Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1/2021: Abstracts

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

R. Wagner: **Judicial cooperation in civil and commercial matters after Brexit**

Brexit has become a reality. When the UK left the EU on 31 January 2020 at midnight, it entered the transition period stipulated in the UK-EU Withdrawal Agreement. During this period, EU law in the field of judicial cooperation in civil and commercial matters applied to and in the United Kingdom. The transition period ended on 31 December 2020. The following article primarily describes the legal situation in the judicial cooperation in civil and commercial matters from 1 January 2021.

Addendum: At the time when this contribution was written, the conclusion of a Trade and Cooperation Agreement between the EU and United Kingdom still was uncertain. Meanwhile, the Agreement of 24 December 2020 has come into existence. It is applicable provisionally since 1 January 2021 for a limited period and will be permanently applicable when after ratification it has formally come into force. The Agreement does not envisage any additional provisions on judicial cooperation in civil and commercial matters between the United Kingdom and the EU. Therefore, it has to be concluded that the present article reflects the current state of law as established by the Trade and Cooperation Agreement (Rolf Wagner).

K. Thorn/K. Varón Romero: **Conflict of laws in the “Twilight Zone” – On the reform of German private international law on welfare relationships**

With the government draft of 25 September 2020, a comprehensive reform of

guardianship and care law is approaching which will fundamentally modernize these areas. This reform also includes an amendment to the autonomous conflict-of-law rules in that area. The most important changes within this amendment concern the provisions of the Introductory Act to the German Civil Code (EGBGB). On the one hand, it includes a methodological change to the relevant Article 24 EGBGB which takes greater account of its role as a merely supplementary provision to prior international treaties and Union law. The authors welcome the changes that this will entail but point out that some clarifications are still needed before the reform is completed, particularly in cases of a change in the applicable law. On the other hand, a new Article 15 EGBGB is intended to create a special conflict-of-law rule for the mutual representation of spouses which is based on the also new substantive rule of Section 1358 of the German Civil Code (BGB) and is designed as a unilateral conflict-of-law rule in favour of domestic substantive law. The authors basically agree with the reasoning for this approach and in addition address questions which remain unresolved even after reading the reasoning, in particular the relationship between Article 15 of the Introductory Act to the Civil Code and the conflict-of-law rules of Union law.

D. Coester-Waltjen: **Conflict rules on formation of marriage – Some reflections on a necessary reform**

The conflict rule on formation of marriages (Article 13 Introductory Law to the Civil Code) underwent several changes during the last years. In addition, societal conditions and circumstances changed considerably. It seems at least questionable whether the cumulative application of the national law of both prospective spouses in case of a heterosexual marriage and the law of the place of registration in case of a homosexual marriage provides a reasonable solution. The article deals with a possible reform of the conflict rule on formation of marriage and envisages whether a comparable solution might be found for other (registered or factual) relationships.

U.P. Gruber: **Reflections on the reform of the conflict of laws of the registered life partnerships and other partnerships**

Under the current law, the formation of a registered life partnership, its general

effects and its dissolution are governed by the substantive provisions of the country in which the life partnership is registered. The article deals with a possible reform of this rule. In particular, it addresses the question whether there can be a convergence of the private international law for marriage and registered partnership. Moreover, the article discusses a conflict-of-law rule for de facto relationships.

F. Temming: **Payment of wage supplements in respect of annual leave constitute a civil and commercial matter within the scope of Art. 1 Brussels Regulation**

In its judgement the CJEU holds that an action for payment of wage supplements in respect of annual leave pay brought by a body competent to organize the annual leave of workers in the construction sector against an employer, in connection – among others – with the posting of workers to a Member State where they do not have their habitual place of work, can be qualified as a "civil and commercial matter" for the purpose of the Brussels Ibis Regulation and, thus, falls within the scope of its Article 1. This can even be the case if the competent body is governed by public law, such as the Construction Workers' Leave and Severance Pay Fund of Austria (hereinafter "BUAK"), provided that it does not act under a public law prerogative of its own conferred by law. This case note argues that the contested section 33h (2b) of the BUAG does not constitute such a prerogative but rather can be construed according to EU law in such a manner that an Austrian court can fully review the accuracy of a claim relied on by BUAK. The importance of the Korana judgement of the CJEU lies in the fact that it ensures the recognition and enforcement of judgments according to Art. 36 ff. of the Brussels I Regulation in favour of these above mentioned bodies. In so doing the CJEU strengthens the regulatory framework set up by the revised Posting of Workers Directive 96/71/EC. It marks the procedural keystone of a long-standing CJEU jurisprudence enabling a special, however adequate and institutionalised system of granting annual leave in the building sector. At the same time, it sends a clear signal towards the Swiss Federal Court that took a contrary view with respect to Art. 1 of the Lugano Convention 2007.

F. Maultzsch: **International Jurisdiction for Liability and Recourse Claims in the Wake of Cum-Ex Transactions**

The Higher Regional Court of Frankfurt (OLG Frankfurt a.M.) had to deal with issues of international jurisdiction for liability and recourse actions resulting from so-called cum-ex transactions that failed on a tax-based level. In doing so, the court took position on diverse jurisdictional issues under the Brussels Ibis Regulation. These issues covered the requirements of a sufficient contest of jurisdiction by the defendant in appellate proceedings, a possible jurisdiction under Art. 7 No. 5 Brussels Ibis Regulation for disputes arising out of the operations of a branch, aspects of characterization regarding the forum of the contract (Art. 7 No. 1 Brussels Ibis Regulation), as well as the standards of international jurisdiction for a recourse claim from joint and several liability for tax payments. The following article analyses the findings of the court and discusses, inter alia, the application of Art. 26 Brussels Ibis Regulation in cases of a modification of the matter in dispute.

J. Schulte: **A reinforced EU trademark through a strengthened alternative forum**

The EU trademark has been strengthened when it comes to infringements via internet by the recent ECJ decision in AMS Neve, reviving the alternative forum of the place where an act of infringement has been committed or threatened. The Court ruled out an interpretation not congruent with that in Art. 8 (2) Rome II (applicable law) or Art. 7 no. 2 Brussels Ia (international jurisdiction for national trademarks). Instead, it transferred the EU Trademark Regulation’s substantive law understanding, thus guaranteeing a uniform interpretation of the regulation. Competent are the courts of the Member State where the consumers or traders are located to whom an allegedly infringing advertising or offers for sale are directed. This reverses the unfortunate “Parfummarken”-doctrine of the German Bundesgerichtshof and gives plaintiffs more leeway for choosing a forum and the possibility of bringing actions for infringements of EU and national trademarks simultaneously at the same court.

H. Schack: **Does Art. 27 Lugano Convention permit requiring a special**

legitimate interest in actions for negative declaratory relief?

