„El clásico“ of Recognition and Enforcement – A Manifest Breach of Freedom of Expression as a Public Policy Violation: Thoughts on AG Szpunar 8.2.2024 – Opinion C-633/22, ECLI:EU:C:2024:127 – Real Madrid Club de Fútbol

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Introduction

On 8 February 2024, Advocate General (AG) *Szpunar* delivered his Opinion on C-633/22 (AG Opinion), submitting that disproportionate damages for reputational harm may go against the freedom of expression as enshrined in Art. 11 Charter of Fundamental Rights of the European Union (CFR). The enforcement of these damages therefore may (and at times *will*) constitute a violation of public policy in the enforcing state within the meaning of Art. 34 Nr. 1 Brussels I Regulation. The AG places particular emphasis on the severe deterring effect these sums of damages may have – not only on the defendant newspaper and journalist in the case at hand but other media outlets in general (AG Opinion, paras. 161-171). The decision of the Court of Justice of the European Union (CJEU) will be of particular topical interest not least in light of the EU’s efforts to combat so-called “Strategic Lawsuits Against Public Participation” (SLAPPs) within the EU in which typically financially potent plaintiffs initiate unfounded claims for excessive sums of damages against public watchdogs (see COM(2022) 177 final).

The Facts of the Case and Procedural History

Soccer clubs *Real Madrid* and *FC Barcelona*, two unlikely friends, suffered the

same fate when both became the targets of negative reporting: The French newspaper *Le Monde* in a piece titled "Doping: First cycling, now soccer" had covered a story alleging that the soccer clubs had retained the services of a doctor linked to a blood-doping ring. Many Spanish media outlets subsequently shared the article. *Le Monde* later published *Real Madrid's* letter of denial without further comment. *Real Madrid* then brought actions before Spanish courts for reputational damage against the newspaper company and the journalist who authored the article. The Spanish courts ordered the defendants to pay 390.000 euros in damages to *Real Madrid*, and 33.000 euros to the member of the club's medical team. When the creditors sought enforcement in France, the competent authorities were disputed as to whether the orders were compatible with French international public policy due to their potentially interfering with freedom of expression.

The *Cour de Cassation* referred the question to the CJEU with a request for a preliminary ruling under Art. 267 TFEU, submitting no less than seven questions. Conveniently, the AG summarized these questions into just one, namely essentially: whether Art. 45(1) read in conjunction with Arts. 34 Nr. 1 and 45(2) Brussels I Regulation and Art. 11 CFR are to be interpreted as meaning that a Member State may refuse to enforce another Member State's judgment against a newspaper company and a journalist based on the grounds that it would lead to a manifest infringement of the freedom of expression as guaranteed by Art. 11 CFR.

Discussion

The case raises a considerable diversity of issues, ranging from the relationship between the European Convention on Human Rights (ECHR), the CFR, and the Brussels I Regulation, to public policy, and the prohibition of *révision au fond*. I will focus on whether and if so, under what circumstances, a breach of freedom of expression under Art. 11 CFR may lead to a public policy violation in the enforcing state if damages against a newspaper company and a journalist are sought.

Due to the Regulation's objective to enable free circulation of judgments, recognition and enforcement can only be refused based on limited grounds – public policy being one of them. Against this high standard (see as held recently in C-590/21 *Charles Taylor Adjusting*, ECLI:EU:C:2023:633 para. 32), AG *Szpunar*

submits first (while slightly circular in reasoning) that in light of the importance of the press in a democracy, the freedom of the press as guaranteed by Art. 11 CFR constitutes a fundamental principle in the EU legal order worthy of protection by way of public policy (AG Opinion, para. 113). The AG rests this conclusion on the methodological observation that Art. 11(2)CFR covers the freedom and plurality of the press to the same extent as Art. 10 ECHR (ECtHR, Appl. No. 38433/09 – *Centro Europa and Di Stefano/Italy*, para. 129).

Under the principle of mutual trust, the Regulation contains a prohibition of *révision au fond*, Art. 45(2) Brussels I Regulation, i.e., prevents the enforcing court from reviewing the decision as to its substance. Since the assessment of balancing the interests between the enforcement creditors and the enforcement debtors had already been carried out by the Spanish court, the AG argues that the balancing required in terms of public policy is limited to the freedom of the press against the interest in enforcing the judgment.

Since the Spanish court had ordered the defendants to pay a sum for damages it deemed to be *compensatory* in nature, in light of Art. 45(2) Brussels I Regulation, the enforcing court could not come to the opposing view that the damages were in fact *punitive*. With respect to punitive damages, the law on enforcement is more permitting in that non-compensatory damages may potentially be at variance, in particular, with the legal order of continental states (*cf.* Recital 32 of the Rome II Regulation). In a laudable overview of current trends in conflict of laws, taking into account Art. 10(1) of the 2019 Hague Judgments Convention, the Résolution de L'Institut de Droit International (IDI) on infringements of personality rights via the internet (which refers to the Judgments Convention), and the case law of the CJEU and the ECtHR (AG Opinion, paras. 142-158), AG *Szpunar* concludes that, while generally bound by the compensatory nature these damages are deemed to have, the enforcing court may only resort to public policy as regards compensatory damages in exceptional cases if further reasons in the public policy of the enforcing Member State so require.

The crux of this case lies in the fact that the damages in question could potentially have a deterring effect on the defendants and ultimately prevent them from investigating or reporting on an issue of public interest, thus hindering them from carrying out their essential work in a functioning democracy. Yet, while frequently referred to by scholars, the CJEU (see e.g., in C-590/21 *Charles Taylor Adjusting*, ECLI:EU:C:2023:633 para. 27), and e.g., in the preparatory work for

the Anti-SLAPP Directive (see the explanatory memorandum, COM(2022) 177 final; see also Recital 11 of the Anti-SLAPP Recommendation, C(2022) 2428 final), it is unclear what a deterring effect actually consists of. Indeed, the terms "deterring effect" and "chilling effect" have been used interchangeably (AG Opinion, para. 163-166). In order to arrive at a more tangible definition, the AG makes use of the ECtHR's case law on the deterring effect in relation to a topic of public interest. In doing so, the deterring effect is convincingly characterized both by its *direct effect* on the defendant newspaper company and the journalist, and the *indirect effect* on the freedom of information on society in the enforcing state as a whole (AG Opinion, para. 170). Furthermore, in the opinion of the AG it suffices if the enforcement is likely to have a deterring effect on press freedom in the enforcing Member State (AG Opinion, para. 170: "*susceptible d'engendrer un effet dissuasif*").

As to the appropriateness of the amount of damages which could lead to a manifest breach of the freedom of the press, there is a need to differentiate: The newspaper company would be subject to a severe (and therefore disproportionate) deterring effect, if the amount of damages could jeopardize its economic basis. For natural persons like the journalist, damages would be disproportionate if the person would have to labor for years based on his or her or an average salary in order to pay the damages in full. It is convincing that the AG referred to the ECtHR's case law and therefore applied a gradual assessment of the proportionality, depending on the financial circumstances of the company or the natural person. As a result, in case of a thus defined deterring effect on both the defendants and other media outlets, enforcing the decision would be at variance with public policy and the enforcing state would have to refuse enforcement in light of the manifest breach of Art. 11 CFR (AG Opinion, para. 191).

Conclusion

The case will bring more clarity on public policy in relation to freedom of expression and the press. It is worth highlighting that the AG relies heavily on principles as established by the ECtHR. This exhibits a desirable level of cooperation between the courts, while showing sufficient deference to the ECtHR's competence when needed (see e.g., AG Opinion, para. 173). These joint efforts to elaborate on criteria such as "public participation" or issues of "public interest" – which will soon become more relevant if the Anti-SLAPP Directive

employs these terms –, will help bring legal certainty when interpreting these (otherwise partially ambiguous) terms. It remains to be seen whether the CJEU will adopt the AG's position. This is recommended in view of the deterrent effect of the claims for damages in dispute – not only on the defendants, but society at large.

Colonialism and German PIL (3) – Imagined Hierachies

This post is part of a series regarding Colonialism and the general structure of (German) Private International Law, based on a presentation I gave in spring 2023. See the introduction here.

As mentioned in the introduction, this series does **not** intent to automatically pass judgment on a norm or method influenced by colonialism **as inherently negative**. Instead, the aim is to reveal these influences and to initiate a first engagement with and awareness of this topic and to stimulate a discussion and reflection.

The first post (after the introduction) dealt with classic PIL and colonialism and already sparked a vivid discussion in the comments section. This second considered structures and values inherent in German or European law, implicitly resonating within the PIL and, thus, expanding those values to people and cases from other parts of the world. The **third category** discusses an imagined hierarchy between the Global North and Global South that is sometimes inherent in private international law thinking, for instances where courts or legislators abstractly or paternalistically apply the public policy to "protect" individuals from foreign legal norms. This is especially evident in areas like underage marriages and unilateral divorce practices found *inter alia* in Islamic law.

