traditional alternative techniques of (i) the independent connection (or disjunctive solution, based on recourse to the conflict rules of the forum even for preliminary questions), (ii) the dependent connection (to which both the so-called "joint" solution and the "absorption" solution are attributable, for which, respectively, the conflict rules of the *lex causae* or, directly, the substantive law of the latter are relevant), or, finally, (iii) the approach which emphasises the procedural dimension of preliminary questions and leads them back to the substantive law of the forum. In these pages, an attempt is made to ascertain whether, in the absence of EU rules explicitly intended to determine the law applicable to preliminary questions, there are nevertheless indications within the EU Regulations containing uniform conflict rules that make it possible to reconstruct, at least in selected cases, an inclination, if not adherence, of the European legislature to a specific technique for resolving preliminary questions. To this end, particular attention will be paid to the rules defining the material scope of application of the various EU p.il. Regulations in force and in the making, to those establishing the "scope" of the applicable law identified by these Regulations, and to those concerning the circulation (of points) of decisions on preliminary questions. This approach will concern both the preliminary questions the subject-matter of which falls *ratione materiae* within the scope of those Regulations and those that do not. On the assumption that at least in some areas, if not in all, the EU legislator does not take a position on the law applicable to preliminary questions, leaving this task to the law of the Member States, the compatibility of the traditional alternative techniques

used in the law of the Member States (or in practice) with the general and sec-toral objectives of EU p.i.l. and with the obligation to safeguard its effectiveness will be assessed. Finally, some considerations will be made as to the appropriateness, relevance and extent of an initiative of the EU legislator on this topic, as well as the coordinates to be considered in such an exercise.

Sara Tonolo, Professor at the University of Padova, **Luci e ombre: il diritto internazionale privato è strumento di contrasto allo sfruttamento della povertà o di legittimazione dell'ingiustizia?** [Lights and Shadows: Is Private International Law a Tool for Combating the Exploitation of Poverty or Legitimising Injustice?; in Italian]

The relationship between private international law and poverty is complex and constantly evolving. It is a multifaceted issue in which private international law plays an ambivalent role: on the one hand, as a tool to combat the exploitation of poverty, and on the other, as a means of legitimizing injustice. The analysis of the role of private international law in countering the exploitation of poverty often intersects with other fields, such as immigration law, due to the relevance that private law institutions have on individuals' status and their international mobility, which is significantly affected in the case of people in situations of poverty.

Lidia Sandrini, Professor at the University of Milan, **La legge applicabile al lavoro mediante piattaforma digitale, tra armonizzazione materiale e norme di conflitto** [The Law Applicable to Labour through a Digital Platform, between Material Harmonisation and Conflict of Law Rules; in Italian]

This article explores the phenomenon of platform work in the legal framework of the European Union from the methodological point of view of the relationship between substantive law and conflict-of-law rules. After a brief examination of the text of the Directive (EU) No. 2024/2831 "on improving working conditions in platform work", aimed at identifying its overall rationale and the aspects that most directly reverberate effects on the EU conflict-of-law rules, the article investigates its interference with Regulation (EC) No. 593/2008 (Rome I), proposing an assessment of the solutions accepted from the point of view of the coherence between the two acts and their adequacy to their respective purposes.

This issue also comprises the following comments:

Stefano Dominelli, Associate Professor at the University of Genoa, **A New Legal Status for the Environment and Animals, and Private International Law: *Tertium Genus Non Datur*? Some Thoughts on (the Need for) Eco-Centric Approaches in Conflict of Laws** [in English]

> Traditional continental approaches postulate a fundamental contraposition between (natural and legal) 'persons' – entitled to a diverse range of rights – and 'things'. Conflict of laws is methodologically coherent with an anthropocentric understanding of the law. Yet, in some – limited – cases, components of the environment are granted a legal personality and some rights. Narratives for animals' rights are emerging as well. This work wishes to contribute to current debates transposing in the field of conflict of laws reflections surrounding non-human legal capacity by addressing legal problems a national (Italian) court might face should a non-human-based entity start proceedings in Italy. The main issues explored are those related to the possibility of said entity to exist as an autonomous rights-holder and thus to start legal proceedings; to the search for the proper conflict-of-laws provisions as well as to the conceptual limits surrounding connecting factors developed for 'humans'. Furthermore, public policy limits in the recognition of non-human-derived autonomous rights-holders will be explored. The investigation will conclude by highlighting the possible role of private international law in promoting societal and legal changes if foreign legal personality to the environment is recognised in the forum.

Sara Bernasconi, Researcher at the University of Milan, **Il ruolo del diritto internazionale privato e processuale nell'attuazione del «pacchetto sui mercati e servizi digitali» (DMA&DSA)** [The Role of Private International and Procedural Law in the Implementation of the 'Digital Markets and Services Package' (DMA&DSA); in Italian]

> In line with the goal to achieve a fair and competitive economy, Regulation (EU) 2022/1925 of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) and Regulation (EU) 2022/2065 of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) – composing the so called Digital Services Act Package

– aim at introducing a uniform legal framework for digital services provided in the Union, mainly protecting EU-based recipients, companies and the whole society from new risks and challenges stemming from new and innovative business models and services, such as online social networks and online platforms. Namely, the ambition of the abovementioned regulations is, on the one hand, to regulate, with an ex ante approach, platform activities so to reduce side-effects of the platform economy and therefore ensure contestable and fair markets in the digital sector and, on the other hand, to introduce EU uniform to grant a safe, predictable and trustworthy online environment for recipients (e.g. liability of providers of intermediary services for illegal contents and on obligations on transparency, online interface design and organization, online advertising). Despite expressly recognising the inherently cross-border nature of the Internet, which is generally used to provide digital services, DMA and DSA do not contain any private international law rule or provide for any provision on the relationship between the two sectors, but only state that their rules do not prejudice EU rules on judicial cooperation in civil and commercial matters. Therefore, the present article will discuss the role of private international law rules in the daily application of DMA and DSA to cross-border situations. Accordingly, after having ascertained the so called extraterritorial effects of the new rule on digital markets and digital services and assessed their overriding mandatory nature, the author first investigates the role that conflict-of-laws provisions could possibly play in the application of DMA and DSA, by integrating such regimes, and then suggests a possible role also for rules on jurisdiction in a private enforcement perspective, highlighting potential scenarios and possible difficulties arising from the need to coordinate two different set of rules (i.e. substantive provisions on digital markets and digital services, on the one hand, and private international rules, on the other hand).

Finally, the issue features the following book review by *Gabriella Venturini*, former Professor at the University of Milan: **INSTITUT DE DROIT INTERNATIONAL, *150 ans de contributions au développement du droit international: Livre du sesquicentenaire de l'Institut de Droit international (1873-2023)/150 Years of Contributing to the Development of International Law: Sesquicentenary Book of the Institute of International Law (1873-2023), Justitia et Pace*,** edited by Kohen, van der

Heijden, Paris, Editions A. Pedone, 2023, p. 1053.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1/2025: Abstracts

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

W. Hau: **Third countries and the revision of the Brussels Ibis Regulation: jurisdiction, parallel proceedings, recognition and enforceability (German)**

The question of whether the provisions of the Brussels Ibis Regulation on international jurisdiction should be extended to defendants not domiciled in a Member State is to be considered in the upcoming round of revision (as expressly stated in Article 79). This paper discusses this question, but also whether the already existing provisions on the relevance of parallel proceedings in third countries have proven effective and whether the recognition and enforcement of third-country judgments should finally be put on the Brussels agenda.

Ch. Thomale: **Ipso facto clauses in cross-border cases (German)**

Ipso facto clauses or *bankruptcy clauses* present a controversial problem to both contract law and insolvency law. After a comparative overview of international substantive solutions to the problem, the article addresses associated conflict of

laws issues, notably of characterisation. Special attention is given to *"anticipatory" ipso facto clauses*, cancelling the contract before the opening of insolvency proceedings.

A. Engel/R. Müller: **Limits to the freedom of choice of law in the context of player agent services (German)**

The article deals with a decision of the Rechtbank Limburg (Netherlands) (31 January 2024 – C/03/313729 / HA ZA 23–42, ECLI:NL:RBLIM:2024:524) concerning limits to the freedom of choice of law, in the context of player agent services in international football. The decision hinged upon the application of Section 297 No. 4 of the German Social Security Code III (SGB III). The relevant contract between the parties contained a clause according to which the claimant was exclusively authorised to represent the player during the term of the contract. The German provision would render the clause invalid.