In an antitrust dispute between a Swiss watch manufacturer and a British wholesaler the Swiss Federal Court gives up its former holding (BGE 136 III 523) that a Swiss action for negative declaratory relief required a special legitimate interest. Today, at least in international cases, the plaintiff's mere interest in fixing the forum is sufficient. That strengthens the attractiveness of Swiss courts in transborder cases.

Walking Solo – A New Path for the Conflict of Laws in England

Written by Andrew Dickinson (Fellow, St Catherine's College and Professor of

Law, University of Oxford)

The belated conclusion of the UK-EU Trade and Cooperation Agreement did not dampen the impact of the UK's departure from the European Union on judicial co-operation in civil matters between the UK's three legal systems and those of the 27 remaining Members of the Union. At the turn of the year, the doors to the UK's participation in the Recast Brussels I Regulation and the 2007 Lugano Convention closed. With no signal that the EU-27 will support the UK's swift readmission to the latter, a new era for private international law in England and Wales, Scotland and Northern Ireland beckons.

The path that the United Kingdom has chosen to take allows it, and its constituent legal systems, to shape conflict of laws rules to serve the interests that they consider important and to form new international relationships, unfettered by the EU's legislative and treaty making competences. This liberty will need to be exercised wisely if the UK's legal systems are to maintain their positions in the global market for international dispute resolution, or at least mitigate any adverse impacts of the EU exit and the odour of uncertainty in the years following the 2016 referendum vote.

As the guidance recently issued by the Ministry of Justice makes clear, the UK's detachment from the Brussels-Lugano regime will magnify the significance of the rules of jurisdiction formerly applied in cases falling under Art 4 of the Regulation (Art 2 of the Convention), as well as the common law rules that apply to the recognition and enforcement of judgments in the absence of a treaty relationship.

This is a cause for concern, as those rules are untidy and ill-suited for the 21st century.

If the UK's legal systems are to prosper, it is vital that they should not erase the institutional memory of the three decades spent within the EU's area of justice. They should seek to capture and bottle that experience: to see the advantages of close international co-operation in promoting the effective resolution of disputes, and to identify and, where possible, replicate successful features of the EU's private international law framework, in particular under the Brussels-Lugano regime.

With these considerations in mind, I began the New Year by suggesting on my Twitter account (@Ruritanian) ten desirable steps towards establishing a more

effective set of conflict of laws rules in England and Wales for civil and commercial matters. Ralf Michaels (@MichaelsRalf) invited me to write this up for ConflictofLaws.Net. What follows is an edited version of the original thread, with some further explanation and clarification of a kind not possible within the limits of the Twitter platform. This post does not specifically address the law of Scotland or of Northern Ireland, although many of the points made here take a broader, UK-wide view.

First, a stand-alone, freshly formulated set of rules of jurisdiction replacing the antiquated service based model. That model (Civil Procedure Rules 1998, rr 6.36-6.37 (**CPR**) to be read with Practice Direction 6B) dates back to the mid-19th century and has only been lightly patched up, albeit with significant *ad hoc* extensions, since then. The new rules should demand a significant connection between the parties or the subject matter of the claim and the forum of a kind that warrants the exercise of adjudicatory jurisdiction. In this regard, the Brussels-Lugano regime and the rules applied by the Scots courts (Civil Jurisdiction and Judgments Act 1982, Sch 8) provide more suitable starting points than the grounds currently set out in the Practice Direction.

Taking this step would allow the rules on service to focus on the procedural function of ensuring that the recipient of a claim form or other document is adequately informed of the matters raised against it. It would enable the cumbersome requirement to obtain permission to serve a claim form outside England and Wales to be abolished, and with it the complex and costly requirement that the claimant show that England and Wales is the 'proper place' (ie clearly the appropriate forum) for the trial of the action. Instead, the claimant would need to certify that the court has jurisdiction under the new set of rules (as has been the practice when the rules of the Brussels-Lugano apply) and the defendant would need to make an application under CPR, Part 11 if it considers that the English court does not have or should not exercise jurisdiction. The claimant would bear the burden of establishing jurisdiction, but the defendant would bear the burden of persuading the court that it should not be exercised. This brings us to the second point.

Secondly, stronger judicial (or legislative) control of the expensive and resource eating Goffian *forum conveniens* model. Senior judges have repeatedly noted the excesses of the *Spiliada* regime, in terms of the time, expense and judicial

resource spent in litigating questions about the appropriate forum (see, most recently, Lord Briggs in *Vedanta Resources Plc v Lungowe* [2019] UKSC 20, [6]-[14]), yet they and the rule makers have done little or nothing about it. In many ways, the model is itself to blame with its wide ranging evaluative enquiry and micro-focus on the shape of the trial. Shifting the onus to the defendant in all cases (see above) and an emphasis on the requirement that another forum be 'clearly [ie manifestly] more appropriate' than England would be useful first steps to address the excesses, alongside more pro-active case management through (eg) strict costs capping, a limit in the number of pages of evidence and submissions for each side and a greater willingness to require the losing party to pay costs on an indemnity basis.

Thirdly, a clipping of the overly active and invasive wings of the anti-suit injunction. English judges have become too willing to see the anti-suit injunction, once a rare beast, as a routine part of the judicial arsenal. They have succumbed to what I have termed the 'interference paradox' ((2020) 136 Law Quarterly Review 569): a willingness to grant anti-suit injunctions to counter interferences with their own exercise of jurisdiction coupled with an overly relaxed attitude to the interferences that their own orders wreak upon foreign legal systems and the exercise of constitutional rights within those systems. Moreover, the grounds for granting anti-suit injunctions are ill defined and confusing – in this regard, the law has travelled backwards rather than forwards in the past century (another Goffian project). Much to be done here.

Fourthly, steps to accede to the Hague Judgments Convention and to persuade others to accede to the Hague Choice of Court Convention. Although the gains from acceding to the Judgments Convention may be small, at least in the short term, it would send a strong signal as to the UK's wish to return to centre stage at the Hague Conference, and in the international community more generally, and may strengthen its hand in discussions for a future Judgments Convention. By contrast, the success of the Hague Choice of Court Convention is of fundamental importance for the UK, given that it wishes to encourage parties to choose its courts as the venue for dispute resolution and to have judgments given by those courts recognised and enforced elsewhere.

Fifthly, a review of the common law rules for the recognition and enforcement of judgments, which are in places both too broad and too narrow. These rules have

been little changed since the end of the 19th century. They allow the enforcement of foreign default judgments based only on the defendant's temporary presence in the foreign jurisdiction at the time of service, while treating as irrelevant much more substantial factors such as the place of performance of a contractual obligation or place of commission of a tort (even in personal injury cases). Parliamentary intervention is likely to be needed here if a satisfactory set of rules is to emerge.

Sixthly, engagement with the EU's reviews of the Rome I and II Regulations to test if our choice of law rules require adjustment. The UK has wisely carried forward the rules of applicable law contained in the Rome Regulations. Although not perfect, those rules are a significant improvement on the local rules that they replaced. The EU's own reviews of the Regulations (Rome II currently underway) will provide a useful trigger for the UK to re-assess its own rules with a view to making appropriate changes, whether keeping in step with or departing from the EU model.