1. The public policy exception – abstract or concrete control?

The public policy exception is intended to prevent the application of foreign law by way of exception if the result of this application of law conflicts with fundamental domestic values. Such control is necessary for a legal system that is open to the application of foreign law and, in particular, foreign law of a completely different character. German law is typically very restrictive in its approach: The public policy control refers to a concrete control of the results of applying the provisions in question. In addition, the violation of fundamental domestic values must be obvious and there must be a sufficient domestic connection. In other countries, the approach is less restrictive. In particular, there are also courts that do not look at the result of the application of the law, but carry out an abstract review, i.e. assess the foreign legal system in the abstract. For a comparison of some EU Member States see this article.

2. Explicit paternalistic rules

Furthermore, there are some rules that exercise an abstract control of foreign law. Article 10 of the Rome III Regulation contains a provision that analyses foreign divorce law in the abstract to determine whether it contains gender inequality. According to this (prevailing, see e.g. conclusions of AG Saugmandsgaard Øe) interpretation, it is irrelevant whether the result of the application of the law actually leads to unequal treatment. This abstract assessment assumes – even more so than a review of the result – an over-under-ordering relationship between domestic and foreign law, as the former can assess the latter as "good" or "bad".

Even beyond the *ordre public* control, there has recently been a tendency towards "paternalistic rules", particularly triggered by the migration movements of the last decade. The legislator seems to assume that the persons concerned must be protected from the application of "their" foreign law, even if they may wish its application. In particular, the "Act to Combat Child Marriage" which was only partially deemed unconstitutional by the Federal Constitutional Court (see official press release and blog post), is one such example: the legislator considered the simple, restrictive *ordre public* provision to be insufficient. Therefore, it created additional, abstract regulations that block the application of foreign, "bad" law.

3. Assessment

In the described cases as a conceptual hierarchy can be identified: The

impression arises that foreign legal systems, particularly from the “Global South”, are categorised in the abstract as “worse” than the German/EU legal system and that persons affected by it must be protected from it (“paternalistic norms”). As far as I can see there is a high consensus in the vast majority of German literature (but there are other voices) and also the majority of case law that the abstract *ordre public* approach should be rejected and that the aforementioned norms, i.e. in particular Art. 13 III EGBGB (against underage marriages) and Art. 10 Rome III-VO (different access to a divorce based on gender), should ideally be abolished. It would be desirable for the legislator to take greater account of the literature in this regard.

Colonialism and German PIL (2) – German and European Structures and Values

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BOOK REVIEW OF THE EUROPEAN PRIVATE INTERNATIONAL LAW OF OBLIGATIONS

EDITED

Sweet & Maxwell is offering a 15% discount on all orders of the book until

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The European Private International Law of Obligations is a practitioners' work that is evidently written at a very high standard. This is perhaps unsurprising because the authors, Mr Michael Wilderspin was a legal adviser to the European Commission, and Sir Richard Plender was an English Judge in his lifetime.

In the 6th edition of this authoritative and very illuminating book, Michael Wilderspin now assumes responsibility for its writing. The first edition of the book (in 1991) was solely written by Richard Plender, but he brought in Michael Wilderspin to work on the second edition with him. They worked together on successive editions of the book for a long time. Unfortunately, Richard Plender passed away in 2020, after the 5th edition of this book which was published in 2019.

The book is regularly cited in English courts, and it is likely that this tradition will be maintained in the 6th edition of the book. In this new edition over 70 recently decided cases (from the UK, Court of Justice of the European Union ("CJEU") and other Member States of the EU) have been incorporated into the analysis. The new edition also incorporates many recent secondary sources in its analysis.

The book contains four main parts. Part One contains what is described as "COMMON PRINCIPLES" on Rome I and Rome II Regulations. This runs from pages 3 to 91, focusing on preliminary matters such as the history and interpretative approaches of Rome I and Rome II, and a comparison of both

Regulations. Part Two contains what is described as “CONTRACT” based on Rome I. This runs from pages 95 to 488, focusing on a detailed analysis of the Articles of Rome I. Part Three contains what is described as “THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS.” This runs from pages 491 to 860, focusing on a detailed analysis of the Articles of Rome II. Part Four contains what is described as “ROME I AND II REGULATIONS IN THE UK.” This runs from pages 863 to 868, focusing on the changes brought by Brexit to Rome I and Rome II as provided in The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019.

Each chapter usually commences with a very useful legislative history. There is very impressive knowledge of Rome I and Rome II from a European comparative perspective and comparisons with other international conventions. The interaction between domestic private law in Member States and England, and law applicable to contract and torts is an underlying theme that is explored well in the book. In this regard, there is impressive knowledge of the domestic private laws and conflict of laws rules of many Member States in the EU and England, making this book genuinely European. One point worth mentioning is that the authors also note the final decision of Member State Courts that refer a matter to the CJEU on the applicable law of obligations. For example, in analysing the decision of the CJEU in *Haeger* (2015) which interprets Article 4(4) of the Rome Convention on the law applicable to contract of carriage of goods, Wilderspin also notes the final decision of the French Cour de Cassation that referred the question (see paragraph 8-016, footnote 37). Similarly, in analysing the decision of the CJEU in *Nikiforidis* (2016) which interprets Article 9 of Rome I on overriding mandatory rules, Wilderspin also notes the final decision of the German Court that referred the question (see paragraph 12-041).

Wilderspin notes in the Preface that whilst Richard Plender did not challenge the accuracy of his views, he encouraged him to use a more polite language in writing. Indeed, Wilderspin is a bold writer. He fiercely engages with both primary and secondary sources. On some occasions, he is very blunt. For example, Recital 12 to the Rome I Regulation provides in interpreting Article 3 of Rome I that:

“An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.”

Many French scholars like Professor Maxi Scherer (2011) are of the view that there is a requirement of corroboration with other factors in utilising an exclusive jurisdiction agreement to imply a choice of law under Article 3 of Rome I. However, Wilderspin disagrees and regards this view as a “scarcely credible claim” and “very weak.” This tops my chart as one of the strongest languages used by a conflict of laws’ academic to disagree with another academic.

Wilderspin now appears to have changed his view on the significance of the word “clearly demonstrated” under Article 3 of Rome I (see para 6-028 and 29-104). Wilderspin and Plender previously expressed the view that there is no significant difference between “demonstrated with reasonable certainty” under Article 3 of the Rome Convention and “clearly demonstrated” under Article 3 of Rome I, on the ground that the change was made to merely align the English and German version with the French version. This is a view that has been endorsed by English judges in *Lawlor* (at para 3) and *Aquavita International SA v Ashapura Minecham Ltd* [2014] EWHC 2806 (Comm) [20], citing inter alia, older editions of Plender and Wilderpin. Wilderspin now expresses the view that the English version of Article 3 of Rome I is “apparently stricter” than Article 3 of the Rome Convention, and notes that “although the English version was in line with the majority of the other language versions, in particular the German, those versions have become aligned with the minority, French version” (see para 6-028 and 29-104). This change of view by Wilderspin can be attributed to the influence of the outstanding work of Mr Michael McParland (2015) on Rome I Regulation, who at paras 9.37-9.72 notes the detailed legislative history that brought about the significant change in wording under Article 3 of Rome I. Indeed, he cites McParland. However, at para 11-027, footnote 48, Wilderspin notes that the difference between the wording of Article 3 of the Rome Convention and Article 3 of Rome I is “probably more apparent than real.” I think this statement might be an error that was carried over from the last edition. I also take this view because

Wilderspin refers to the old paragraph 6-024 instead of the new 6-026 of the new edition of the book.

In the light of this modified view by Wilderspin, it is open to question if English judges and other courts of Member State courts will apply a stricter approach in interpreting Article 3 of Rome I. For example, Professor Pietro Franzina also notes in a book chapter (at para 3.1.1) that the Italian Supreme Court (Cass., 10 April 2019, No. 10045, Pluris) held that while the wording of Article 3 of the Rome Convention and Rome I were not identical, "they must be understood to have, in substance, the same meaning" on tacit choice of law.