While the parties had chosen Dutch law to be applicable to the contract, the court held that the German provision was applicable in view of Art. 3 para. 3 of the Rome I Regulation, which stipulates the application of mandatory provisions of the state in which the facts of the case are exclusively located if the law of another state is chosen. The article analyses this limit to party autonomy in the context of other limitations which could have been applied: Art. 9 Rome I, regarding overriding mandatory provisions, and Art. 6 Rome I, regarding the protection of consumers. The article pays heed in particular to the requirements of the domestic connections of the case.

J. M. Blaschczok: **The assessment of arbitration agreements in competition law (German)**

In recent years, arbitration agreements have come under the repeated scrutiny of competition law enforcers. By analysing a recent judgment of the CJEU, the Article finds that arbitration agreements are generally still regarded as harmless to competition in EU law. The Article subsequently discusses the exceptional cases in which arbitration agreements have been found to violate competition law. These cases include arbitration agreements which serve to cover-up other

infringements of competition law as well as arbitration agreements by which a dominant undertaking imposes an unfair dispute resolution mechanism on a structurally disadvantaged party. The Article concludes that neither EU competition law nor other EU law require the place of arbitration to be located within the single market.

D. Fischer: **§ 40 KGSG as an overriding mandatory provision (German)**

Erik Jayme stated incidentally in a conference report in 2018 that sec. 40 (1)–(4) *Kulturgutschutzgesetz* (KGSG) is an overriding mandatory provision. *Haimo Schack* makes the same qualification. This finding can be confirmed for sec. 40 (1) and (2) KGSG. This article concentrates on the nature of these two paragraphs of sec. 40 KGSG as overriding mandatory provisions.

B. Kasolowsky/C. Wendler: **German Courts confirm Anti-Suit Remedy against Sanctioned Russian Parties breaching Arbitration Agreements pursuant to Section 1032(2) GCPR (English)**

Following last year's landmark decision recognising the availability of declaratory anti-suit relief, the Berlin Higher Regional Court has again applied Section 1032(2) GCPR and broadened its scope of application. In its new decision, the court reiterated that sanctioned Russian parties remain bound to previously concluded arbitration agreements. In addition, the court offered even more hands-on protection for parties trying to serve proceedings in Russia.

L. M. Kahl: **Security for legal costs before the Unified Patent Court compared to German and Austrian law (on UPC, Central Division Munich of 30 October 2023, UPC_CFI_252/2023) (German)**

The article takes a decision of the Unified Patent Court (UPC) as an opportunity to examine the discretionary provision on security for costs, Art. 69 (4) UPCA, in more detail. According to this provision, both enforcement difficulties against third countries and the insolvency risk of the plaintiff can be considered. Among other things, the article deals with the effects of the attribution of UPC acts to the

contracting member states pursuant to Art. 23 UPCA on the ordering of a security, how a so-called decision by default is to be interpreted when the claimant fails to provide a security and traces the line of previous case law. This can be seen as part of a general trend towards better protection of defendants.

J. Gibbons: **Acceptance of English Notary Public Certificate of corporate representation without requirement of being a scrivener notary: recent decision of Regional Higher Court of Cologne (English)**

The purpose of this article is to explain the professional standing, qualification, legal competence, regulatory equivalence, authority and evidential value of the acts of notaries public and scrivener notaries in England and Wales. This is considered necessary, as a number of German courts have, in recent years, rejected certificates of corporate representation issued by a notary public in England for use in Germany and elsewhere on the ground that they are not issued by a scrivener notary.

Ch. Thomale: **Inheritance of limited partnership interests in cross-border cases (German)**

The case note discusses a judgment rendered by the Higher Regional Court of Hamm, concerning the inheritance of limited partnership interest in a German partnership while the inheritance succession is governed by Austrian law. The note focuses on the company and partnership law exceptions according to Art. 1 para. 2 lit. h) and i) Regulation (EU) 659/2012 and places these in the overall context of EU conflict of laws.

S. L. Gössl: **Birth registrations and (no) procedural recognition in Ukrainian surrogacy cases (German)**

In two cases, the BGH dealt with the attribution of parenthood to a child born to a surrogate mother in Ukraine. Under Ukrainian law, the German intended parents would have been the legal parents. The BGH refused to recognise this allocation under both procedural law and conflict of laws. From a dogmatic point of view,

her statements are well justifiable. The distinction between a ‘decision’ and other administrative acts in the sense of procedural recognition could have been explored further.

M. Andrae: **Correction of the date of birth under civil status and social law based on foreign court decisions and public documents (German)**

A person‘s identity includes their date of birth. In the area of social law, a person’s rights and obligations are partly dependent on their age. The date of birth is part of the social insurance number. If the person in question was born abroad, it is often the case that only the year of birth is given and, if necessary, proven. This has corresponding consequences for civil status certification and social law. The registration under civil status law is then limited to stating the year of birth. In the area of social law, July 1st of the year in question is fictitiously assumed. The insurance number contains blank spaces in this regard. Later, a specific date of birth is claimed and a foreign decision or documents are presented as proof. In other cases, a date of birth with a different year of birth is claimed in this way. The article discusses under which conditions the original civil status entry must be corrected and a different date of birth must be assumed for social law purposes.

N. C. Elsner: **Review of OGH, order of 2.11.2023 – 5 Nc 22/23i: Enforcement of a British decision in Austria (German)**

L. M. Kahl: **Review of OGH, order of 31.1.2024 – 3 Ob 6/24i: Judicial conflict: Inadmissible non-application of the Hague Convention on Civil Procedure by Russian courts due to a Russian presidential decree (German)**

A. Anthimos: **UK Third Party Costs Orders Enforceable in Greece (German)**

A UK third-party costs order (TPCO) is a totally unknown procedural concept in

Greece. In the course of exequatur proceedings, the Piraeus first instance court and the Piraeus court of appeal were called to examine the issue for the first time in Greece, both declaring that no obstacles, especially those intertwined with procedural public policy, are barricading the path towards the declaration of enforcement of a TPCO issued by a judge in the UK.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2024: Abstracts

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

Th. Klink: **Der Commercial Court nach dem Justizstandort-Stärkungsgesetz – ein Modellprojekt für grenzüberschreitende Gerichtsverfahren**

The Legal Venue Strengthening Act allows the German states to establish Commercial Courts at the higher regional courts as of 2025. The project aims to make the jurisdiction of state courts more attractive, especially for cross-border disputes, by implementing elements of arbitration. In a contract or after the dispute has arisen, the parties can agree on the jurisdiction of the Commercial Court as a special court of first instance in cases with a value of EUR 500,000.– or more, provided that a specific area of law is involved (B2B cases, M&A cases and cases of D&O liability). For the first time, the entire civil procedure from complaint to judgment can be conducted in English. Commercial Chambers may be established at the regional courts, allowing for similar specialization regardless of the amount in dispute. The article explains the background to the legislative reform and analyzes the procedural framework for jurisdiction and commencement of proceedings, with a focus on cross-border litigation.

J. F. Hoffmann: **New developments regarding the relationship between main and secondary insolvency proceedings in European insolvency law?**

The ECJ had to answer fundamental questions concerning the relationship between main and secondary proceedings under the European Insolvency Regulation. Firstly, the ECJ affirms that the lex fori concursus of the main proceedings applies to liabilities of the estate that arise between the opening of the main proceedings and that of the secondary proceedings. Reading between the lines, it can be inferred from the decision that the secondary estate is also liable for these preferential debts of the main proceedings. However, a number of details remain vague and in the future, the individual categories of liabilities of the estate should be more clearly distinguished: The secondary estate should only have subsidiary liability for the costs of the main proceedings. Genuine privileges of the main proceedings that are not related to the administration of the estate should not be able to be invoked in the secondary proceedings, just as, conversely, the secondary proceedings should be able to recognize their own privileges in accordance with the lex fori concursus secundarii.