Seventhly, statutory rules governing the law applicable to assignments (outside Rome I) and interests in securities. The UK had already chosen not to participate in the upcoming Regulation on the third party effects of assignments, but will need to keep a close eye on the outcome of discussions and on any future EU initiatives with respect to the law applicable to securities and should consider legislation to introduce a clear and workable set of choice of law rules with respect to these species of intangible property. These matters are too important to be left to the piecemeal solutions of the common law.

Eighthly, a measured response to the challenges presented by new technology, recognising that the existing (choice of law) toolkit is fit for purpose. In December 2020, the UK Law Commission launched a consultation on Smart Contracts with a specific section (ch 7) on conflict of laws issues. This is a welcome development. It is hoped that the Law Commission will seek to build upon existing solutions for offline and online contracts, rather than seeking to draw a sharp distinction between 'smart' and 'backward' contracts.

Ninthly, changes to the CPR to reduce the cost and inconvenience of introducing and ascertaining foreign law. The English civil procedure model treats foreign law with suspicion, and places a number of obstacles in the way of its effective deployment in legal proceedings. The parties and their legal teams are left in

control of the presentation of the case, with little or no judicial oversight. This approach can lead to uncertainty at the time of trial, and to the taking of opportunistic points of pleading or evidence. A shift in approach towards more active judicial case management is needed, with a move away from (expensive and often unreliable) expert evidence towards allowing points of foreign law to be dealt with by submissions in the same way as points of English law, especially in less complex cases.

Tenthly, measures to enhance judicial co-operation between the UK's (separate) legal systems, creating a common judicial area. It is a notable feature of the Acts of Union that the UK's constituent legal systems stand apart. In some areas (notably, the recognition and enforcement of judgments – Civil Jurisdiction and Judgments Act 1982, Sch 6 and 7), the rules operate in a way that allows the recognition of a single judicial area in which barriers to cross-border litigation have been removed. In other respects, however (for example, the service of documents, the taking of evidence and the ascertainment of foreign law), the UK's legal systems lack the tools that would facilitate closer co-operation and the more effective resolution of disputes. The UK's legal systems should consider what has worked for the EU, with its diverse range of legal systems, and for Commonwealth federal States such as Australia and work together to adopt comprehensive legislation on a Single UK Judicial Area.

Determining the applicable law of an arbitration agreement when there is no express choice of a governing law – Enka Insaat Ve

Sanayi A.S. v OOO Insurance Company Chubb [2020] UKSC 38.

This brief note considers aspects of the recent litigation over the identification of an unspecified applicable law of an arbitration agreement having an English seat. Though the UK Supreme Court concluded that the applicable law of the arbitration agreement itself was, if unspecified, usually to be the same as that of the contract to which the arbitration agreement refers, there was an interesting division between the judges on the method of determining the applicable law of the arbitration agreement from either the law of the arbitral seat (the view favoured by the majority) or from the applicable law of the underlying contract (the view favoured by the minority). As will become clear, the author of this note finds the views of the minority to be more compelling than those of the majority.

In a simplified form the facts were that, in February 2016, a Russian power station was damaged by an internal fire. 'Chubb', insurer of the owners of the power station, faced a claim on its policy. In May 2019, Chubb sought to sue 'Enka' (a Turkish subcontractor) in Russia to recover subrogated losses. Enka objected to these Russian proceedings claiming that under the terms of its contract of engagement any such dispute was to be arbitrated via the ICC in England: in September 2019, it sought declaratory orders from the English High Court that the matter should be arbitrated in England, that the applicable law of the arbitration agreement was English, and requested an English anti-suit injunction to restrain Chubb from continuing the Russian litigation.

Neither the arbitration agreement nor the contract by which Chubb had originally engaged Enka contained a clear provision specifically and unambiguously selecting an applicable law. Though it was plain that the applicable law of the underlying contract would, by the application of the provisions of the Rome I Regulation, eventually be determined to be Russian, the applicable law of the arbitration agreement itself could not be determined as directly in this manner because Art. 1(2)(e) of the Regulation excludes arbitration agreements from its scope and leaves the matter to the default applicable law rules of the forum.

After an unsuccessful interim application in September 2019, Enka's case came before Baker J in December 2019 in the High Court. It seems from Baker J's

judgment that Enka appeared to him to be somewhat reticent in proceeding to resolve the dispute by seeking to commence an arbitration; this, coupled with the important finding that the material facts were opposite to those that had justified judicial intervention in *The Angelic Grace* [1995] 1 Lloyd's Rep 87, may explain Enka's lack of success before the High Court which concluded that the correct forum was Russia and that there was no basis upon which it should grant an anti-suit injunction in this case.

In January 2020, Enka notified Chubb of a dispute and, by March 2020, had filed a request for an ICC arbitration in London. Enka also however appealed the decision of Baker J to the Court of Appeal and duly received its requested declaratory relief plus an anti-suit injunction. The Court of Appeal sought to clarify the means by which the applicable law of an arbitration agreement should be determined if an applicable law was not identified expressly to govern the arbitration agreement itself. The means to resolve this matter, according to the court, was that without an express choice of an applicable law for the arbitration agreement itself, the curial law of the arbitral seat should be presumed to be the applicable law of the arbitration agreement. Thus, though the applicable law of the underlying contract was seemingly Russian, the applicable law of the arbitration agreement was to be presumed to be English due to the lack of an express choice of Russian law and due to the fact of the English arbitral seat. Hence English law (seemingly wider than the Russian law on a number of important issues) would determine the scope of the matters and claims encompassed by the arbitration agreement and the extent to which they were defensible with the assistance of an English court.

In May 2020, Chubb made a final appeal to the UK Supreme Court seeking the discharge of the anti-suit injunction and opposing the conclusion that the applicable law of the arbitration agreement should be English (due to the seat of the arbitration) rather than Russian law as per the deduced applicable law of the contract to which the arbitration agreement related. The UK Supreme Court was thus presented with an opportunity to resolve the thorny question of whether in such circumstances the curial law of the arbitral seat or the applicable law of the agreement being arbitrated should be determinative of the applicable law of the arbitration agreement. Though the Supreme Court was united on the point that an express or implied choice of applicable law for the underlying contract usually determines the applicable law of the arbitration agreement, it was split three to

two on the issue of how to proceed in the absence of such an express choice.

The majority of three (Lords Kerr, Hamblen and Leggatt) favoured the location of the seat as determinative in this case. This reasoning did not proceed from the strong presumption approach of the Court of Appeal (which was rejected) but rather from the conclusion that since there had been no choice of applicable law for either the contract or for the arbitration agreement, the law with the closest connection to the arbitration agreement was the curial law of the arbitral seat. As will be seen, the minority (Lords Burrows and Sales) regarded there to have been a choice of applicable law for the contract to be arbitrated and proceeded from this to determine the applicable law of the arbitration agreement.