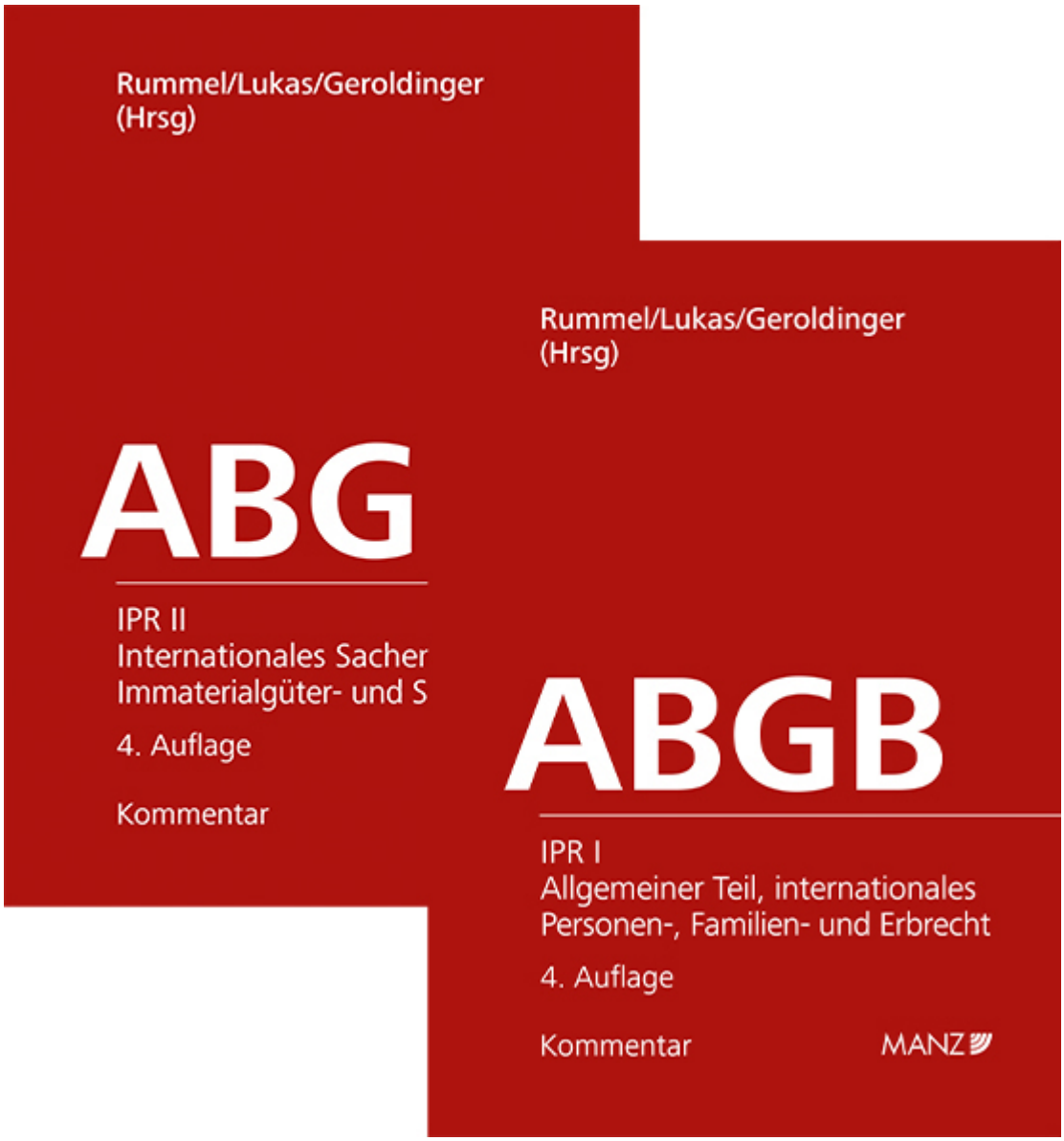
The book is a highly specialist work that is meticulously written. Nevertheless, I found what I consider to be only three minor typographical errors the author may correct for the next edition. These are odd references to "CHECK" at paragraph 9-061, "that1" at paragraph 9-064, and "pr" at paragraph 9-089.

My final verdict is that the 6th edition of this book will make an excellent Christmas and New Year's gift in the library of any academic and/or practitioner with an interest in conflict of laws. I highly recommend it without any reservations.

Out Now: Lukas/Geroldinger,

ABGB-Kommentar, 4th ed 2023 on Austrian PIL (written by Heindler and Verschraegen)

Authored by Bea Verschraegen and Florian Heindler, the Austrian Publishing House MANZ published on 1 December 2023 an Article-by-Article Commentary in two Volumes on the entire Private International Law applicable in Austria. The volumes include, in particular, the Rome Regulations (I–III), the Succession and the Matrimonial Property Regulation, the Hague Maintenance Protocol, the Hague Conventions on the Protection of Adults, on the Protection of Children, Adoption, Child Abduction and Traffic Accidents as well as the Austrian Private International Law Act. The two volumes with 1840 pages are edited by Peter Rummel, Meinhard Lukas and Andreas Geroldinger.



Giustizia consensuale No 1/2023: Abstracts

The first issue of 2023 of *Giustizia Consensuale* (published by Editoriale Scientifica) has just been released, and it features:

Annalisa Ciampi (Professor at the University of Verona), ***La giustizia***

consensuale internazionale (*International Consensual Justice*; in Italian)

> All means of dispute settlement between States, including adjudication, are based on the consent of the parties concerned. The post-Cold War era saw an unprecedented growth of third-party (judge or arbitrator) dispute resolution systems. In more recent years, however, we are witnessing a weakening of the international judicial function. This paper analyses and explains similarities and differences between dispute settlement between States and dispute resolution between private parties at the national level. Whilst doing so, it makes a contribution to the question of whether the de-judicialisation taking place in Italy and elsewhere, as well as in the international legal system, can be considered a step in the right direction.

Sabrina Tranquilli (Researcher at the "Università degli Studi di Napoli Parthenope"), ***I contratti istituzionali di sviluppo (CIS) e i modelli di risoluzione e prevenzione dei conflitti tra pubbliche amministrazioni*** (*Institutional Development Contracts (IDC) and Models for Conflict Resolution and Prevention between Public Administrations*; in Italian)

> The paper examines the two models of conflict resolution between public administrations set out in the Institutional Development Contracts (IDC). These contracts – recurrently used by the Italian lawmaker, also for the implementation of the Recovery and Resilience Plan (NRRP) for strategic interventions, especially in the area of territorial cohesion – allow the Administrations involved to define their respective spheres of intervention while also preventing possible conflicts between them. IDCs provide for both a centralised-substitutive model of conflict resolution and a negotiated one. This article shows that, although there is no overriding criterion between the two models, in both cases the dialectic between the parties based on the principle of loyal cooperation is essential.

Guillermo Schumann Barragán (Associate Professor at the "Universidad Complutense" in Madrid), ***Verso una teoria generale degli accordi processuali. Premesse ricostruttive*** (*Toward a General Theory of Procedural Agreements. Reconstructive Premises*; in Italian)

> Procedural agreements are legal transactions with which the parties pursue certain procedural effects. Although such agreements are not unknown in

the Spanish and Italian legal systems, there seems to be a lack of drive in these to define them as a legal category per se, i.e. as a set of legal transactions that share a series of structural elements and common criteria of validity and effectiveness. The aim of this paper is to outline a general theory of procedural agreements and to apply the theoretical results achieved to a few, selected procedural agreements. In doing so, this paper aims to assess the usefulness and appropriateness of such agreements, also in the light of the economic analysis of the law and of the growing regulatory competition of States vis-à-vis cross-border legal relations as well as jurisdiction, in case a dispute arises.

Alessandro Giuliani (Reserchер at the "Università Politecnica delle Marche"), ***Percorsi di valorizzazione dell'arbitrato irrituale nel diritto del lavoro in una prospettiva diacronica*** (*Pathways to the Enhancement of Informal Arbitration in Labour Law in a Diachronic Perspective*; in Italian)

Through a diachronic examination of applicable law, the article addresses critical issues in informal arbitration in the context of labour disputes. The legal framework of informal arbitration reveals a piecemeal scenario marked by discrepancies between legal provisions and implementation thereof. Against this backdrop, informal arbitration contributes to fostering a culture of alternative dispute resolution within the Italian legal system. The article focuses in greater detail on the procedure set out in Article 7 of Italian Law No 300 of 1970 and its potential to boost the effectiveness of informal arbitration in labour disputes, thus enhancing the protection of workers' rights beyond the judicial process.

Observatory on Legislation and Regulations

Claudio Scognamiglio (Professor at the University of Rome "Tor Vergata"), ***La negoziazione assistita e le controversie di lavoro. Verso un nuovo ruolo dell'avvocato nel riequilibrio delle situazioni di asimmetria negoziale?*** (*Assisted Negotiation and Labor Disputes. Toward a New Role for the Lawyer in Rebalancing Situations of Negotiation Asymmetry?*; in Italian)

The article offers food for thought on assisted negotiation in labour disputes introduced in the context of the recent reform of civil justice in Italy, which

was enacted with Legislative Decree No 149/2022. Starting from the traditional function of labour law, and recalling the legislator's distrust for this alternative resolution instrument for labour disputes – a distrust which lasted until the enactment of Legislative Decree No 149/2022 – the author analyzes the normative data to delve on the prospects of dialogue between civil law and labour law, and on the (new?) role of lawyers and their suitability to perform the function of rebalancing the asymmetries in the parties' power.