Secondly, the ECJ states largely undisputed that the secondary estate is only constituted at the time the secondary proceedings are opened. The main administrator may transfer assets from the state of (future) secondary proceedings to the state of main proceedings prior to the opening of secondary proceedings. Although this may constitute abuse of rights under certain circumstances, the ECJ does not specify this further. The ECJ also takes a position in favor of avoidability on the highly controversial question of whether the secondary administrator can take action against the main administrator by way of insolvency avoidance. However, no further clarification is provided. The question is ultimately left entirely to the national regulations on insolvency avoidance, which is not a convincing solution. In substance, the powers of the main administrator to deal with assets located in other Member States should be limited to what is necessary for the proper conduct of the insolvency proceedings as a whole (ordinary course of business).

B. Kasolowsky/C. Wendler: **Sanctioned Russian parties breaching the**

arbitration agreement: an extra-territorial declaratory relief in aid of arbitration

In a landmark decision on 1 June 2023, the Berlin Higher Regional Court upheld the validity of an arbitration agreement under Section 1032(2) of the German Code of Civil Procedure in a novel context. The court used this provision to bind a sanctioned Russian entity to an arbitration agreement, which it had breached by initiating proceedings in Russian state courts. This decision also sheds light on how German courts deal with the practical challenges of serving court documents on Russian parties. Notably, the court ruled that Russian parties could be served by public notice in German courts, as the Russian authorities currently refuse to accept service of documents under the Hague Service Convention.

B. Steinbrück: **Federal Court of Justice rules foreign judgments refusing to set aside an award cannot bind German courts**

Does a foreign decision upholding an arbitral award on challenge have binding effect in enforcement proceedings in the German courts? If a foreign award has already been challenged unsuccessfully at the arbitral tribunal's seat, a full re-hearing of the same grounds of challenge can seem inefficient; however, foreign decisions vary widely in their quality, so a blanket binding effect equally seems inappropriate. The Federal Court of Justice has nonetheless now ruled out any binding effect of foreign decisions rejecting challenge proceedings. The Federal Court of Justice also decided that, even if the court at the seat of the arbitration has rejected a challenge, it is open to the losing party to proactively apply to the German courts for a declaration that the foreign award cannot be enforced in Germany.

On the facts of the present case, this outcome appears justified, since the arbitral award at stake in the decision itself appears to have been obtained in highly dubious circumstances and suffered from serious irregularity. Nonetheless, it is less clear why a foreign decision rejecting the challenge to an arbitral award should not be taken into account in German enforcement proceedings if the foreign challenge proceedings are comparable to German litigation standards. As such, a more nuanced approach that is able to reflect that foreign decisions on arbitral awards vary widely would have been preferable.

Ch. Reibetanz: **The ‘purely domestic case’ under Art. 3 (3) Rome I Regulation**

In its first decision concerning Article 3 (3) Rome I Regulation, the German Federal Court of Justice has set out guidelines as to when “all other elements relevant to the situation […] are located in a country other than the country whose law has been chosen”. The provision constitutes a relevant restriction of the principle of party autonomy in international contract law. The case concerns a choice-of-law clause in a tenancy agreement to which the Bulgarian embassy was a party. The Federal Court decided that the case is “purely domestic”. The author argues that the decision is highly questionable from a dogmatic point of view. Instead of applying Article 3 (3) Rom I Regulation, the Court should have at least referred the question to the ECJ. The protection of the tenant could have been equally safeguarded by means of Article 11 (5) Rome I Regulation.

J. P. Schmidt: **The European rules on the service of documents and national time limits for appeals – the translation regime must not be hollowed out**

The European rules on the service of documents allow for the service without translation. However, the addressee may refuse to accept the document to be served if it is not written in either a language which the addressee understands or the official language of the Member State addressed. In order to safeguard this protection, but also to promote the efficiency and speed of cross-border judicial proceedings, the CJEU ruled that the period for Coding an Appeal under national law may not start to run at the same time as the period for refusing acceptance (Judgement of 7.7.2022 – Rs. C-7/21, LKW Walter). The CJEU’s decision deserves support, even though it raises a number of follow-up questions and highlights the practical downsides of the flexible translation regime.

F. Heindler: **Wirksame Eheschließung zweier afghanischer Staatsbürger als Vorfrage bei Behandlung eines Antrags auf einvernehmliche Scheidung durch österreichische Gerichte**

The Rome III Regulation on the law applicable to divorce and legal separation excludes the existence, validity or recognition of a marriage from its scope ("preliminary question"). Austrian courts dealing with divorce applications from spouses in a cross-border situation apply national Private International Law provisions to determine if the marriage validly exists. This annotation comments on a decision concerning two Afghan citizens who married in Afghanistan in 1996. According to section 16(2) of the Austrian Private International Law Act, the form of a marriage celebration abroad is subject to the personal status law of each of the betrothed, sufficient is, however, compliance with the provisions on form of the place of celebration. According to section 17(1) of the Austrian Private International Law Act, the prerequisites for entry into marriage are subject to the personal status law of each of the betrothed. In both cases, a subsequent change in the prerequisites determinative for the reference to a particular legal order has no effects upon already completed facts (section 7 of the Austrian Private International Law Act). Personal status law in the case at hand was determined according to the Afghan citizenship. The question decided by the Austrian Supreme Court was a matter of form of marriage celebration, i.e. whether in 1996 Afghanistan (the exact locus is not reported in the decition) the marriage had to be registered. The Austrian Supreme Court stated that a registration requirement postulated in the Afghan Civil Code of 1977, but widely ignored in practice in 1996, could not render a marriage celebration ineffective. The Supreme Court recalled that foreign law shall be applied as it would be in its original jurisdiction (section 3 of the Austrian Private International Law Act).

G. Zou/Z. Wang: **The Refinement of Rules on the Ascertainment of Foreign Laws in China**

The ascertainment of foreign law has always been a major challenge that has long constrained the quality and effectiveness of foreign-related civil or commercial trials by Chinese people's courts. The judicial interpretation (II) concerning the application of Chinese PIL-Act newly promulgated in November 2023 by the Supreme People's Court of China greatly refines many aspects in ascertaining foreign laws including the responsibility, means, relevant procedures, criteria, the burden of the expenses, etc. It is expected but remains to be seen whether the people's courts as well as Chinese and foreign parties could benefit from such refinement.

D. Sprick: **Building a "Foreign-Related Rule of Law": China's State Immunity Law**

With its new Law on Foreign State Immunity, the People's Republic of China abandons its long-standing notion of absolute state immunity and introduces a paradigmatic shift towards the internationally dominant restrictive approach of state immunity. Furthermore, this law needs to be understood as a building block of China's ambitions for a stronger impact of its legal system around the globe within the agenda of a "foreign-related rule of law". This paper will therefore discuss this new avenue for the resolution of commercial disputes between private parties and states before Chinese courts, which is certainly also aimed at providing enhanced protection for Chinese businesses considering their legal risks stemming out of China's going global strategy and especially its Belt and Road Initiative (BRI). Furthermore, China's new Law on Foreign State Immunity will be analysed within the specific setting of China's approach toward the rule of law and its limited legal certainty as well as its political functionality understanding of Chinese courts.

G. Zou/Z. Wang: **The Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Act of the People's Republic of China on the Law Applicable to Civil Relations with Foreign Elements (II)**

E. Jayme †: **On the dual applicability of German law of succession and Cuban matrimonial property law**

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2024: Abstracts

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

Erik Jayme †

T. Lutzi: **Unilateralism as a structural principle of the Digital Single Market?**

While the body of instruments through which the European legislator aims to create a Digital Single Market keeps growing, it remains strangely devoid of multilateral conflicts rules. Instead, directives in this area usually contain no conflict-of-laws provisions at all, while regulations limit themselves to a unilateral definition of their territorial scope of application. As the instruments do not regulate the matters falling into their material scope of application conclusively, though, they continue to rely on, and interact with, national systems of private law. The existing, general conflict-of-laws rules do not coordinate between these systems satisfactorily. In order to realise a genuine Digital Single Market with uniform standards of liability, specific universal conflicts rules thus seem indispensable

L. Theimer: **The last arrow in the English courts’ quiver? ‘Quasi-anti-suit injunctions’ and damages for breach of exclusive choice of court agreements**

This article analyses the last instance of failed integration of English common law instruments into the jurisdictional system of the Brussels regime. In its decision in

Charles Taylor Adjusting, the ECJ held that decisions granting provisional damages for bringing proceedings in another Member State, where the subject matter of those proceedings is covered by a settlement agreement and the court before which proceedings were brought does not have jurisdiction on the basis of an exclusive choice of court agreement, are contrary to public policy under Art 34 (no 1) and Art 45(1) Brussels I Regulation. More specifically, they violate the principle of mutual trust by reviewing the jurisdiction of a court of another Member State and interfering with its jurisdiction. Such decisions also undermine access to justice for persons against whom they are issued. By and large, the decision merits approval as it unmasks the English decisions as "quasi-anti-suit injunctions" which are incompatible with the Brussels Regulation, just like their "real" siblings, anti-suit injunctions. The ECJ's analysis is, however, not in all respects compelling, particularly with regard to the point of reviewing another court's jurisdiction. Moreover, the Court's and the Advocate General's reluctance to engage with the English view on the issue is regrettable. In conclusion, the ECJ's decision may well – in terms of EU law – have broken the last arrow in the English courts' quiver. It is unlikely, however, that English courts will be overly perturbed by this, considering that, following Brexit, their arsenal is no longer constrained by EU law.