The majority (for the benefit of non-UK readers, when there is a majority the law is to be understood to be stated on this matter by that majority in a manner as authoritative as if there had been unanimity across all five judges) considered that there was no choice of an applicable law pertinent to Art.3 of Rome I in the underlying contract by which Enka's services had been engaged. It is true that this contract did not contain a helpful statement drawn from drafting precedents that the contract was to be governed by any given applicable law; it did however make many references to Russian law and to specific Russian legal provisions in a manner that had disposed both Baker J and the minority in the Supreme Court to conclude that there was indeed an Art.3 choice, albeit of an implied form. This minority view was based on a different interpretation of the facts and on the Giuliano and Lagarde Report on the Convention on the law applicable to contractual obligations (OJ EU No C 282-1). The majority took the view that the absence of an express choice of applicable law for the contract must mean that the parties were unable to agree on the identity of such a law and hence 'chose' not to make one. The minority took the view that such a conclusion was not clear from the facts and that the terms of the contract and its references to Russian law did indicate an implied choice of Russian law. As the majority was however unconvinced on this point, they proceeded from Art.3 to Art.4 of Rome I and concluded that, in what they regarded as the absence of an express or implied choice of applicable law for the contract, Russian law was the applicable law for the contract.

For the applicable law of the arbitration agreement itself, the majority resisted the idea that on these facts their conclusion re the applicable law of the contract should also be determinative for the applicable law of the arbitration agreement.

Instead, due to the Art.1(2)(e) exclusion of arbitration agreements from the scope of the Regulation, the applicable law of the arbitration agreement fell to be determined by the English common law. This required the identification of the law with which the arbitration agreement was 'most closely connected'. Possibly reading too much into abstract notions of international arbitral practice, the majority concluded that, in this case, the applicable law of the arbitration agreement should be regarded as most closely connected to the curial law of the arbitral seat. Hence English law was the applicable law of the arbitration agreement despite the earlier conclusion that the applicable law of the contract at issue was Russian.

As indicated, the minority disagreed on the fundamental issue of whether or not there had been an Art.3 implied choice of an applicable law in the underlying contract. In a masterful dissenting judgment that is a model of logic, law and clarity, Lord Burrows, with whom Lord Sales agreed, concluded that this contract contained what for Art.3 of Rome I could be regarded as an implied choice of Russian law as '… clearly demonstrated by the terms of the contract or the circumstances of the case'. This determination led to the conclusion that the parties' implied intentions as to the applicable law of the arbitration agreement were aligned determinatively with the other factors that implied Russian law as the applicable law for the contract. Russian law was (for the minority) thus the applicable law of the underlying contract and the applicable law of the ICC arbitration (that, by March, 2020 Enka had acted to commence) was to take place within the English arbitral seat in accordance its English curial law. Lord Burrows also made plain that if had he concluded that there was no implied choice of Russian law for the contract, he would still have concluded that the law of the arbitration agreement itself was Russian as he considered that the closest and most substantial connection of the arbitration agreement was with Russian law.

Though the views of the minority are of no direct legal significance at present, it is suggested that the minority's approach to Art.3 of the Rome I Regulation was more accurate than that of the majority and, further, that the approach set out by Lord Burrows at paras 257-8 offers a more logical and pragmatic means of settling any such controversies between the law of the seat and the law of the associated contract. It is further suggested that the minority views may become relevant in later cases in which parties seek a supposed advantage connected with the identity of the applicable law of the arbitration. When such a matter will

re-occur is unclear, however, though the Rome I Regulation ceases to be directly applicable in the UK on 31 December 2020, the UK plans to introduce a domestic analogue of this Regulation thereafter. It may be that a future applicant with different facts will seek to re-adjust the majority view that in the case of an unexpressed applicable law for the contract and arbitration agreement that the law of the seat of the arbitration determines the applicable law of the arbitration agreement.

As for the anti-suit injunction, it will surprise few that the attitude of the Court of Appeal was broadly echoed by the Supreme Court albeit in a more nuanced form. The Supreme Court clarified that there was no compelling reason to refuse to consider issuing an anti-suit injunction to any arbitral party who an English judge (or his successors on any appeal) has concluded can benefit from such relief. They clarified further that the issuance of an anti-suit injunction in such circumstances does not require that the selected arbitral seat is English. The anti-suit injunction was re-instated to restrain Chubb's involvement in the Russian litigation proceedings and to protect the belatedly commenced ICC arbitration.

The Italian Supreme Court on Competence and Jurisdiction in Flight Cancellation Claims

The case

In a recent decision deposited 5 November 2020 (ordinanza 24632/20), the Italian Supreme Court has returned on the competent court in actions by passengers against air carriers following cancellation of flights.

The case is quite straightforward and can be summarized as follows: (i) passengers used a travel agency in Castello (province of Perugia) to buy EasyJet

flight tickets; (ii) the Rome(Fiumicino)-Copenhagen fight was cancelled without any prior information being given in advance; (iii) passengers had to buy a different flight from another air carrier to Hamburg, and travel by taxi to their final destination – thus sustaining additional sensitive costs.

Before the Tribunal (*Tribunale*) in Perugia, the passengers started proceedings against the air carrier asking for both the standardized lump-sum compensation they were entitled under the Air Passenger Rights Regulation following the cancellation of the flight (art. 5 and art. 7), and for the additional damages sustained due to the cancellation.

The relevant legal framework: an overview

Passengers requested Italian courts to adjudicate two different set of claims, each of which has its own specific legal basis.

One the one side, the specific right for standardized lump-sum compensation in case of cancellation of flight is established by the EU Air Passenger Rights Regulation; on the other side, the additional damage for which they sought compensation did fall within the scope of application of the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air.

As it has already been clarified by the Court of Justice of the European Union (see *ex multis* Case C-464/18, para. 24), the Air Passenger Rights Regulation entails no rule on jurisdiction – with the consequence that this is entirely governed by the Brussels I bis Regulation. On the contrary, to the extent the Brussels I bis Regulation and the 1999 Montreal Convention overlap in their respective scope of application, the latter is to be granted primacy due to its *lex special* character (under the *lex specialis* principle). Hence, the questions of jurisdiction for the two claims have to be addressed separately and autonomously one from the other – each in light of the respective relevant instrument (see CJEU Case C-213/18, para. 44).

The decision of the Italian court

Focusing on international civil procedure aspects of the decision, claimants did start one single proceedings against the air carrier before the *Tribunale* in Perugia, the place where the flight ticket was bought though a travel agency.

The air carrier contested this jurisdiction and competence (as the value of individual claims rather than the value of aggregated claims pointed to the competence *rationae valoris* of the Giudice di pace – Justice of the peace – of Castello in the province of Perugia) up to the Supreme court invoking the Brussels I bis Regulation.