Observatory on Practices

Mauro Bove (Professor at the University of Perugia), ***Insegnare la mediazione nell'Università*** (*Teaching Mediation at the University*; in Italian)

The paper explores ways to integrate the teaching of mediation into university curricula. The discourse ties into the overall issue of legal education and addresses relevant topics such as negotiation strategies for the settlement of civil disputes and university education as a means of cultural and personal growth for all those involved.

Viviana Di Capua (Researcher at the "Università degli Studi di Napoli Federico II"), ***La funzione 'mediatrice' dell'Arbitro per le Controversie Finanziarie. La segreteria tecnica quale strumento di riequilibrio delle parti in lite*** (*The 'Mediating' Function of the Financial Disputes Arbitrator. The Technical Secretariat as a Tool for Rebalancing the Disputing Parties*; in Italian)

Almost two decades after its establishment, Arbitration for Financial Disputes (AFD) has proven to be an effective alternative means to resolve financial disputes between intermediaries and retail investors. Although the instrument was not created with the aim of reaching a consensual solution to disputes, the structure of the procedure, the investigative powers and the strategic role of the technical secretariat, along with the features introduced by the most recent reform, have created room for dialogue between the parties, thus providing incentives for reaching an agreement regardless of the final decision. The contribution aims to examine the nature of the proceedings, the powers available to the arbitrator, and the final decision, focusing on cases in which the AFD can take on a 'mediating' function

between the parties, instrumental to a consensual resolution of the dispute.

Rachele Beretta (Ph.D. Candidate at the University of Antwerp), ***The Evolving Landscape of Online Dispute Resolution. A Study on the Use of ICT in International Civil and Commercial ODR***

Over the last two decades, Online Dispute Resolution (ODR) has expanded to new geographical and practice areas. However, data regarding the extension and characteristics of the ODR market are scarce. The empirical study presented in this article provides a snapshot of the current ODR landscape in international civil and commercial dispute resolution. After introducing the orienting framework for the study, this contribution will present data concerning ODR providers and the use of technology in civil and commercial dispute resolution services. The analysis will uncover critical issues and areas of interest for research and practice in light of the future development of ODR.

Conference Proceedings

Silvana Dalla Bontà (Associate Professor at the University of Trento), **Mediation: A Sleeping Beauty. *La promessa della giustizia consensuale alla luce della riforma della giustizia civile*** (*Mediation: A Sleeping Beauty. The Promise of Consensual Justice in Light of the Italian Reform of Civil Justice*; in Italian)

The paper draws on the introductory remarks to the Trento chapter of the 'Sleeping Beauty Conferences Series' organized by Giuseppe De Palo and Lela Love. Nearly ten years after the Jed D. Melnick Annual Symposium sponsored by the Cardozo Journal of Conflict Resolution (2014), the Conference at the University of Trento (11 November 2022) once again evokes the image of mediation as a 'sleeping beauty' awaiting her Prince Charming. What is the current state of play of mediation? Is mediation still a 'sleeping beauty'? Has the situation evolved? What could help improve the use of this promising dispute resolution tool? The author addresses these questions from the perspective of the recent Italian reform of civil justice, which significantly improved the legal framework for mediation. Will the promise of mediation be finally fulfilled?

Giuseppe De Palo (Senior Fellow and International Professor of ADR Law and Practice at Mitchell Hamline School of Law), ***Mediating Mediation Itself. The Easy Opt-Out Model Settles the Perennial Dispute between Voluntary and Mandatory Mediation***

> The contribution reflects on the desirability of soft regulation of mediation to strike a balance between the principle of voluntariness and providing a viable alternative to litigation, thus boosting the efficiency of the civil justice system. While focusing on the debate around the mandatory attempt to mediate, the author argues that mediation not only benefits the disputing parties but also the judicial system at large in that it helps reduce the workload of courts and ensure access to justice for all. Despite the clear advantages of mediation, it is debated whether participation must be voluntary or should be mandatory in some instances. The author proposes an 'easy opt-out' mediation model where parties may leave the process if they so wish. Arguably, participation in the process may provide the parties with an understanding of mediation and its advantages. The proposed model has the potential to expose skeptical parties to the benefits of mediation.

Zachary R. Calo (Professor at the Hamad bin Khalifa University, Qatar), ***Commercial Mediation in the Gulf Cooperation Council. The Development of ADR in the Middle East***

> The paper analyzes recent developments in the law and practice of commercial mediation among the Arab Gulf countries. Substantial changes have occurred since 2019, the year that Qatar and Saudi Arabia signed the Singapore Convention on Mediation, including issuance of new domestic laws, establishment of mediation rules and centers, and the general promotion of mediation. These changes have established in short order the foundational infrastructure needed to facilitate greater use of mediation in the region. Yet, in spite of the many impressive legal developments, there are barriers preventing the Gulf countries from more fully embedding mediation into their dispute resolution ecosystems.

Paola Lucarelli (Professor at the University of Florence), ***La nuova mediazione civile e commerciale*** (*The New Civil and Commercial Mediation*; in Italian)

> By shedding light on the profound meaning of mediation, the legal culture

begins to awaken consciences: the reform of mediation shifts the point of view from solely adversarial to one that contemplates beforehand the concerted, consensual sphere. In doing so, it enhances the role of mediation, which is of coexistence with litigation. In this framework, law as a mere remedy is escorted by cooperative dialogue: with mediation, people acquire a leading role in the pursuit of answers to their needs and to the need for justice. Against this background, the issue of choice arises: for instance, the choice whether to participate in a process of evolution of the society or, rather, to assist inert, possibly complaining of injustices, puerile behaviours, and inefficiencies; and also the choice whether to contribute to the innovation of the legal profession to adequately respond to the needs of a client. In this context, the role of higher education is crucial. In fact, higher education can foster a legal culture that grants space and time to autonomy: a culture of adults, equipped to responsibly address their problems in a direct exchange with their counterparties.

Filippo Danovi (Professor at the University of Milano-Bicocca), ***La giustizia consensuale nella crisi familiare*** (*Consensual Justice in Family Crisis*; in Italian)

Within the recent civil justice reform, a dedicated attention has been given to alternative (or, better, complementary) means of dispute resolution. In particular, in the area of family and juvenile justice, a prominent place has been given to forms of consensual justice, both judicial in nature, which thus presuppose that the meeting of the parties' will is formalized within a jurisdictional framework, and extrajudicial in nature, in the models of assisted negotiation and family mediation. This essay reconstructs the main lines of regulatory intervention in this area.

In addition to the foregoing, this issue features the following chronicles:

Angela M. Felicetti (Research Fellow at the University of Bologna), ***Un'occasione di confronto tra Università e Organismi di mediazione. Note da un recente Convegno*** (*An Opportunity for Discussion between Universities and Mediation Bodies. Notes from a Recent Conference*; in Italian)

Luciana Breggia (formerly Judge at the Florence Tribunal), ***Una proposta degli***

Osservatori sulla Giustizia civile in merito alla riforma del processo civile. Tra buone prassi e auspicati correttivi al d.lgs. n. 149 del 2022 (*A Proposal from the Civil Justice Observers on the Italian Reform of Civil Justice. Between Best Practices and Desired Corrective Measures to Legislative Decree No 149 of 2022*; in Italian)

Finally, it features the following book review by ***Cristina M. Mariottini****:* **Guillermo PALAO (ed),** ***The Singapore Convention on Mediation. A Commentary on the United Nations Convention on International Settlement Agreements Resulting from Mediation***, Edward Elgar Publishing, 2023, ix-xxvi, 1-350.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2023: Abstracts

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

(These abstracts can also be found at the IPRax-website under the following link: https://www.iprax.de/en/contents/)

C. Budzikiewicz/K. Duden/A. Dutta/T. Helms/C. Mayer: **The European Commission’s Parenthood Proposal – Comments of the Marburg Group**

The Marburg Group – a group of German private international law scholars – reviewed the European Commission’s Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood. The Group welcomes the initiative of the Commission

and embraces the overall structure of the Parenthood Proposal. Nevertheless, it suggests some fundamental changes, apart from technical amendments. The full article-by-article comments of the Group with redrafting suggestions for the Commission Proposal are available at www.marburg-group.de. Building on the comments, the present article authored by the members of the Marburg Group focuses on the main points of critique and considers the present state of discussion on the proposed Regulation.