W. Hau: **The required cross-border implication in Article 25 Brussels I Regulation: prerequisite for application or measure against abuse?**

It has long been debated whether two parties domiciled in the same Member State can agree on the jurisdiction of the courts of another Member State pursuant to Art. 25 Brussels Ibis Regulation if, apart from this agreement, the facts of the case have no other cross-border implications. The ECJ has now convincingly answered this question in the affirmative. This ruling provides an opportunity to take a closer look at the function of the requirement of an international element in the context of Art. 25 Brussels Ibis Regulation and some questionable arguments that are derived from other legal instruments.

A. Hemler: **The "consumer jurisdiction of the joinder of parties" in the Brussels Ia Regulation and the comparison between the law applicable to**

consumer contracts and other contracts in the Rome I Regulation

In the cases Club La Costa and Diamond Resorts, Spanish courts referred various questions to the ECJ on timeshare contracts between consumers and businesses residing in the UK concerning the right to use holiday accommodations in Spain. In Club La Costa, the ECJ primarily discussed whether the consumer jurisdiction of Art 18(1) Brussels Ia Regulation permits an action in front of Spanish courts against the consumer's contractual partner if the latter is not established in Spain and if the co-defendant, who is only connected to the consumer via an ancillary contractual relationship, has a registered office in Spain. In both proceedings, the question also arose as to whether the law applicable under the general rules of Art 3, 4 Rome I Regulation can be applied instead of the law applicable under Art 6 Rome I Regulation if the former is more favourable to the consumer in the specific case. The ECJ answered both questions in the negative and with somewhat generalised reasoning. Both decisions can be endorsed above all because both International Civil Procedural Law and the Conflicts of Laws realise consumer protection through abstract rules on the access to domestic courts or the applicable law, which means that, in principle, choosing the most favourable forum or legal result in each individual case is not a valid option.

C. Uhlmann: **The contract to enter into a future contract in Private International Law and International Civil Litigation**

In EXTÉRIA, the ECJ decided upon the question of whether a contract to enter into a future contract relating to the future conclusion of a franchise agreement, which provides for an obligation to pay a contractual penalty based on non-performance of that contract to enter into a future contract, is a service contract in accordance with Art. 7(1)(b) Brussels Ia-Regulation. The ECJ answered this question in the negative on the grounds that the contract to enter into a future contract does not stipulate the performance of any positive act or the payment of any remuneration; in the absence of any actual activity carried out by the co-contractor, the payment of the contractual penalty could also not be characterized as remuneration. Instead, international jurisdiction should be determined in accordance with Art. 7(1)(a) Brussels Ia-Regulation. The author criticizes that the ECJ characterizes the contract to enter into a future contract detached from the future contract and generally argues in favor of an ancillary characterization and

a broad understanding of the provision of services for the purpose of Art. 7(1)(b) Brussels Ia-Regulation.

C. Rüsing: **Transfer of jurisdiction under Article 15 Brussels IIbis Regulation and Articles 12, 13 Brussels IIter Regulation in cases of child abduction**

According to Art. 15 Brussels IIbis Regulation, a court of a Member State may, under certain prerequisites, transfer its jurisdiction in custody proceedings to the court of another Member State. In TT ./. AK (C-87/22), the CJEU held that in cases of child abduction, a court with jurisdiction under Art. 10 Brussels IIbis Regulation may also transfer jurisdiction to a court of the state to which the child has been abducted. The article welcomes this, but highlights problems that both courts must take into account in doing so. It also discusses changes under the Brussels IIter Regulation now in force.

D. Looschelders: **Time-preserving effect of a waiver of the succession before the courts of the heir's habitual residence**

Whether a waiver of the succession before a court at the habitual residence of the heir competent under Article 13 of the EU Succession Regulation has time-preserving effect, even if the declaration of the heir is not forwarded to the court responsible for settling the estate within the period stipulated by the law applicable to the succession, has been controversial to date. In the present decision, the ECJ has affirmed a deadline-preserving effect. The operative part and the grounds of the judgement suggest that the ECJ regards the question of before which court the waiver of the succession is to be declared as a matter of form. The prevailing opinion in Germany, on the other hand, still categorises this question as a matter of substantive law; the jurisdiction of the courts at the habitual residence of the heirs is therefore understood as a case of substitution ordered by law. Within the scope of application of Article 13 EU Succession Regulation the divergent characterisation has no practical significance. However, different results may arise if an heir according to the law of his habitual residence does not waive the succession before a court or if he declares the waiver of the succession before a court of a third country. In these cases, only Article 28 EU

Succession Regulation is applicable, but not Article 13 EU Succession Regulation. As the ECJ has argued with the interaction between both provisions, a new referral to the ECJ may be necessary in this respect.

C. A. Kern/K. Bönold: **Blocking effect of filing an insolvency petition with courts in Member States and third countries under the EU Insolvency Regulation and InsO**

In its preliminary ruling of 24 March 2022 (Case C-723/20 – Galapagos BidCo. Sàrl ./. DE, Hauck Aufhäuser Fund Services SA, Prime Capital SA), the ECJ confirmed that the filing of an insolvency petition with a court of a Member State triggers a bar to the jurisdiction of courts of other Member States. Due to Brexit, the BGH, in its final decision of 8 December 2022 (IX ZB 72/19), had to apply German international insolvency law, which it interpreted differently from the EU Insolvency Regulation.

H.-P. Mansel: **In memory of Erik Jayme**

C. Kohler: **Guidelines on the recognition of a foreign legal relationship in private international law – Conference of the European Group for Private International Law 2023, Milan, September 2023**

There and Back Again? – The unexpected journey of EU-UK

Judicial Cooperation finally leads to The Hague

by Achim Czubaiko, Research Fellow („Wissenschaftlicher Mitarbeiter“) and PhD Candidate, supported by the German Scholarship Foundation, Institute for German and International Civil Procedural Law, University of Bonn.

Union Jack and European Union flag 2012 © Dave Kellam (CC BY-SA 2.0 Deed)

Today marks a significant step towards the reconstruction of EU-UK Judicial Cooperation. As neither House of Parliament has raised an objection by 17 May 2024,[1] the way seems to be paved for the Government’s ambitious plans to have the HCCH 2019 Judgments Convention[2] implemented and ratified by the end of June 2024.[3] For the first time since the withdrawal of the United Kingdom from the European Union (so-called *Brexit*) on 31 January 2020, a general multilateral instrument would thus once again be put in place to govern the mutual recognition and enforcement of judgments in civil and commercial matters across

the English Channel.

We wish to take this opportunity to look back on the eventful journey that the European Union and the United Kingdom have embarked on in judicial cooperation since Brexit (I.) as well as to venture a look ahead on what may be expected from the prospective collaboration within and perhaps even alongside the HCCH system (II.).