The air carrier supported the view that the competent courts where either those having territorial competence over the airport of departure (i.e. the court in Civitavecchia, under art. 7, Brussels I bis) or arrival (in Copenhagen, always under art. 7 Brussels I bis; cf CJEU Case C-204/08), or courts in London (under art. 4 Brussels I bis).

The passengers insisted on their position invoking the 1999 Montreal Convention assuming that proceedings were brought at the "*place of business through which the contract has been made*", one of the heads of jurisdiction under art. 33 of the Convention. Moreover, the passengers argued that the Convention only contained rules on international jurisdiction and not on territorial competence, this aspect being entirely governed by internal civil procedure.

a. On UK Companies

As a preliminary matter, the Italian Supreme court acknowledges 'Brexit' and the Withdrawal Agreement, yet proceeds without sensitive problems in the evaluation and application of EU law as the transition period has not expired at the time of the decision according to artt. 126 and 127 of the agreement (*point 1, reasoning in law*).

b. Autonomous actions: the proper place for starting proceedings

Consistently with previous case law (CJEU Case C-213/18, para. 44), the Italian

Supreme court concludes for the autonomy of the legal actions brought before the courts, arguing that jurisdiction has to be autonomously addressed (*point 3, reasoning in law*).

Actions based on lump-sum standardized compensation in cases of cancellation of flights deriving from the Air Passenger Rights Regulation do entirely and exclusively fall under the scope of application of the Brussels I bis Regulation – art. 7 being applicable. In this case, the Italian territorial competent court is the one having territorial jurisdiction over the airport of departure – (Rome Fiumicino), i.e. the *Giudice di pace* of Civitavecchia.

Actions for additional damages connected to long delays or cancellation of flights, the right for compensation deriving from the Montreal Convention, remain possible before the courts identified under art. 33 of the 1999 Montreal Convention (*point 3, reasoning in law*).

Here, two elements are of particular interests.

In the first place, the Italian Supreme court apparently changes its previous understanding of the Convention as it concedes that rules on jurisdiction therein enshrined are not merely rules on international jurisdiction, but are also rules on territorial competence (*point 6, reasoning in law*; consistent with *Case C-213/18*; overrules Cassazione 3561/2020 where territorial competence was determined according to domestic law).

In the second place, the court dwells – in light of domestic law – on the notion of "*place of business through which the contract has been made*" *ex* art. 33 of the Convention, which grounds a territorial competence (*point 6.3, reasoning in law*). Distinguishing its decision from cases where passengers directly buy online tickets from the air carriers, it is the court's belief that a travel agency operates under IATA Sales Agency Agreements, hence as an authorized "representative" of the air carrier business for the purposes of the provision at hand. According to the court, the fact that a travel agency may be considered as a ticket office of the air carrier for the purposes of art. 33 of the 1999 Montreal Convention is nothing more than a *praesumptio hominis*; yet such a circumstance was not challenged by the air carrier and thus, under Italian law, considered proven and final. This, with the consequence that competence for damages related to the cancellation of the flight, other than the payment of compensation under the Air Passenger Rights

Regulation, is reserved to the Justice of the peace (giudice di pace) competent *rationae valoris* of the place where the travel agency (in Castello, near Perugia) is located, as this place is the "*place of business through which the contract has been made*".

c. Connected actions

The Italian Supreme court acknowledges the impracticalities that may follow from the severability of closely related actions grounded on same facts (*point 6.3, reasoning in law*), in particular where compensation for damages granted from one court under the 1999 Montreal Convention must deduct compensation already granted by another court under the Air Passenger Rights Regulation. In this sense, *in fine* the court mentions the possibility to refer to art. 30 Brussels I bis Regulation, presumably having in mind also art. 30(2).

Open questions

Whereas the decision of the Italian Supreme court largely follows indications of the Court of Justice of the European Union, some passages appear to leave room for discussion.

Firstly, even though correctly primacy to the 1999 Montreal Convention over the Brussels I bis Regulation is granted, the proper disconnection clause is not analyzed at all in the decision. In a number of previous decisions, the court did address the disconnection clause, arguing in favor of the *lex specialis* invoking art. 71 Brussels I bis Regulation – a provision that grants priority to international conventions in specific matters to which Member States are party to (cf *Cass 18257/2019, and Cass 3561/2020*). However, given that the EU has become part to the 1999 Montreal Convention by way of a Council Decision in 2001, other courts have invoked art. 67 to solve the coordination issue – as this provision is destined to govern the relationship between Brussels I bis and rules on jurisdiction contained in other "*EU instruments*" (cf *LG Bremen, 05.06.2015 – 3 S 315/14*). A position, the latter, that appears consistent with art. 216(2) TFEU,

according to which "*Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States*". In this sense, the Italian Supreme court could have dwelled more on the proper non-affect clause to be applied when it comes to the relationships between the Brussels I bis Regulation and the 1999 Montreal Convention.

Secondly, the final remarks of the Italian Supreme court on related actions in the Brussels I bis also should impose a moment of reflection. In the case at hand there were no parallel proceedings, so the "indications" of the court were nothing more than that.

However, recourse to the rules on related actions of the Brussels I bis Regulation should be allowed only so far no specific rule is contained in the *lex specialis*. Again, an evaluation on the existence of such rules is completely missing in the decision.

More importantly, even though it is generally accepted that Brussels I bis rules on coordination on proceedings can be subject to a somewhat "extensive" interpretation (as current art. 30 on related actions has been deemed applicable regardless of whether courts ground their jurisdiction on domestic law or on the regulation itself – cf Case C-351/89, para. 14), it remains that art. 30 refers to parallel proceedings pending "*in the courts of different Member States*". A circumstance that would not occur where proceedings are pending before two courts of *the same Member State*, as the one dealt with by the Italian supreme court in the case at hand.

The present research is conducted in the framework of the En2Bria project (Enhancing Enforcement under Brussels Ia – EN2BRIa, Project funded by the European Union Justice Programme 2014-2020, JUST-JCOO-AG-2018 JUST 831598). The content of the Brussels Ia – EN2BRIa, Project, and its deliverables, amongst which this webpage, represents the views of the author only and is his/her sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

Overriding Mandatory Rules in the Law of the EU Member States: Webinar of the EAPIL Young EU Private International Law Research Network

On Monday, 16 November 2020, starting at 9.15 am CET, the Young EU Private International Law Research Network of the European Association of Private International Law (EAPIL), organizes a webinar on "Overriding Mandatory Rules in the Law of the EU Member States".

In two sessions, Young PIL researchers from various EU Member States will discuss *selected issues related to overriding mandatory rules*, such as their explicit legislative characterization in recent EU directives and their application by arbitral tribunals.

Subsequently, the *General Report of the second Young EU PIL project*, namely "The Application of Overriding Mandatory Norms outside the Scope of Application of the EU Private International Law Regulations" as well as some national perspectives will be presented. The concluding discussion of the webinar is dedicated to *future initiatives and projects* of the Research Network.