U.P. Gruber: **A plea against ex post-adaptation of spousal inheritance rights**

Adaptation is recognized as a tool to eliminate the lack of coordination between the provisions of substantive law derived from different legal systems. According to a widespread view, adaption is very often necessary with regard to the spouse's share in the deceased's estate, namely if the matrimonial property regime and questions relating to succession are governed by different laws. However, in this article, the author takes the opposite view. Especially in light of the ECJ's classification of paragraph 1371(1) BGB as a provision dealing with succession, there are new solutions which render ex post adaptations superfluous.

M. Mandl: **Apparent and virtual establishments reflected through Art. 7 No. 5 Brussels Ia Regulation and Art. 19 (2) Rome I Regulation**

The Federal Court of Justice (Bundesgerichtshof – BGH) has ruled that a dispute has the required connection to the operation of an (existing) establishment pursuant to Article 7 (5) Brussels Ia Regulation if the business owner operates an internet presence that gives the appearance of being controlled by this establishment instead of the company's central administration and the contract in dispute was concluded via this internet presence. This decision provides an opportunity to examine the prerequisites and legal consequences of apparent establishments and so-called virtual establishments (internet presences) from a general perspective, both in the context of Article 7 (5) Brussels Ia Regulation and in connection with Article 19 (2) Rome I Regulation.

D. Nitschmann: **The consequences of Brexit on Civil Judicial Cooperation between Germany and the United Kingdom**

The United Kingdom's withdrawal from the European Union has far-reaching consequences for international civil procedure law. This is exemplified by the decisions of the Higher Regional Court of Cologne for the international service of process. Since the European Regulation on the Service of Documents no longer applies to new cases, the Brexit leads to a reversion to the Hague Service Convention and the German-British Convention regarding Legal Proceedings in Civil and Commercial Matters. Of practical relevance here is, among other things, the question of whether and under what conditions direct postal service remains permissible.

R.A. Schütze: **Security for costs of english plaintiffs in Austrian litigation**

The judgment of the Austrian Supreme Court (Oberster Gerichtshof – OGH) of 29 March 2022 deals with the obligation of English plaintiffs to provide security for costs according to sect. 57 Austrian Code of Civil Procedure. The principle stated in para. 1 of this section is that plaintiffs of foreign nationality have to provide security for costs. But an exception is made in cases where an Austrian decision for costs can be executed in the country of residence of the plaintiff.

The OGH has found such exception in the Hague Convention 2005 on Choice of Court Agreements. As the United Kingdom has, on 28 September 2020, declared the application of the Hague Convention 2005 for the United Kingdom, the Convention is applicable between Austria and the United Kingdom despite the Brexit. The Hague Convention opens the possibility to recognition and execution of judgments rendered under a choice of court agreement including decisions on costs.

Th. Garber/C. Rudolf: **Guardianship court authorisation of a claim before Austrian courts ¬– On international jurisdiction and applicable law for the grant of a guardianship court authorization**

The Austrian court has requested court approval for the filing of an action by a

minor represented by the parents. The international jurisdiction for the granting of a guardianship court authorisation is determined according to the Brussels II-bis Regulation or, since 1.8.2022, according to the Brussels II-ter Regulation. In principle, the court competent to decide on the action for which authorization by the guardianship court is sought has no corresponding annex competence for the granting of the authorization by the guardianship court: in the present case, the Austrian courts cannot therefore authorize the filing of the action due to the lack of international jurisdiction. If an Austrian court orders the legal representative to obtain the authorization of the guardianship court, the courts of the Member State in which the child has his or her habitual residence at the time of the application have jurisdiction. In the present case, there is no requirement for approval on the basis of the German law applicable under Article 17 of the Hague Convention 1996 (§ 1629 para 1 of the German Civil Code). The Cologne Higher Regional Court nevertheless granted approval on the basis of the escape clause under Article 15 para 2 of the Hague Convention 1996. In conclusion, the Cologne Higher Regional Court must be agreed, since the escape clause can be invoked to protect the best interests of the child even if the law is applied incorrectly in order to solve the problem of adaptation.

M. Fornasier: **The German Certificate of Inheritance and its Legal Effects in Foreign Jurisdictions: Still Many Unsettled Issues**

What legal effects does the German certificate of inheritance („Erbschein“) produce in other Member States of the EU? Is it a reliable document to prove succession rights in foreign jurisdictions? More than one decade after the entry into force of the European Succession Regulation (ESR), these questions remain, for the most part, unsettled. In particular, commentators take differing views as to whether the Erbschein, being issued by the probate courts regardless of whether the succession is contentious or non-contentious, constitutes a judicial decision within the meaning of Article 3(1)(g) ESR and may therefore circulate in other Member States in accordance with the rules on recognition under Articles 39 ESR. This article deals with a recent ruling by the Higher Regional Court of Cologne, which marks yet another missed opportunity to clarify whether the Erbschein qualifies as a court decision capable of recognition in foreign jurisdictions. Moreover, the paper addresses two judgments of the CJEU (C-658/17 and C-80/19) relating to national certificates of inheritance which,

unlike the German Erbschein, are issued by notaries, and explores which lessons can be learned from that case-law with regard to certificates of inheritance issued by probate courts. In conclusion, it is submitted that, given the persisting uncertainties affecting the use of the Erbschein in foreign jurisdictions, the European Certificate of Succession provided for by the ESR is better suited for the settlement of cross-border successions.

E. Vassilakakis/A. Vezyrtzi: **Innovations in International Commercial Arbitration – A New Arbitration Act in Greece**

On 4.2.2023 a new Arbitration Act came into effect in Greece. It was approved by means of Law No. 5016/2023 on international commercial arbitration, and was enacted in order to align the regime of international commercial arbitration with the revision of the UNCITRAL Model Law on International Commercial Arbitration adopted in 2006 (hereinafter the revised Model Law). The new law contains 49 arbitration-related provisions and replaces the Law No. 2735/1999 on international commercial arbitration, while domestic arbitration continues to be regulated by Art. 867–903 of the Greek Code of Civil Procedure (hereinafter grCCP). A reshaping of Art. 867 ff. grCCP was beyond the "mission statement" of the drafting Committee.1 Besides, it should also be associated with a more extensive and, in consequence, time-consuming reform of procedural law. Hence, the dualist regime in matters of arbitration was preserved.

Pursuant to Art. 2, the new law incorporates on the one hand the provisions of the revised Model Law and on the other hand the latest trends in international arbitration theory and practice. Therefore, it is not confined to a mere adjustment to the revised Model Law, but also includes several innovative provisions that merit a brief presentation.

Notifications:

C. Rüsing: Dialogue International Family Law, 28th – 29th April, Münster, Germany.

The EU Sustainability Directive and Jurisdiction

The Draft for a Corporate Sustainable Due Diligence Directive currently contains no rules on jurisdiction. This creates inconsistencies between the scope of application of the Draft Directive and existing jurisdictional law, both on the EU level and on the domestic level, and can lead to an enforcement gap: EU companies may be able to escape the existing EU jurisdiction; non-EU companies may even not be subject to such jurisdiction. Effectivity requires closing that gap, and we propose ways in which this could be achieved.

(authored by Ralf Michaels and Antonia. Sommerfeld and crossposted at https://eapil.org/)

1. **The Proposal for a Directive on Corporate Sustainability Due Diligence**

The process towards an EU Corporate Sustainability Due Diligence Directive is gaining momentum. The EU Commission published a long awaited Proposal for a Directive on Corporate Sustainability Due Diligence (CSDDD), COM(2022) 71 final, on 23 February 2022; the EU Council adopted its negotiation position on 1 December 2022; and now, the EU Parliament has suggested amendments to this Draft Directive on 1 June 2023. The EU Parliament has thereby backed the compromise textreached by its legal affairs committee on 25 April 2023. This sets off the trilogue between representatives of the Parliament, the Council and the Commission.

The current state of the CSDDD already represents a milestone. It not only introduces corporate responsibility for human rights violations and environmental damage – as already found in some national laws (e.g. in France; Germany;

Netherlands; Norway; Switzerland; United Kingdom) – but also and in contrast (with the exception of French law – for more details see *Camy*) introduces civil liability. Art. 22 (1) CSDDD entitles persons who suffer injuries as result of a failure of a company to comply with the obligations set forth in the Directive to claim compensation. It thereby intends to increase the protection of those affected within the value chain, who will now have the prospect of compensation; it also intends to create a deterrent effect by having plaintiffs take over the enforcement of the law as "private attorney generals". Moreover, the Directive requires that Member States implement this civil liability with an overriding mandatory application to ensure its application, Art. 22 (5) CSDDD. This is not unproblematic: the European Union undertakes here the same unilateralism that it used to criticize when previously done by the United States, with the Helms/Burton Act as the most prominent example.