I. From Brexit to The Hague (2016-2024)

When the former Prime Minister and current Foreign Secretary *David Cameron* set the date for the EU referendum on 23 June 2016, this was widely regarded as just a political move to ensure support for the outcome of his renegotiations of the terms of continued membership in the European Union.[4] However, as the referendum results showed 51.9% of voters were actually in favour of leaving,[5] it became apparent that *Downing Street* had significantly underestimated the level of voter mobilisation achieved by the *Vote Leave* campaign. Through the effective adoption of their alluring "take back control" slogan, the Eurosceptics succeeded in framing European integration as undermining Britain's sovereignty – criticising *inter alia* a purportedly dominant role of the Court of Justice (CJEU) – while simultaneously conveying a positive sentiment for the United Kingdom's future as an autonomous country[6] – albeit on the basis of sometimes more than questionable arguments.[7]

http://www.voteleavetakecontrol.org/why_vote_leave.html

Whatever the economic or political advantages of such a repositioning might be (if any at all), it proved to be a severe setback in terms of judicial cooperation. Since most – if not all – of the important developments with respect to civil and commercial matters[8]in this area were achieved within the framework of EU Private International Law (PIL) (e.g. Brussels Ibis, Rome I-II etc.), hopes were high that some of these advantages would be preserved in the subsequent negotiations on the future relationship after Brexit.[9] A period of uncertainty in forum planning for cross-border transactions followed, as it required several rounds of negotiations between EU Chief Negotiator *Michel Barnier* and his changing UK counterparts (*David Frost* served for the final stage from 2019-2020) to discuss both the Withdrawal Agreement[10] as well as the consecutive Trade and Cooperation Agreement (TCA).[11] While the first extended the applicability of the relevant EU PIL Regulations for proceedings instituted, contracts concluded or events occurred during the transition period until 31 December 2020,[12] the latter contained from that point onwards effectively no provision for these matters, with the exception of the enforcement of intellectual property rights.[13] Thus, with regard to civil judicial cooperation, the process of leaving the EU led to – what is eloquently referred to elsewhere as – a "sectoral hard Brexit".[14]

With no tailor-made agreement in place, the state of EU-UK judicial cooperation technically fell back to the level of 1973 before the UK's accession to the European Communities. In fact, – in addition to the cases from the transition period – the choice of law rules of the Rome I and Rome II-Regulations previously incorporated into the domestic law, remained applicable as so-called *retained EU law* (REUL) due to their universal character (*loi uniforme*).[15] However, this approach was not appropriate for legal acts revolving around the principle of reciprocity, particularly in International Civil Procedure.[16] Hence, a legal stocktaking was required in order to assess how *Brexit* affected the status of those pre-existing multilateral conventions and bilateral agreements with EU Member States that had previously been superseded by EU law.

First, the UK Government has been exemplary in ensuring the "seamless continuity" of the HCCH 2005 Choice of Court Convention throughout the uncertainties of the whole withdrawal process, as evidenced by the UK's

declarations and *Note Verbale* to the depositary Kingdom of the Netherlands.[17] The same applies *mutatis mutandis* to the HCCH 1965 Service Convention, to which all EU Member States are parties, and the HCCH 1970 Evidence Convention, which has only been ratified so far by 23 EU Member States. Second, some doubts arose regarding an *ipso iure* revival of the original Brussels Convention of 1968,[18] the international treaty concluded on the occasion of EU membership and later replaced by the Brussels I Regulation when the EU acquired the respective competence under the Treaty of Amsterdam.[19] Notwithstanding the interesting jurisprudential debate, these speculations were effectively put to a halt in legal practice by a clarifying letter of the UK Mission to the European Union.[20] Third, there are a number of bilateral agreements with EU Member States that could be reapplied, although these can hardly substitute for the Brussels regime, which covers most of the continental jurisdictions.[21] This is, for example, the position of the German government and courts regarding the German-British Convention of 1928.[22]

It is evident that this legal patchwork is not desirable for a major economy that wants to provide for legal certainty in cross-border trade, which is why the UK Government at an early stage sought to enter into a more specific framework with the European Union. First and foremost, the *Johnson Ministry* was dedicated to re-access the Lugano Convention[23] which extended the Brussels regime to certain Member States of the European Free Trade Association (EFTA)/European Economic Area (EEA) in its own right.[24] Given the strong resentments *Brexiteers* showed against the CJEU during their campaign this move is not without a certain irony, as its case law is also crucial to the uniform interpretation of the Lugano Convention.[25] Whereas Switzerland, Iceland and Norway gave their approval, the European Commission answered the UK's application in the negative and referred to the HCCH Conventions as the "framework for cooperation with third countries".[26] What some may view as a power play by EU bureaucrats could also fairly be described as a necessary rebalancing of trust and control due to the comparatively weaker economic and in particular judicial integration with the United Kingdom *post-Brexit*.[27] At the very least, the reference to the HCCH reflects the consistent European practice in other agreements with third countries.[28]

Be that as it may, if *His Majesty's Government* implements its ratification plan as diligently as promised, the HCCH 2019 Judgments Convention may well be the

first new building block in the reconstruction what has been significantly shattered on both sides by the twists and turns of *Brexit*.

II. (Prospective) Terms of Judicial Cooperation

Even if the path of EU-UK Judicial Cooperation has eventually led to The Hague, there is still a considerable leeway in the implementation of international common rules.

Fortunately, the UK Government has already put forward a roadmap for the HCCH 2019 Judgments Convention in its responses to the formal consultation carried out from 15 December 2022 to 9 February 2023[29] as well as the explanatory memorandum to the Draft Recognition and Enforcement of Judgments Regulations 2024.[30] Generally speaking, the UK Government wants to implement the HCCH Convention for all jurisdictions of the United Kingdom without raising any reservation limiting the scope of application. Being a devolved matter, this step requires the Central Government to obtain the approval of a Northern Ireland Department (*Roinn i dTuaisceart Éireann*) and the Scottish Ministers (*Mhinistearan na h-Alba*).[31] Furthermore, this approach also implies that there will be no comparable exclusion of insurance matters as under the HCCH 2005 Convention.[32] However, the Responses contemplated making use of the bilateralisation mechanism in relation to the Russian Federation upon its accession to the Convention.[33]

Technically, the Draft Statutory Instrument employs a registrations model that has already proven successful for most recognition and enforcement schemes applicable in the UK.[34] However, registration within one jurisdiction (e.g. England & Wales) will on this basis alone not allow for recognition and enforcement in another (e.g. Scotland, Northern Ireland), but is rather subject to re-examination by the competent court (e.g. Court of Session).[35] This already constitutes a significant difference compared to the system of automatic recognition under the Brussels regime. Moreover, the draft instrument properly circumvents the peculiar lack of an exemption from legalisation in the HCCH 2019 Convention by recognizing the seal of the court as sufficient authentication for the purposes of recognition and enforcement.[36] It remains to be seen if decisions of third states "domesticated" in the UK under the common law *doctrine of obligation* will be recognized as judgments within the European Union. If the CJEU extends the position taken in *J. v. H Limited* to the HCCH 2019 Judgments

Convention, the UK may become an even more attractive gateway to the EU Single Market than expected.[37] Either way, the case law of the CJEU will be mandatory for 26 Contracting States and thus once again play – albeit not binding – a dominant role in the application of the HCCH legal instrument.

As far as the other legal means of judicial cooperation are concerned, the House of Lords does not yet appear to have given up on accession to the Lugano Convention.[38] Nevertheless, it seems more promising to place one's hopes on continued collaboration within the framework of the HCCH. This involves working towards the reconstruction of the remaining foundational elements previously present in EU-UK Judicial Cooperation by strengthening the HCCH *Jurisdiction Project* and further promoting the HCCH 1970 Evidence Convention in the EU.

III. Conclusion and Outlook

After all, the United Kingdom's withdrawal from the European Union has dealt a serious blow to judicial cooperation across the English Channel. A look back at the history of *Brexit* and the subsequent negotiations has revealed that the separation process is associated with an enormous loss of trust. Neither could the parties agree on a specific set of rules under the TCA, nor was the European Union willing to welcome the United Kingdom back to the Lugano Convention.

Against this background, it is encouraging to see that both parties have finally agreed on the HCCH as a suitable and mutually acceptable forum to discuss the future direction of EU-UK Judicial Cooperation. If *Brexit* ultimately brought about a reinvigorated commitment of the United Kingdom to the HCCH Project, this might even serve as an inspiration for other States to further advance the Hague Conference's ambitious goal of global judicial cooperation. Then the prophecies of the old songs would have turned out to be true, after a fashion. Thank goodness!

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[1] HL Int. Agreements Committee, 11th Report of 8 May 2024 "Scrutiny of international agreements: 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters" (HL Paper 113), para. 1. According to sec. 20 (1) (a) and (2) of the Constitutional Reform and Governance Act 2010 (c. 25) is a treaty not ratified unless a Minister of the Crown

has laid a copy before parliament for a period of 21 sitting days.