All young PIL researchers who are interested in joining the webinar and/or the Young EU Private International Research Network are cordially invited to send an e-mail to youngeupil@gmail.com. Attendance is free of charge. Details regarding the virtual attendance will be sent to all registered participants.

The programme reads as follows:

9.15 am Opening of the conference – Tamás SZABADOS (ELTE)

Session I – Chair: Florian HEINDLER (Sigmund Freund University Vienna)

9.20 am Ennio PIOVESANI (University of Turin/University of Cologne): Overriding Mandatory Rules in the Context of the Covid-19 Pandemic

9.35 am Martina MELCHER (University of Graz): Substantive EU Regulations as Overriding Mandatory Provisions?

9.50 am Johannes UNGERER (University of Oxford): Explicit Legislative Characterization of Overriding Mandatory Provisions in EU Directives

10:05 am Uglješa GRUŠI? (University College London): Some Recent Developments Regarding the Treatment of Mandatory Rules of Third Countries

10.20-10:35 am Discussion

Session II – Chair: Dr. Eduardo Alvarez-Armas (Brunel University London)

10.45 am Katarzyna BOGDZEVI? (Mykolas Romeris University): Overriding Mandatory Provisions in Family Law and Personal Status Issues

11.00 am Markus PETSCHE (Central European University): The Application of Mandatory Rules by Arbitral Tribunals

11.15 am István ERD?S (ELTE): Imperative Rules in Investment Arbitration

11.30-11.45 am Discussion

Young EU PIL Project: The Application of Overriding Mandatory Norms outside the Scope of Application of the EU Private International Law Regulations

2.00 pm Tamás SZABADOS (ELTE): Presentation and Discussion of the General Report

2.15 pm Stefano DOMINELLI (University of Genoa) and Ennio PIOVESANI (University of Turin/University of Cologne): Italian Perspective

Holger JACOBS (University of Mainz): German Perspective

Dora ZGRABLJI? ROTAR (University of Zagreb): Croatian Perspective. Overriding Mandatory Rules and the Proposal on the Law Applicable to the Third-party Effects of Assignments of Claims

3.00 -3.30 pm Future of the Young EU Private International Law Network (Chair:

Martina MELCHER and Tamás SZABADOS)

Ilaria Viarengo and Francesca C Villata recently published a new book

Ilaria Viarengo and **Francesca C Villata** recently published a new book titled: "***Planning the Future of Cross Border Families: A Path Through Coordination***" under the prestigious Hart Studies in Private International Law. The abstract reads as follows:

This book is built upon the outcomes of the EUFam's Project, financially supported by the EU Civil Justice Programme and led by the University of Milan. Also involved are the Universities of Heidelberg, Osijek, Valencia and Verona, the MPI in Luxembourg, the Italian and Spanish Family Lawyers Associations and training academies for judges in Italy and Croatia. The book seeks to offer an exhaustive overview of the regulatory framework of private international law in family and succession matters. The book addresses current features of the Brussels IIa, Rome III, Maintenance and Succession Regulations, the 2007 Hague Protocol, the 2007 Hague Recovery Convention and new Regulations on Property Regimes.
The contributions are authored by more than 30 experts in cross-border family and succession matters. They introduce social and cultural issues of cross-border families, set up the scope of all EU family and succession regulations, examine rules on jurisdiction, applicable law and recognition and enforcement regimes and focus on the current problems of EU family and succession law (lis pendens in third States, forum necessitatis, Brexit and interactions with other legal instruments). The book also contains national reports from 6 Member States and annexes of interest for both legal scholars and practitioners (policy guidelines, model clauses and protocols).

The End of the “Sahyouni Saga”

The German Bundesgerichtshof (BGH) in August finally decided the case “Sahyouni” that made it twice to the ECJ (Sahyouni I and Sahyouni II). The BGH decision (German text here) applied the new German rules on private divorces. The German legislator had enacted these rules after the ECJ declared the Rome III Regulation as only applicable on divorces by a court. Additionally, the court took the opportunity to comment on several other private international law issues. The probably most interesting issues of the case are (1) the new German rules, (2) the treatment of parties with more than one nationality if the connecting factor is nationality and (3) the question whether the unilateral private divorce finally was recognized.

1. **German law regarding “private divorces”**

Following the second “Sahyouni” decision, new private international law rules were enacted. German private international law follows the principle of “recognition via conflict of laws”, meaning that a divorce not issued by a court decision will only be recognized if it complies with the rules applicable according to German private international law. The new rules basically declared the Rome III Regulation applicable to private divorces *mutatis mutandis* except for those rules that could not be applied on a private divorce (e.g. the application of *lex fori* as there is not *forum*). Furthermore, Article 10 Rome III, the rule that initially triggered the request for the preliminary ruling, is not applicable. Thus, only the “usual” public policy exception can prevent the application of the *lex causae*.

1. **Treatment of double-nationality**

The court came to the conclusion that the spouses did not have a common habitual residence as required by Article 8 lit a, b Rome III (*mutatis mutandis*). So, the question occurred whether the spouses had a common nationality (Article 8 lit. c). In this special case, both spouses did not only have one common nationality but two: German and Syrian. As the Rome III regulation is silent to the treatment of double-nationals (and, furthermore, Rome III only applied *mutatis mutandis*), the court applied Article 5 para. 1 EGBGB (English non-official

translation here). This rule provides in case of double-nationality (1) a prevalence of the German nationality and (2), if no German nationality is in play, a prevalence of the "effective" nationality, ie the nationality that is closer connected to the person, usually the one of habitual residence. In the context of EU private international law, there was a discussion whether these two rules can hold – given that in Garcia Avello and Haddadi similar rules had been regarded as violating EU primarily law, esp. the principle of non-discrimination.

In "Sahyouni" the BGH concluded that both cases were not relevant. The second (and probably non-effective) nationality of both spouses was the Syrian, a non-EU nationality. Thus, the principle of non-discrimination did not apply. Therefore, German law applied on the case. German law does not allow a "private divorce". For that reason, the divorce was regarded as invalid in Germany.

1. **Unilateral divorces and *public policy***

Finally, the court took the opportunity to mention that the poblic policy exception also would have made the divorce invalid: Article 10 Rome III was not applicable, thus, Article 6 EGBGB (English) would have applied. Contrary to Article 10, Article 6 requires an analysis of the concrete result of the application of the *lex causae* to determine whether this result violates fundamental principles/values of the German legal system. In Germany, divorces by unilateral declarations (such as *talaq* or *ghet*) can be regarded as not violating the German *ordre public*, especially if both spouses agree on the divorce. From the facts of the case the BGH concluded that in "Sahyouni" the wife did not wish for divorce. For that reason, the recognition of the unilateral declaration would violate the German public policy ("would" as this argument was not decisive for the case – as aforementioned, German law applied).