That is not our concern here. Nor do we want to add to the lively discussion on the choice-of-law- aspects regarding civil liability (see, amongst others, *van Calster*, *Ho-Dac*, *Dias* and, before the Proposal, *Rühl*). Instead, we address a gap in the Draft Directive, namely the lack of any provisions on jurisdiction. After all, mandatory application in EU courts is largely irrelevant if courts do not have jurisdiction in the first place. If the remaining alternative is to bring an action in a court outside the EU, the application of the CSDDD civil liability regime is not, however, guaranteed. It will then depend on the foreign court's conflict-of-law rules and whether these consider the CSDDD provisions applicable – an uncertain path.

Nonetheless, no mirroring provisions on international jurisdiction were included in the CSDDD, although such inclusion had been discussed. Suggestions for the inclusion of a new jurisdictional rule establishing a *forum necessitatis* in the Brussels I Regulation Recast existed (see the Study by the European Parliament Policy Department for External Relations from February 2019, the Draft Report of the European Parliament Committee on Legal Affairs with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL) as well as the Recommendation of the European Groupe of Private International Law (GEDIP) communicated to the Commission on 8 October 2021). Further, the creation of a *forum connexitatis* in addition to a *forum necessitatis* had been recommended by both the Policy Department Study and the GEDIP. Nevertheless, the report of the European Parliament finally adopted,

together with the Draft Directive of 10 March 2021, no longer contained such rule on international jurisdiction, without explanation. Likewise, the Commission's CSDDD draft and the Parliament's recent amendments lack such a provision.

2. Enforcement Gap for Actions against Defendants Domiciled within the EU

To assess the enforcement gap, it is useful to distinguish EU companies from non-EU companies as defendants. For EU companies, the Directive applies to companies of a certain size which are formed in accordance with the legislation of a Member State according to Art. 2 (1) CSDDD – the threshold numbers in the Commission's draft and the Parliament amendments differ, ranging between 250–500 employees and EUR 40–150 million annual net worldwide turnover, with questions of special treatment for high-risk sectors.

At first sight, no enforcement gap seems to exist here. The general jurisdiction rule anchored in Art. 4 (1) Brussels I Regulation Recast allows for suits in the defendant's domicile. Art. 63 (1) further specifies this domicile for companies as the statutory seat, the central administration or the principal place of business. (EU-based companies can also be sued at the place where the harmful event occurred according to Art. 7 (2) Brussels I Regulation Recast, but this will provide for access to an EU court only if this harmful event occurred within the EU.) The objection of *forum non conveniens* does not apply in the Brussels I Regulation system (as clarified in the CJEU's *Owusu* decision). Consequently, in cases where jurisdiction within the EU is given, the CSDDD applies, including the civil liability provision with its mandatory application pursuant to Art. 22 (1), (5).

Yet there is potential leeway for EU domiciled companies to escape EU jurisdiction and thus avoid the application of the CSDDD's civil liability. One way to avoid EU jurisdiction is to use an exclusive jurisdiction agreement in favour of a third country, or an arbitration clause. Such agreements concluded in advance of any occurred damage are conceivable between individual links of the value chain, such as between employees and subcontractors (in employment contracts) or between different suppliers along the chain (in purchase and supply agreements). EU law does not expressly prohibit such derogation. Precedent for how such exclusive jurisdiction agreements can be treated can be found in the

case law following the *Ingmar* decision of the CJEU. In *Ingmar*, the CJEU had decided that a commercial agent's compensation claim according to Arts. 17 and 18 of the Commercial Agents Directive (86/653/EEC) could not be avoided through a choice of law in favour of the law of a non-EU country, even though the Directive said nothing about an internationally mandatory nature for the purpose of private international law – as Art. 22 (5) CSDDD in contrast now does. The German Federal Court of Justice (BGH) extended this choice-of-law argument to the law of jurisdiction and held that jurisdiction clauses which could undermine the application of mandatory provisions are invalid, too, as only such a rule would safeguard the internationally mandatory scope of application of the provisions. Other EU Member State courts have shown a similar understanding not only with regard to exclusive jurisdiction agreements but also with regard to arbitration agreements (Austrian Supreme Court of Justice; High Court of Justice Queen's Bench Division).

Common to Arts. 17 and 18 Commercial Agents Directive and Art. 22 CSDDD is their mandatory nature for the purpose of private international law, which established by the ECJ for the former and is legally prescribed for the latter in Art. 22 (5) CSDDD. This suggests a possible transfer of the jurisdictional argument regarding jurisdiction. To extend the internationally mandatory nature of a provision into the law of jurisdiction is not obvious; choice of law and jurisdiction are different areas of law. It also means that the already questionable unilateral nature of the EU regulation is given even more force. Nonetheless, to do so appears justified. Allowing parties to avoid application of the CSDDD would run counter to its effective enforcement and therefore to the *effet utile*. This means that an exclusive jurisdiction agreement in favour of a third country or an arbitration clause will have to be deemed invalid unless it is clear that the CSDDD remains applicable or the applicable law provides for similar protection.

3. Enforcement Gap for Actions against Defendants Domiciled Outside the EU

While the enforcement gap with regard to EU companies can thus be solved under existing law, additional problems arise with regard to non-EU corporations. Notably, the Draft Directive applies also to certain non-EU companies formed in accordance with the legislation of a third country, Art. 2 (2) CSDDD. For these

companies, the scope of application depends upon the net turnover within the territory of the Union, this being the criterion creating a territorial connection between these companies and the EU (recital (24)). The Parliament's amendments lower this threshold and thereby sharpen the scope of application of the Directive.

While application of the CSDDD to these companies before Member State courts is guaranteed due to its mandatory character, jurisdiction over non-EU defendants within the EU is not. International jurisdiction for actions against third-country defendants as brought before EU Member State courts is – with only few exceptions – generally governed by the national provisions of the respective Member State whose courts are seized, Art. 6 (1) Brussels I Regulation Recast. If the relevant national rules do not establish jurisdiction, no access to court is given within the EU.

And most national rules do not establish such jurisdiction. General jurisdiction at the seat of the corporation will usually lie outside the European Union. And the territorial connection of intra-EU turnover used to justify the applicability of the CSDDD does not create a similar basis of general jurisdiction, because jurisdiction at the place of economic activity ("doing business jurisdiction") is alien to European legal systems. Even in the US, where this basis was first introduced, the US Supreme Court now limits general jurisdiction to the state that represents the "home" for the defendant company (*BNSF Railroad Co. v. Tyrrell*, 137 S.Ct. 1549 (2017); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011)); whether the recent decision in *Mallory v. Norfolk Southern Railway Co.,* 600 U.S. (2023) will re-open the door to doing business jurisdiction remains to be seen (see *Gardner*).

Specific jurisdiction will not exist in most cases, either. Specific jurisdiction in matters relating to tort will be of little use, as in value chain civil liability claims the place of the event giving rise to damages and the place of damage are usually outside the EU and within that third state. Some jurisdictional bases otherwise considered exorbitant may be available, such as the plaintiff's nationality (Art. 14 French Civil Code) or the defendant's assets (Section 23 German Code of Civil Procedure). Otherwise, the remaining option to seize a non-EU defendant in a Member State court is through submission by appearance according to Art. 26 Brussels I Regulation Recast.

Whether strategic joint litigation can be brought against an EU anchor defendant in order to drag along a non-EU defendant depends upon the national provisions of the EU Member States. Art. 8 (1) Brussels I Regulation Recast, which allows for connected claims to be heard and determined together, applies only to EU-defendants – for non-EU defendants the provision is inapplicable. In some Member States, the national civil procedure provisions enable jurisdiction over connected claims against co-defendants, e.g. in the Netherlands (Art. 7 (1) Wetboek van Burgerlijke Rechtsvordering), France (Art. 42 (2) Code de procédure civile) and Austria (§ 93 Jurisdiktionsnorm); conversely, such jurisdiction is not available in countries such as Germany.

Various Member State decisions have accepted claims against non-EU companies as co-defendants by means of joinder of parties. These cases have based their jurisdiction on national provisions which were applicable according to Art. 6 (1) Brussels I Recast Regulation: In *Milieudefensie* in December 2015, the Court of Appeal at the Hague held permissible an action against a Dutch anchor defendant that was joined with an action against a Nigerian company as co-defendant based on Dutch national procedural law, on the condition that claims against the anchor defendant were actually possible. The UK Supreme Court ruled similarly in its *Vedanta* decision in April 2019, wherein it found that English private international law, namely the principle of the *necessary or proper party gateway*, created a valid basis for invoking English jurisdiction over a defendant not domiciled in a Member State (with registered office in Zambia) who had been joined with an anchor defendant based in the UK. The claim was accepted on the condition that (i) the claims against the anchor defendant involve a real issue to be tried; (ii) it would be reasonable for the court to try that issue; (iii) the foreign defendant is a necessary or proper party to the claims against the anchor defendant; (iv) the claims against the foreign defendant have a real prospect of success; (v) either England is the proper place in which to bring the combined claims or there is a real risk that the claimants will not obtain substantial justice in the alternative foreign jurisdiction, even if it would otherwise have been the proper place or the convenient or natural forum. The UK Supreme Court confirmed this approach in February 2021 in its *Okpabi* decision (for discussion of possible changes in UK decisions after Brexit, see *Hübner/Lieberknecht*).