[2] Convention on the recognition and enforcement of foreign judgments in civil or commercial matters (HCCH 2019 Judgments Convention) of 2 July 2019, UNTS I-58036 and Tractatenblad 2024, 42 (Verdragsnr. 013672).

[3] Civil Procedure Rule Committee, Minutes of 1 December 2023, para. 28

[4] See *inter alia*, *Mason*, "How did UK end up voting to leave the European Union?", The Guardian of 24 June 2016; *Boffey*, "Cameron did not think EU referendum would happen, says Tusk", The Guardian of 21 January 2019; *Duff*, "David Cameron's EU reform claims: If not 'ever closer union', what?", Blogpost of 26 January 2016 on Verfassungsblog | On Matters Constitutional; *von Lucke*, "Brexit oder: Die verzockte Demokratie", Blätter 8/2016, 5 et seq.

[5] UK Electoral Commission, "23 June 2016 referendum on the UK's membership of the European Union", Report of September 2016, p 6.

[6] Compare *Haughton*, "Ruling Divisions: The Politics of Brexit", Perspectives on Politics 19 (2021), 1258, 1260; *Özlem Atikcan/Nadeau/Bélanger*, "Framing Risky Choices: Brexit and the Dynamics of High-stakes Referendums", p. 44.

[7] E.g. *Rankin*, "Is the leave campaign really telling six lies?", The Guardian of 7 June 2016.

[8] This finding might look different for International Family Law, according to *Beaumont*, "Private International Law concerning Children in the UK after Brexit: Comparing Hague Treaty Law with EU Regulations", Child & Fam. L. Q. 29 (2017), 213, 232: "In all these matters students, practitioners and judges will be grateful to have fewer operative legal regimes post-Brexit".

[9] For example, on this blog *Fitchen*, "Brexit: No need to stop all the clocks", Blogpost of 31 January 2020 or *Lutzi*, "Brexit: The Spectre of Reciprocity Evoked Before German Courts", Blogpost of 13 December 2020.

[10] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (Withdrawal Agreement) of 24 January 2020, OJ EU CI 384/1.

[11] Trade and Cooperation Agreement between the European Union and the

European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (TCA) of 30 December 2020, OJ EU L 149/10.

[12] Art. 126 of the Withdrawal Agreement.

[13] Compare Chapter 3: Art. 256-273 of the TCA.

[14] *Bert*, "Judicial Cooperation in Civil Matters: Hard Brexit After All?", Blogpost of 26 December 2020 on Dispute Re§olution Germany.

[15] Sec. 3 (1) European Union (Withdrawal) Act 2018, Chapter 16/2018, sec. 10, 11 The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019, SI 2019/834; For the current status of the Retained EU Law, see House of Commons Library "The end of REUL? – Progress in reforming retained EU law", Research Briefing No.°09957 of 2 February 2024 (author: *Leigh Gibson*).

[16] Implicitly *Dickinson*, "Realignment of the Planets – Brexit and European Private International Law", IPRax 2021, 213, 217 et seq.

[17] See Notes Verbales of the United Kingdom to the Kingdom of the Netherlands in its capacity as depositary of the HCCH 2005 Judments Convention from 28 December 2018 to 28 September 2020 in the Treaty Database.

[18] Convention on jurisdiction and the enforcement of judgments in civil and commercial matter (Brussels Convention) of 27 September 1968, OJ EU L 229/31; See e.g. *Rühl*, "Judicial Cooperation in Civil and Commercial Matters after Brexit: Which Way Forward?", ICLQ 67 (2018), 99, 104 et seq.

[19] Art. 73m of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts of 2 October 1997, OJ EU C 340/1.

[20] UK Mission to the European Union, Letter to the Council of the European Union of 29 January 2021, NO 17/2021.

[21] See, for example, the Agreement on the continued Application and Amendment of the Convention between the Government of the United Kingdom and the Government of Norway providing for the Reciprocal Recognition and

Enforcement of Judgments in Civil Matters singed at London on 12 June 1961, SI 2020 No. 1338.

[22] Convention on the Facilitation of Legal Proceedings in Civil and Commercial Matters between His Majesty and the President of the German Reich of 20 March 1928; RGBl. 1928 II Nr. 47; for the position of the German Government, please refer to German Federal Government "Response to the parliamentary enquiry on judicial cooperation in civil matters with the United Kingdom post-Brexit", BT-Drucks. 19/27550 of 12 March 2021, p. 3, for a recent decision of the German Judiciary, see Higher Regional Court of Cologne, Decision of 2 March 2023, I-18 U 188/21, paras. 60 et seq.

[23] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention) of 30 October 2007, OJ EU L 339/3.

[24] With the notable exception of Liechtenstein.

[25] Art. 64 Lugano Convention as well as the Protocol concerning the interpretation by the Court of Justice of 3 June 1971, OJ EU L No°204/28.

[26] For the consent of the other Contracting State (except Denmark), see Swiss FDFA, "Communications by the depositary with respect to the application of accession by the United Kingdom", Notification of 28 April 2021, 612-04-04-01 – LUG3/21; for the rejection of the EU Commission, Note Verbale to the Swiss Federal Council of 22 June 2021 and, "Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention", COM(2021) 222 final of 4 May 2021, pp. 3 et seq. However, this decision was not without criticism, for example by the Chair-Rapporteur of the OHCHR Working Group on the issue of human rights and transnational corporations and other business enterprises in a letter to the EU Commission of 14 March 2024.

[27] For these arguments see EU Commission, "Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention", COM(2021) 222 final of 4 May 2021, p. 3 and European Parliamentary Research Service (EPRS), "The United Kingdom's possible re-joining of the 2007 Lugano Convention" Briefing PE 698.797 of November 2021 (author: *Rafa? Ma?ko*), pp. 3 et seq. For a theoretical foundation, see *M. Weller*,

" 'Mutual Trust': A Suitable Foundation for Private International Law in Regional Integration Communities and Beyond", RdC 423 (2022), 37, 295 et seq.

[28] See e.g. Art. 24 of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other par, OJ EU No°L 161/3: "The Parties agree to facilitate further EU-Ukraine judicial cooperation in civil matters on the basis of the applicable multilateral legal instruments, especially the Conventions of the Hague Conference on Private International Law in the field of international Legal Cooperation and Litigation as well as the Protection of Children". Until recently, the regulation of judicial cooperation specifically in and for extra-EU trade relations appeared to be aout of sight, see *M. Weller*, "Judicial cooperation of the EU in civil matters in its relations to non-EU States – a blind spot?", in Alan Uzelac/Rhemco van Rhee (eds.), Public and Private Justice (PPJ) 2017: The Transformation of Civil Justice, Intersentia 2018, pp. 63 et seq.

[29] UK Ministry of Justice, The Hague 2019 – Response to Consultation of 23 November 2023 ("Responses").

[30] Draft Statutory Instruments 2024 No. XXX Private International Law: The Recognition and Enforcement of Judgments (2019 Hague Convention etc.) Regulations 2024 ("Draft Guidelines"). The competence to make regulations in that respect is based on sec. 2 (1) of the Private International Law (Implementation of Agreements) Act 2020 (c. 24). According to sec. 2 (11) read in conjunction with sched. 6 paras. 4 (2) (a) and (d) draft regulations need to be laid before parliament for approval of each House by a resolution.

[31] Sec. 2 (12) Private International Law (Implementation of Agreements) Act 2020 (c. 24); see also Letter from the Scottish Minister for Victims and Community Safety of 19 March 202 regarding the "UK SI Notification – The Recognition and Enforcement of Judgments (2019 Hague Convention etc) Regulations 2024".

[32] See Response, para. 51; a similar discussion took place regarding "mixed litigation issues", where only certain elements are within the scope of the HCCH 2019 Judgments Convention.

[33] Responses, para. 53.

[34] See *inter alia* the Administration of Justice Act 1920, Chapter 81/1920 (Regnal. 10 & 11 Geo 5) or the Foreign Judgments (Reciprocal Enforcement) Act 1933, Chapter 13/1933 (Regnal. 23 & 24 Geo 5.

[35] Sec. 15 Draft Guidelines and Draft Explanatory Memorandum, para. 5.5.5.

[36] Sec. 12 Draft Guidelines; *Garcimartin/Saumier*, HCCH 2019 Judgments Convention: Explanatory Report, para. 307.