The Bee That's Buzzing in Our

Bonnets. Some Thoughts about Characterisation after the Advocate General's Wikingerhof Opinion

Last week, AG Saugmandsgaard Øe rendered his Opinion on Case C-59/19 Wikingerhof, which we first reported in this post by Krzysztof Pacula. The following post has been written by Michiel Poesen, PhD Candidate at KU Leuven, who has been so kind as to share with us some further thoughts on the underlying problem of characterisation.

Characterisation is not just a bee that has been buzzing in conflicts scholars' bonnets, as Forsyth observed in his 1998 LQR article. Given its central role in how we have been thinking about conflicts for over a century, it has pride of place in jurisprudence and literature. The *Wikingerhof v Booking.com* case (C-59/19) is the latest addition to a long string of European cases concerning the characterisation of actions as 'matters relating to a contract' under Article 7(1) of the Brussels Ia Regulation n° 1215/2012.

Earlier this week, Krzysztof Pacula surveyed Advocate General Saugmandsgaard Øe's opinion in the *Wikingerhof* case on this blog (Geert Van Calster also wrote about the opinion on his blog). Readers can rely on their excellent analyses of the facts and the AG's legal analysis. This post has a different focus, though. The *Wikingerhof* case is indicative of a broader struggle with characterising claims that are in the grey area surrounding a contract. In this post, I would like to map briefly the meandering approaches to characterisation under the contract jurisdiction. Then I would like to sketch a conceptual framework that captures the key elements of characterisation.

1. Not All 'Matters Relating to a Contract' Are Created Equal

There are around 30 CJEU decisions concerning the phrase 'matters relating to a contract'. Three tests for characterisation are discernible in those decisions. In the first approach, characterisation depends on the nature of the legal basis relied on by the claimant. If a claim is based on an obligation freely assumed, then

the claim is a matter relating to a contract to which the contract jurisdiction applies. Statutory, fiduciary, or tortious obligations arising due to the conclusion of a contract are also contractual obligations for private international law purposes. I will call this approach the 'cause of action test', because it centres on the nature of the cause of action pleaded by the claimant. In recent decisions, for example, the cause of action test has been used to characterise claims between third parties as contractual matters (C-337/17 *Feniks*, blogged here; C-772/17 *Reitbauer*, blogged here; joined cases C-274/16, C-447/16 and C-448/16 *flightright*).

The second approach to characterisation is to focus on the relationship between the litigants. From this standpoint, only claims between litigants who are bound by a contract can be characterised as 'matters relating to a contract'. This approach has for example been used in the *Handte* and *Réunion européenne* decisions. We will call it the 'privity test'. Sometimes scholars relied on this test to argue that all claims between contracting parties are to be characterised as matters relating to a contract.

The third and final approach emphasises the nature of the facts underlying the claim brought by the claimant. This approach was first developed in the *Brogsitter* decision (C-548/12). However, it is predated by AG Jacob's opinions in the *Kalfelis* (C-189/87) and *Shearson Lehmann Hutton* (C-89/91) cases (which since have been eagerly picked up by the *Bundesgerichtshof* of Germany). The *Brogsitter* decision provided that a claim is a contractual matter if the defendant's allegedly wrongful behaviour can reasonably be regarded to be a breach of contract, which will be the case if the interpretation of the contract is indispensable to judge. I will dub this approach the 'factual breach test', since it directs attention to factual elements such as the defendant's behaviour and the indispensability to interpret the contract. It is plain to see that this is by far the most complicated of the three approaches to characterisation we discussed here (among other things because of the unclear relation between the different layers of which the test is composed, an issue that AG Saugmandsgaard Øe entertained in *Wikingerhof*, [69]–[70], and C-603/17 *Bosworth v Arcadia*).

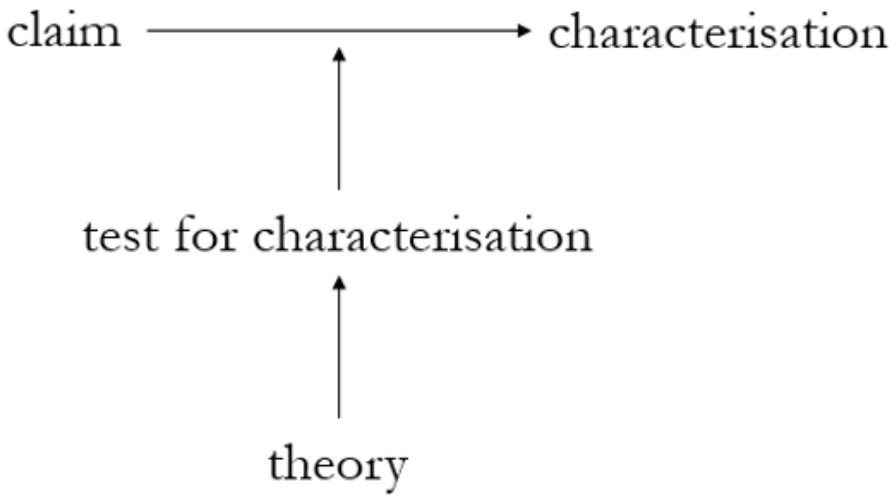
The use in practice and literature of the three approaches laid out above demonstrates a tale of casuistry. Similar claims have been subjected to different approaches, and approaches developed in a specific setting have been applied to entirely different contexts. For example, a few CJEU decisions characterised

claims between litigants who are not privy to consensual obligations as non-contractual in nature under the privity test. Other decisions characterised such claims as contractual in nature, applying the cause of action test. A similar dichotomy underlies the characterisation of claims between contracting parties. Initially, the CJEU jurisprudence applied the cause of action test, focussing on the nature of the legal basis relied on (see C-9/87 *Arcado v Haviland*). Later, the *Brogsitter* decision adopted the factual breach test, which shifted the focus to the nature of the facts underlying the claim.

It is difficult to understand why these divergences have occurred. How can they be explained?

2. The Theories Underlying Characterisation

A good way to start is to conceptualise characterisation further along the lines of this scheme:



Seen from the perspective of this scheme, the previous section described three 'tests for characterisation'. A 'test for characterisation' refers to the interpretational exercise that lays down the conditions under which a claim can be characterised as a matter relating to a contract. Each test elevates different elements of a 'claim' as relevant for the purpose of characterisation and disregards others. Those elements are the identity of the litigants, the claim's legal basis, or the dispute underlying the claim. As such, it concretises an idea about the broader purpose the contract jurisdiction should serve, which is called a 'theory'. The divergences among the tests for characterisation outlined above is

explained by the reliance on different theories.