In total, these decisions allow for strategic joint litigation against third-country companies together with an EU anchor defendant. Nonetheless, they do not

establish international jurisdiction within the EU for isolated actions against non-EU defendants.

4. How to Close the Enforcement Gap – *forum legis*

The demonstrated lack of access to court weakens the Directive's enforceability and creates an inconsistency between the mandatory nature of the civil liability and the lack of a firm jurisdictional basis. On a substantive level, the Directive stipulates civil liability for non-EU companies (Art. 22 CSDDD) if they are sufficiently economically active within the EU internal market (Art. 2 (2) CSDDD). Yet missing EU rules on international jurisdiction vis-à-vis third-country defendants often render procedural enforcement before an intra-EU forum impossible – even if these defendants generate significant turnover in the Union. Consequently, procedural enforcement of civil liability claims against these non-EU defendants is put at risk. The respective case law discussed does enable strategic joint litigation, but isolated actions against non-EU defendants cannot be based upon these decisions. At the same time, enforceability gaps exist with respect to EU defendants: It remains uncertain whether the courts of Member States will annul exclusive jurisdiction agreements and arbitration agreements if these undermine the application of the CSDDD.

This situation is unsatisfactory. It is inconsistent for the EU lawmaker to make civil liability mandatory in order to ensure civil enforcement but to then not address the access to court necessary for such enforcement. And it is inadequate that the (systemic) question of judicial enforceability of civil liability claims under the Directive is outsourced to the decision of the legal systems of the Member States. National civil procedural law is called upon to decide which third-country companies can be sued within the EU and how the *Ingmar* case law for EU domiciled companies will be further developed. This is a problem of uniformity – different national laws allow for different answers. And it is a problem of competence as Member State courts are asked to render decisions that properly belong to the EU level.

The CSDDD aims to effectively protect human rights and the environment in EU-related value chains and to create a level playing field for companies operating within the EU. This requires comparable enforcement possibilities for actions

based on civil liability claims that are brought pursuant to Art. 22 CSDDD against all corporations operating within the Union. The different regulatory options the EU legislature has to achieve this goal are discussed in what follows.

Doing Business Jurisdiction

A rather theoretical possibility would be to allow actions against third-country companies within the EU in accordance with the former (and perhaps revived) US case law on *doing business jurisdiction* in those cases where these companies are substantially economically active within the EU internal market. This would be consistent with the CSDDD's approach of stretching its scope of application based on the level of economic activity within the EU (Art. 2 (2) CSDDD). However, the fact that such jurisdiction has always been considered exorbitant in Europe and has even been largely abolished in the USA speaks against this development. Moreover, a *doing business jurisdiction* would also go too far: it would establish general jurisdiction, at least according to the US model, and thus also apply to claims that have nothing to do with the CSDDD.

Forum Necessitatis and Universal Jurisdiction

Another possible option would be the implementation of a *forum necessitatis* jurisdiction in order to provide access to justice, as proposed by the European Parliament Policy Department for External Relations, the European Parliament Committee on Legal Affairs and the GEDIP. However, such jurisdiction could create uncertainty because it would apply only exceptionally. Moreover, proving a "lack of access to justice" requires considerable effort in each individual case. Until now, EU law provides for a *forum necessitatis* only in special regulations; the Brussels I Regulation Recast does not contain any general rule for emergency jurisdiction. Member State provisions in this regard generally require a certain connection with the forum to establish such jurisdiction – the exact prerequisites differ, however, and will thus not be easily agreed upon on an EU level (see *Kübler-Wachendorff*).

The proposal to enforce claims under Art. 22 CSDDD by means of universal civil jurisdiction for human rights violations, which could be developed analogously to universal jurisdiction under criminal law, appears similarly unpromising; it would also go further than necessary.

Forum connexitatis

It seems more promising to implement a special case of a *forum connexitatis* so as to allow for litigation of closely connected actions brought against a parent company domiciled within the EU together with a subsidiary or supplier domiciled in a third country, as proposed by the European Parliament Policy Department for External Relations and the GEDIP. This could be implemented by means of a teleological reduction of the requirements of Art. 8 (1) Brussels I Regulation Recast with regard to third-country companies, which would be an approach more compatible with the Brussels Regulation system than the implementation of a *forum necessitatis* provision (such a solution has, for instance, been supported by *Mankowski*, in: Fleischer/Mankowski (Hrsg.), LkSG, Einl., para. 342 and the GEDIP). This would simultaneously foster harmonisation on the EU level given that joint proceedings currently depend upon procedural provisions in the national law of the Member States. Moreover, this could avoid "blame games" between the different players in the value chain (see *Kieninger*, RW 2022, 584, 589). For the implementation of such a *forum connexitatis*, existing Member State regulations and related case law (*Milieudefensie, Vedanta*, and *Okpabi*) can serve as guidance. Such a forum is not yet common practice in all Member States; thus, its political viability remains to be seen. It should also be borne in mind that the implementation of a *forum connexitatis* on its own would only enable harmonised joint actions that were brought against EU domiciled anchor defendants together with non-EU defendants; it would not enable isolated actions against third-country companies – even if they are economically active within the EU and fall within the scope of application of the CSDDD.

Forum legis

The best way to close the CSDDD enforcement gap would be introducing an international jurisdiction basis corresponding to the personal scope of application of the Directive. The EU legislature would need to implement a head of jurisdiction applicable to third-country companies that operate within the EU internal market at the level specified in Art. 2 (2) CSDDD. Effectively, special jurisdiction would be measured on the basis of net turnover achieved within the EU. This would procedurally protect the Directive's substantive regulatory objectives of human rights and environmental protection within EU-related value chains. Moreover, this would ensure a level playing field in the EU internal market.

Other than a forum premised on joint litigation, this solution would allow isolated

actions to be brought – in an EU internal forum – against non-EU companies operating within the EU. The advantage of this solution compared to a forum of necessity is that the connecting factor of net turnover is already defined by Art. 2 (2) CSDDD, thus reducing the burden of proof, legal uncertainty and any unpredictability for the parties. Moreover, this approach would interfere less with the regulatory interests of other states than a *forum necessitatis* rule, which for its part would reach beyond the EU's own regulatory space.

A *forum legis* should not be implemented only as a subsidiary option for cases in which there is a lack of access to justice, because this would create legal uncertainty. The clear-cut requirements of Art. 2 (2) CSDDD are an adequate criterion for jurisdiction via a *forum legis*. On the other hand, it should not serve as an exclusive basis of jurisdiction, because especially plaintiffs should not be barred from the ability to bring suit outside the EU. The risk of strategic declaratory actions brought by companies in a court outside the EU seems rather negligeable, and this can be avoided either by giving preference to actions for performance over negative declaratory actions, as is the law in Germany or through the requirement of recognisability of a foreign judgment, which would not be met by a foreign decision violating domestic public policy by not providing sufficient protection.

This leaves a problem, however: The CSDDD does not designate which Member State's court have jurisdiction. Since a *forum legis* normally establishes adjudicatory jurisdiction correlating with the applicable law, jurisdiction lies with the courts of the country whose law is applied. This is not possible as such for EU law because the EU does not have its own ordinary courts. The competent Member State court within the EU must be determined. Two options exist with regard to the CSDDD: to give jurisdiction to the courts in the country where the highest net turnover is reached, or to allow claimants to choose the relevant court. The first option involves difficult evidentiary issues, the second may give plaintiffs an excessive amount of choice. In either case, non-EU companies will be treated differently from EU companies on the question of the competent court – for non-EU companies, net turnover is decisive in establishing the forum, for EU-companies, the seat of the company is decisive. This difference is an unavoidable consequence resulting from extension of the scope of application of the Directive to third-country companies on the basis of net turnover.

5. Implementation

How could this *forum legis* be achieved? The most straightforward way would be to include a rule on jurisdiction in the CSDDD, which would then oblige the Member States to introduce harmonised rules of jurisdiction into national procedural law. This would be a novelty in the field of European international civil procedure law, but it would correspond to the character of the special provision on value chains as well as to the mechanism of the CSDDD's liability provision. An alternative would be to include in the Brussels I Regulation Recast a sub-category of a special type of jurisdiction under Art. 7 Brussels I Regulation Recast. This as well would be a novelty to the Brussels system, which in principle requires that the defendant be seated in a Member State (see also *Kieninger*, RW 2022, 584, 593, who favours reform of the Brussels I Regulation Recast for the sake of uniformity within the EU). This second option would certainly mesh with current efforts to extend the Brussels system to non-EU defendants (see *Lutzi/Piovesani/Zgrabljic Rotar*).