[37] See CJEU, Judgment of 7 April 2022, *J. v. H. Limited*, C-568/20, para. 47. However, there is a certain chance that this case law will be corrected in the upcoming revision process of the Brussels Ibis-Regulation, see e.g. *Hess/Althoff/Bens/Elsner/Järvekülg*, "The Reform of the Brussels Ibis Regulation", MPI Luxembourg Research Paper Series N.°2022 (6), proposal 15.

[38] HL Int. Agreements Committee, 11th Report of 8 May 2024 "Scrutiny of international agreements: 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters" (HL Paper 113), para. 17: "Many stakeholders have called for the Government to continue its efforts to join the Lugano Convention in addition to ratifying Hague 2019. We agree that the Government should do so."

The European Parliament's last plenary session & Private International Law

This post was written by Begüm Kilimcio?lu (PhD researcher), Thalia Kruger (Professor) and Tine Van Hof (Guest professor and postdoctoral researcher), all of the University of Antwerp.

During the last plenary meeting of the current composition of the European Parliament (before the elections of June 2024), which took place from Monday 22

until Thursday 24 April, **several proposals relevant to private international law** were put to a vote (see the full agenda of votes and debates). All of the regulations discussed here still have to be formally approved by the Council of the European Union before they become binding law, in accordance with the ordinary legislative procedure.

It is interesting to note that, while many pieces of new legislation have a clear cross-border impact in civil matters, not all of them explicitly address private international law. While readers of this blog are probably used to the discrepancies this has led to in various fields of the law, it is still worth our consideration.

First, the European Parliament voted on and adopted the proposal for a **Directive on Corporate Sustainability Due Diligence** (CSDDD) with 374 votes in favour, 235 against and 19 abstentions (see also the European Parliament's Press Release). The text adopted is the result of fierce battles between the Commission, Parliament and the Council and also other stakeholders such as civil society, academics and practitioners. This necessitated compromise and resulted in a watered-down version of the Commission's initial proposal of 23 February 2022 and does not go as far as envisaged in the European Parliament's Resolution of 10 March 2021 (see also earlier blog pieces by Jan von Hein, Chris Tomale, Giesela Rühl, Eduardo Álvarez-Armas and Geert van Calster).

The Directive is one of the few instruments worldwide that put legally-binding obligations on multinational enterprises. It lays down obligations for companies regarding their adverse actual and potential human rights and environmental impacts, with respect to their own operation, the operations of their subsidiaries, and the operations carried out by their business partners in the chains of activities. The Directive further stipulates specific measures that companies have to take to prevent, mitigate or bring an end to their actual or potential adverse human rights impacts. Besides national supervisory authorities for the oversight of the implementation of the obligations, the Directive enacts civil liability for victims of corporate harm.

The adopted Directive is more or less **silent on private international law.** The closest it gets to addressing our field of the law is Article 29(7), placing the duty on Member States to ensure the mandatory nature of civil remedies:

Member States shall ensure that the provisions of national law transposing this Article are of overriding mandatory application in cases where the law applicable to claims to that effect is not the national law of a Member State.

and Recital 90, which is more general:

In order to ensure that victims of human rights and environmental harm can bring an action for damages and claim compensation for damage caused when the company intentionally or negligently failed to comply with the due diligence obligations stemming from this Directive, this Directive should require Member States to ensure that the provisions of national law transposing the civil liability regime provided for in this Directive are of overriding mandatory application in cases where the law applicable to such claims is not the national law of a Member State, as could for instance be the case in accordance with international private law rules when the damage occurs in a third country. This means that the Member States should also ensure that the requirements in respect of which natural or legal persons can bring the claim, the statute of limitations and the disclosure of evidence are of overriding mandatory application. When transposing the civil liability regime provided for in this Directive and choosing the methods to achieve such results, Member States should also be able to take into account all related national rules to the extent they are necessary to ensure the protection of victims and crucial for safeguarding the Member States' public interests, such as its political, social or economic organisation.

While the text contains references to numerous existing Regulations, Brussels I and Rome I are not among them; not even a precursory or confusing reference as in Recital 147 of the GDRP.

Second, the European Parliament voted on two other proposals that build on and implement the objectives of the European Green Deal and the EU Circular Economy Action Plan. The first is a proposal for a **Regulation establishing a framework for setting eco-design requirements for sustainable products** with 455 votes in favour, 99 against and 54 abstentions (see also the European Parliament's Press Release). The Regulation aims to reduce the negative life cycle environmental impacts of products by improving the products' durability, reusability, upgradability, reparability etc. It sets design requirements for products that will be placed on the market, and establishes a digital product certificate to inform consumers.

This Regulation does not contain a private-international-law type connecting factor for contracts or products. Neither does it expressly elevate its provisions to overriding rules of mandatory law (to at least give us some private international law clue). Its scope is determined by the EU's internal market. All products that enter the European market have to be in conformity with the requirements of both regulations, also those that are produced in third countries and subsequently imported on the European market (Art. 3(1)). "Products that enter the market" is the connecting factor, or the basis for applying the Regulation as overriding mandatory law. The Regulation is silent on products that exit the market. Hopefully the result will not be that products that were still in the production cycle at the time of entry into force will simply be exported out of the EU.

The third adopted proposal is the **Regulation on packaging and packaging waste** with 476 votes in favour, 129 against and 24 abstentions (see also the European Parliament's Press Release). This Regulation aims to reduce the amount of packaging placed on the Union market, ensuring the environmental sustainability of the packaging that is placed on the market, preventing the generation of packaging waste, and the collection and treatment of packaging waste that has been generated. To reach these aims, the regulation's key measures include phasing out certain single-use plastics by 2030, minimizing so called "forever chemicals" chemicals in food packaging, promoting reuse and refill options, and implementing separate collection and recycling systems for beverage containers by 2029.

Like the Eco-design Regulation, no word on Private International Law, no references. The Regulation refers to packaging "placed on the market" in various provisions (most notably Art. 4(1)) and recitals (e.g. Recitals 10 and 14).

Lastly, the European Parliament approved the proposal for a **regulation on prohibiting products made with forced labour** on the Union market with an overwhelming majority of 555 votes in favour, 6 against and 45 abstentions (see also the European Parliament's Press Release). The purpose of this Regulation is to improve the functioning of the internal market while also contributing to the fight against forced labour (including forced child labour). Economic operators are to eliminate forced labour from their operations through the pre-existing due diligence obligations under Union law. It introduces responsible authorities and a database of forced labour risk areas or products.

Just as is the case for the other Regulations, this Regulation does not contain references to private international law instruments, and no explicit reference to instruments in this field, even though the implementation of the Regulation requires vigilance throughout the value chain. It would be correct to assume that this provides overriding mandatory law, as the ban on forced labour is generally accepted to be *jus cogens* even though the extent of this ban is contentious (see Franklin).

Other proposals that are more clearly in the domain of private international law have not (yet?) reached the finish line. First, in the procedure on the dual proposals in the field of the protection of adults of 31 May 2023, the European Parliament could either adopt them or introduce amendments at first reading. However, these proposals have not reached the plenary level before the end of term and it will thus be for the Conference of Presidents to decide at the beginning of the new parliamentary term whether the consideration of this 'unfinished business' can be resumed or continued (Art. 240 Rules of Procedure of the European Parliament).

In the second file, the proposal for a **Regulation in matters of parenthood and on the creation of a European Certificate of Parenthood** of 7 December 2022 the European Parliament was already consulted and submitted its opinion in a Resolution of 14 December 2023. It is now up to the Council of the European Union to decide unanimously (according to the procedure in Art. 81(3) of the Treaty on the Functioning of the European Union). It can either adopt the amended proposal or amend the proposal once again. In the latter case the Council has to notify or consult (in case of substantial amendments) the European Parliament again.

Praxis des Internationalen Privat-

und Verfahrensrechts (IPRax) 2/2024: Abstracts

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

H.-P. Mansel/K. Thorn/R. Wagner: **European Conflict of Law 2023: Time of the Trilogue**

This article provides an overview of developments in Brussels in the field of judicial cooperation in civil and commercial matters from January 2023 until December 2023. It presents newly adopted legal instruments and summarizes current projects that are making their way through the EU legislative process. It also refers to the laws enacted at the national level in Germany as a result of new European instruments. Furthermore, the authors look at areas of law where the EU has made use of its external competence. They discuss both important decisions and pending cases before the CJEU as well as important decisions from German courts pertaining to the subject matter of the article. In addition, the article also looks at current projects and the latest developments at the Hague Conference of Private International Law.

H. Kronke: **The Fading of the Rule of Law and its Impact on Choice of Court Agreements and Arbitration Agreements**

Against the background of declining standards of the rule of law in an increasing number of jurisdictions, the article identifies and discusses problematic choices of a forum or of an arbitral seat as well as solutions developed by courts and legal doctrine in private international law, civil procedure and arbitration law. Businesses and their legal advisers are encouraged to anticipate risks and consider appropriate measures when drafting contracts.

L. van Vliet/J. van der Weide: **The Crimean treasures**

In 2013, a collection of highly important archaeological objects, the "Crimean treasures" had been loaned by four Crimean museums to the LVR-Landesmuseum in Bonn, Germany, and the Allard Pierson Museum in Amsterdam for exhibition purposes. During the exhibition at the Allard Pierson Museum, the Crimean Peninsula was illegally annexed by the Russian Federation. The question then arose to whom the Crimean treasures should be returned by the Allard Pierson Museum: to the Crimean museums (de facto in possession of the Russian Federation) or to the State of Ukraine? The legal proceedings concentrated on the interpretation of the notion of "illicit export" in the UNESCO Convention 1970 and on the application of the concept of overriding mandatory rules in the area of property law. As to the UNESCO Convention 1970, the question was whether the concept of illicit export includes the case where protected cultural property is lawfully exported on the basis of a temporary export licence and is not returned to the country that issued the licence after the expiry of the term in the licence. The drafters of the UNESCO Convention did not consider this case. These proceedings are most probably the first to raise and answer this question. The 2015 Operational Guidelines to the UNESCO Convention contain a definition of illegal export that explicitly includes the case of non-return after temporary export. In our opinion, this allows for a broad interpretation of the UNESCO Convention.

The Dutch courts had international jurisdiction because the claims of the Crimean museums were based on the loan agreements and the real right of operational management falling within the scope of the Brussels I Regulation. For the claims of the State of Ukraine, a clear basis for international jurisdiction does not exist when it acts in its state function. Claims iure imperii do not fall under Brussels I or Brussels I bis.

Having ruled that there was no illicit export, the Court of Appeal Amsterdam had to decide whether the contractual and property rights of the Crimean museums to restitution might be set aside by Ukrainian laws and regulations, including Order no. 292 requiring that the Crimean treasures be temporarily deposited with the National Museum of History of Ukraine in Kiev. The Court held that this Order applied at least as an overriding mandatory rule within the meaning of art. 10:7 of the Dutch Civil Code. The Dutch Supreme Court upheld the Court of Appeal's judgment, agreeing with the Court of Appeal's application of the concept of overriding mandatory rules. However, the Supreme Court could not give its view

on the interpretation of the UNESCO Convention 1970.

W. Hau: **Litigation capacity of non-resident and/or foreign parties in German civil proceedings: current law and reform**

This article deals with the litigation capacity (Prozessfähigkeit) of non-resident and/or foreign parties in German civil proceedings, both de lege lata and de lege ferenda. This question can arise for minors and for adults who are under curatorship or guardianship. Particular attention is paid here to the determination of the law applicable to the litigation capacity in such cases, but also to the relevance of domestic and foreign measures directed to the protection of the party.

S. Schwemmer: **Jurisdiction for cum-ex liability claims against Non-EU companies**

In the context of an action for damages brought by investors in a cum-ex fund against the Australian bank that acted as leverage provider, the German Federal Supreme Court (BGH) had to deal with questions regarding the application of the Brussels Ibis Regulation to non-EU companies. The court not only arrived at a convincing definition of the concept of principal place of business (Article 63 (1) c) Brussels Ibis-Regulation), but also ruled on the burden of proof with regard to the circumstances giving rise to jurisdiction. However, one core question of the case remains open: How should the conduct of third parties, especially senior managers, be taken into account when determining the place of action in the sense of Article 7(2) of the Brussels Ibis Regulation?

M. Fehrenbach: **In the Thicket of Concepts of Establishments: The Principal Place of Business within the Meaning of Art. 3 (1) III EIR 2017**

The Federal Court of Justice (Bundesgerichtshof) referred to the CJEU, among other things, the question whether the concept of principal place of business (Hauptniederlassung) within the meaning of Art. 3 (1) III EIR 2017 presupposes the use of human means and assets. This would be the case if the principal place

of business were to be understood as an elevated establishment (Niederlassung) within the meaning of Art. 2 (10) EIR 2017. This article shows that the principal place of business within the meaning of Art. 3 (1) III EIR 2017 is conceived differently from an establishment within the meaning of Art. 2 (10) EIR 2017. Neither follows a requirement of the use of human means and assets from the desirable coherent interpretation with Art. 63

M. Lieberknecht: **Jurisdiction by virtue of perpetuatio fori under the Insolvency Regulation**

In this decision, the German Federal Supreme Court weighs in on the doctrine of perpetuatio fori in the context of international insolvency law. The court confirms that, once the insolvency filing is submitted to a court in the Member State that has international jurisdiction under Art. 3(1) EU Insolvency Regulation, the courts of that Member State remain competent to administer the insolvency proceedings even if the debtor shifts its centre of main interest (COMI) to a different Member State at a later point in time. In line with the EJC's recent decision in the Galapagos case, the ruling continues the approach to perpetuatio fori established under the previous version of the EU Insolvency Regulation. In addition, the court clarifies that international jurisdiction established by way of perpetuatio fori remains unaffected if the initial insolvency filing has been submitted to a court lacking local jurisdiction under the respective national law.

D. Martiny: **Arbitral agreements on the termination of sole distribution agreements in Belgium**

The Belgian Supreme Court has ruled that disputes on the termination of sole distribution agreements can be submitted to arbitration (April 7, 2023, C.21.0325.N). The Court followed the reasoning of the Unamar judgment of the European Court of Justice of 2013 and applied it to the relevant provisions of Article X.35–40 of the Belgian Code of Economic Law. According to the judgment, these provisions mainly protect "private" interests. Since they are not essential for safeguarding Belgian fundamental public interests, they are therefore not to be considered as overriding mandatory provisions in the sense of Article 9 para. 1 Rome I Regulation. Hence, the question whether a dispute can be subject to

arbitration does not depend on whether the arbitrator will apply Belgian law or not. It is also not necessary that foreign law gives the distributor the same level of protection as Belgian law. This means that disputes on the termination of exclusive distribution agreements with Belgian distributors are now arbitrable and that choice of law clauses will be respected.

Th. Granier: **The Strabag and Slot judgments from the Paris Court of Appeal: expected but far-reaching decisions**

In two decisions issued on 19.4.2022, the Paris Court of Appeal held that it was sufficient for an investment protection agreement not to expressly exclude the possible application of laws of the European Union to establish the incompatibility of dispute settlement clauses in investment protection treaties with laws of the European Union. That incompatibility therefore applies to all clauses in those treaties that do not expressly exclude the application of the laws of the European Union by the arbitral tribunal. The Court of Appeal followed decisions of the ECJ in Achmea, Komstroy and PL Holding, by which it is bound. These decisions highlight the increasing difficulties in the recognition and enforcement of arbitral awards rendered pursuant to investment treaties in the European Union.

E. Schick/S. Noyer: **Acquisition of property according to the law applicable to contracts? A critical analysis of thte existing French private international property law in the light of oft he 2022 draft law**

While the private international law of contracts is unified in the Rome I Regulation, the conflict of laws rules for property are still defined individually by member states of the European Union. Autonomous French private international law remains largely uncodified and the product of the jurisprudence of the Cour de cassation, with significant regulatory gaps. The draft legislation for private international law issued by the responsible committee on 31.3.2022 aims to codify large parts of this established jurisprudence and therefore also sheds new light on the conflict rules applicable in France de lege lata. In the field of private international property law, the proposed art. 97–101 feature conflicts rules which do not only appear to the German jurist as exotic, but even raise questions as to the scope of application of the Rome I Regulation. Focusing on the contractual

transfer of movable property – an area where contract law and property law are intricately linked – this article offers an account of the applicable French conflicts of laws rules by examining the relevant jurisprudence and scholarly doctrine. The codification proposal and the problems it creates will also be critically analysed.

N. Dewitte/L.Theimer: **A century of the Hague Academy, 31 July to 18 August 2023, The Hague.**