The implementation of such a *forum legis* is not without problems: It subjects companies, somewhat inconsistently with the EU legal scheme, to *de facto* jurisdiction merely because they generate significant turnover in the EU's internal market. Yet such a rule is a necessary consequence of the extraterritorial extension of the Directive to third-country companies. The unilateral character of the CSDDD is problematic. But if the CSDDD intends to implement such an extension on a substantive level, this must be reflected on a procedural level so as to enable access to court. The best way to do this is by implementing a *forum legis*. The CSDDD demonstrates the great importance of compensation of victims of human rights and environmental damage, by making the cicil liability rule internationally mandatory. Creating a corresponding head of jurisdiction for these substantive civil liability claims is then necessary and consistent in order to achieve access to court and, thus, procedural enforceability.

No Sunset of Retained EU Conflict of Laws in the UK, but Increased Risk of Sunburn

By Dr Johannes Ungerer, University of Oxford

The sunset of retained EU law in the UK has begun: the Retained EU Law (Revocation and Reform) Act 2023 received Royal Assent at the end of June. The Act will revoke many EU laws that have so far been retained in the UK by the end of 2023.

The good news for the conflict of laws is that the retained Rome I and II Regulations are not included in the long list of EU legal instruments which are affected by the mass-revocation. Both Regulations have been retained in the UK post-Brexit by section 3 of the European Union (Withdrawal) Act 2018 and were modified by the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (as amended in 2020). The retained (modified) Rome I and II Regulations will thus be part of domestic law beyond the end of 2023. Yet this retained EU law must not be called by name anymore: it will be called "assimilated law" according to section 5 of the Retained EU Law (Revocation and Reform) Act 2023 (although the title of this enactment, like others, will strangely continue to contain the phrase "Retained EU Law" and will not be changed to "Assimilated Law", see section 5(5)).

Equally, the special conflict of laws provision in regulation 1(3) of the Commercial Agents (Council Directive) Regulations 1993 (as amended in 1998) is not revoked either. This is particularly interesting because these Regulations have not been updated since Brexit, which means they still refer, for instance, to "the law of the other member State".

Although international jurisdiction of UK courts is largely determined by domestic law these days, which replaced the Brussels I Recast Regulation, the Regulation's rules on jurisdiction in consumer and employment matters have been autonomously transposed into sections 15A–D of the Civil Jurisdiction and Judgments Act 1982 by the Civil Jurisdiction and Judgments (Amendment) (EU

Exit) Regulations 2019 (as amended in 2020). The mass-revocation will not affect them either, which means that they will continue to benefit consumers and employees in UK courts beyond the end of 2023.

However, a significant difference to the current situation will arise with regard to how strictly courts will continue to follow precedent on the interpretation of the "assimilated law". This matters for decisions by the Court of Justice of the EU (CJEU) as well as for UK court decisions on the interpretation of the Rome I and II Regulations (and the Commercial Agents Directive/Regulations). The concern is that continuing to apply the EU law which will not be sunsetted, but without continuing to strictly follow the established interpretations, has the potential of increasing the risk of uncertainty or, metaphorically speaking, sunburn.

So far, the risk of sunburn has been mitigated by section 6(3), (4)(a), and (5) of the European Union (Withdrawal) Act 2018 as amended by the European Union (Withdrawal Agreement) Act 2020: the existing body of CJEU decisions has remained binding post-Brexit on the Supreme Court to the same extent as the Supreme Court's own decisions. The Supreme Court can, like previously the House of Lords, depart from precedent in line with the Practice Statement [1966] 1 WLR 1234 (see *Austin v Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28, at [25]), but the Supreme Court is very hesitant to do so in order to maintain legal certainty and predictability. The Court of Appeal has been given a similar power to divert from CJEU case law, section 6(4)(b)(i) and (5A) of the amended European Union (Withdrawal) Act 2018. Decisions of the CJEU handed down after 2020 have in any event not been binding anymore on UK courts, section 6(1) of the amended European Union (Withdrawal) Act 2018, but it has been permitted to take them into account in the UK ("may have regard", section 6(2)).

The Retained EU Law (Revocation and Reform) Act 2023 will change how UK courts can deviate from CJEU case law and their own precedent. This will reduce the protection from uncertainty (or sunburn), which has been maintained so far.

- A UK court will in principle still be obliged to interpret "assimilated law" as established by the CJEU's "assimilated case law" (only the "retained general principles of EU law" have been omitted in the new section 6(3)(a)).
- However, the Supreme Court and the Court of Appeal will not anymore be

restricted by the ordinary domestic rules on deviation from precedent as mentioned above. Rather, according to the new section 6(5), CJEU case law will be treated like "decisions of a foreign court", which in principle are not binding. When deviating from "assimilated case law" by the CJEU, UK courts are solely instructed to have regard to "any changes of circumstances which are relevant to the retained EU case law, and the extent to which the retained EU case law restricts the proper development of domestic law."

- Furthermore, according to the newly inserted section 6(5ZA), a UK court will be permitted to depart from its own "assimilated domestic case law" (which means UK case law on "assimilated law" in contrast to "assimilated case law" by the CJEU) without the usual domestic restrictions on deviation from domestic precedent. Instead, when deviating from its own case law, the UK court will only have to consider "the extent to which the assimilated domestic case law is determined or influenced by assimilated EU case law from which the court has departed or would depart; any changes of circumstances which are relevant to the assimilated domestic case law; and the extent to which the assimilated domestic case law restricts the proper development of domestic law."

Departing from CJEU and UK case law on the Rome Regulations (and the Commercial Agents Directive) will thus become a lot easier, at the expense of "assimilated" legal certainty and predictability. The time at which the change by the Retained EU Law (Revocation and Reform) Act 2023 will become effective has yet to be determined in line with its section 22(3).

Interestingly, in the above-mentioned Civil Jurisdiction and Judgments Act 1982, section 15E(2) explicitly prescribes that the jurisdictional rules for consumers and employees in sections 15A–D are to be interpreted with regard to CJEU principles on consumer and employee jurisdiction under the Brussels regime. More precisely, "regard is to be had to any relevant principles laid down" before the end of 2020 by the CJEU in connection with the Brussels jurisdictional rules; by contrast, the phrases "retained EU law" or "retained case law" are not mentioned. Since the Retained EU Law (Revocation and Reform) Act 2023 does not revoke any rules of the Civil Jurisdiction and Judgments Act 1982 or the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, this specific mandate to have regard to CJEU principles when interpreting the retained jurisdictional rules

will be maintained in its own right beyond the end of 2023. And since the Civil Jurisdiction and Judgments Act 1982 does not use the technical language of retained EU law or retained case law, whose binding character would be affected by the Retained EU Law (Revocation and Reform) Act 2023, the retained jurisdictional rules should not suffer from uncertainty and sunburn. Yet, despite this reasoning, the interpretation of the consumer and employee jurisdictional rules might in practice be condemned to the same fate as the assimilated case law that will be up for grabs.

Many thanks to Professor Andrew Dickinson for his comments on an earlier draft.

Out Now: Briggs, Private International Law in English Courts, 2nd edition

In 2014, Adrian Briggs published his own comprehensive account of English Private International Law, taking stock of centuries of English case law and decades of growing European influence. Other than the author's unique ability to present even the most complex concepts with both clarity and style, the book's strongest selling point arguably was his conscious decision to put the European instruments at the front and centre of the book, presenting English private international law as the hybrid system that it had long become. As Adrian Briggs later admitted, though, the timing of this project could be described as sub-optimal.

Indeed, in light of the UK's subsequent departure from the EU and the resulting 'realignment of the planets', the second edition required changes that went far beyond a mere update. While some parts of the first edition that engaged with European sources and materials could be preserved as historical background (see, eg, pp. 18-21; 123) or even as descriptions of what has now become 'retained EU law' (mainly the Rome I and II Regulations, and with important

caveats), other parts had to be rewritten almost entirely. This is most notable in the chapter on Jurisdiction (ch. 3), which according to the author, is now subject to 'a *corpus iuris* which is a shambles', 'a mess in urgent need of reform' (p. 129).

It is all the more commendable that Adrian Briggs has undertaken this difficult and presumably depressing task to paint, for the second time, a full picture of English private international law as it stands, again drawing heavily from his decades of experience as an author, teacher, and practitioner. It seems fair to say that most of the apparent coherence of this picture is testimony not to the ease with which European instruments, rules and thoughts could be removed from English law but to the author's ability to patch up what was left.

(As a footnote, it is a pity for the reader that not only much European law but also the paragraph numbers have been lost between the first and second edition.)