The AG's considerations about *Brogsitter* in the *Wikingerhof* opinion illustrate the scheme. The AG observed that the factual breach test is informed by what I will dub the 'natural forum theory'. According to that theory, the contract jurisdiction offers the most appropriate and hence natural forum for all claims that are remotely linked to a contract (for the sake of proximity and avoiding multiple jurisdictional openings over claims relating to the same contract). This theory explains why the factual breach test provides such a broad, hypothetical test for characterisation that captures all claims that could have been pleaded as a breach of contract. Opining against the use of the factual breach test and underlying natural forum theory, the AG suggested that the cause of action test be applied. He then integrated the indispensability to interpret the contract (originally a part of the factual breach test) into the cause of action test as a tool for determining whether a claim is based on contract ([90] et seq). Essentially, his approach was informed by what I will call the 'ring-fencing theory'. In contrast to the natural forum theory, this theory presumes that the contract jurisdiction should be delineated strictly for two reasons. First, the contract jurisdiction is a special jurisdiction regime that cannot fulfil a broad role as a natural *forum contractus* ([84]–[85]). Second, a strict delineation promotes legal certainty and efficiency, since it does not require judges to engage in a broad, hypothetical analysis to determine whether a claim is contractual or not ([76]–[77]). The scheme was applied succinctly here, but the analysis could be fleshed out for example by integrating the role of the parallelism between the Brussels Ia and Rome I/II Regulations.

The scheme can be used to understand and evaluate the CJEU's eventual judgment in *Wikingerhof*. I hope that the decision will be a treasure trove that furthers our understanding of the mechanics of characterisation in EU private international law.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2020: Abstracts

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

D. Coester-Waltjen: **Some Thoughts on Recital 7 Rome I Regulation and a Consistent and Systematic Interpretation of Jurisdictional and Choice of Law Rules.**

Decisions of the ECJ in recent years have cast some new light on recital 7 of the Rome I Regulation. These decisions will be analysed regarding the limits of and the guiding principles for a consistent and systematic interpretation of the rules in the Brussels Ibis Regulation on the one hand and the Rome I Regulation on the other. The analysis proves that the understanding of a term in the jurisdictional framework need not necessarily influence the interpretation for private international purposes.

*U.P. Gruber/L. Möller***: Brussels IIbis Recast**

After complicated negotiations, the Council of the EU has finally adopted a recast of the Brussels IIbis-Regulation. The amendments focus primarily on parental responsibility. As far as the enforcement of foreign judgements is concerned, the new regulation provides for a delicate balance between different positions of the Member States. While the new regulation abolishes exequatur, it also introduces new reasons which can be invoked against the enforcement of foreign decisions. At first, the reform did not aim at changes in the field of divorce, legal separation or marriage annulment. However, in the course of the legislative procedure, new provisions allowing for the recognition of extra-judicial agreements on legal separation and divorce were added.

C. Kohler: **Mutual trust and fundamental procedural rights in the framework of mutual assistance between EU Member States and beyond**

In case C-34/17, Donnellan, the ECJ ruled that the recovery of a fine by way of mutual assistance between EU Member States pursuant to Directive 2010/24 may be refused by the requested authority if the decision of the applicant authority imposing the fine was not properly notified to the person concerned, so that the person's right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights has been infringed. The Court restricts the principle of mutual trust which, pursuant to Opinion 2/13, prevents the requested authority in principle to check whether the applicant Member State has infringed a fundamental right of Union law. The ECJ's ruling takes into account the case-law of the ECtHR and, by admitting a "second look", strengthens the protection of fundamental rights in the internal market and within the framework of the judicial cooperation in civil matters.

S. Huber: **Broad Interpretation of the European Rules on Jurisdiction over Consumer Contracts**

The jurisdiction rules for consumer contracts established in Articles 17 to 19 of the Brussels Ibis Regulation and 15 to 17 of the Lugano Convention respectively lead to the question whether the trader has directed his professional activities to the jurisdiction in which the consumer is domiciled. The German Federal Court of Justice had to decide on this question in the context of several similar cases where Swiss solicitors had concluded a contract with several persons living in Germany. The crucial point was a document that the Swiss solicitors had sent to these persons via their German solicitors. The question was whether this document was a sufficiently clear expression of the Swiss solicitors' intention to conclude contracts with consumers domiciled in Germany. In this context, the German Federal Court of Justice (cf., for example, the case IX ZR 9/16) held that the intention to conclude contracts with consumers living abroad could not only be expressed by general forms of advertising addressed to the public abroad, but also y documents that are sent to individual consumers. The line of reasoning of the Court reveals a certain sympathy for the position that even one single document sent to one individual consumer in a foreign jurisdiction might constitute a sufficient expression of the trader's intention to conclude contracts

with consumers of that jurisdiction – but this was of no relevance in the cases at hand where the document had been sent to a group of 60 to 100 persons. Whether the document is sent on the initiative of the trader or at the request of the consumer seems to be of no importance. In addition, the court argued that the acts of the German solicitors were to be attributed to their Swiss colleagues as both law firms had cooperated with the aim of permitting the Swiss solicitors to conclude contracts with clients from Germany. Finally, the court was confronted with the question whether in case of a reorganisation of the trader's business, a consumer can bring a claim against the newly created company in the courts of its domicile. The Court answered this question in the affirmative even for the situation in which the trader's entity that had concluded the consumer contract remained liable besides the new company. The analysis of the Court's decisions shows that the Court has formulated guidelines which are based on the case law of the European Court of Justice and allow the lower courts to apply the rules on jurisdiction over consumer contracts in a way which implements the idea of consumer protection and at the same time takes into account the traders' interests under the general principles of procedural fairness. The clarifying guidelines have enhanced legal certainty and might thus contribute to reducing time and cost-intensive discussions about jurisdiction issues.

K. Duden: **Amazon Dash Buttons and Collective Injunctive Relief in E-Commerce: Ju-risdiction and Preliminary Questions**

The decision of the Munich Court of Appeals relates to a preventive action brought by a consumer protection association against the so-called Amazon Dash Buttons. The decision is guided by the 2016 ECJ decision in Amazon (C-191/15), which it develops further. The Munich decision contains far-reaching statements that are of vital importance to e-commerce and the internet of things. On a substantive level the Court of Appeals finds the Dash Buttons to be an infringement of consumer protection laws. This finding has already led to Amazon's withdrawal of Dash Buttons from the German market. On the level of conflict of laws and international civil procedure, which this paper focusses on, the court starts by rightfully declaring a nationwide jurisdiction under article 7(2) Brussels Ibis-Regulation for preventive actions brought by consumer protection associations. Since the associations pursue the collective interests of all consumers the place where the harmful event may occur is, after all, any place

where a potential consumer might be injured. In determining the applicable law, the court distinguishes between the main question of a claim to injunctive relief and the preliminary question of an infringement of consumer protection laws. In doing so it qualifies the pre-contractual obligations of § 312j BGB as part of the law applicable to consumer contracts, even though a qualification under Art. 12 Rome II-Regulation would be more convincing. Because of the potential importance of the content of the decision to the business model of Amazon it can be assumed that Amazon will pursue this case further and try for its reversal.

L. Kuschel: **Blocking orders against host providers: Content and territorial scope under the E-Commerce-Directive**

In its recent decision (C-18/18) on hosting provider liability, the ECJ set out guidelines on the substantial extent and territorial reach of court orders in cases of online personality rights violations under the E-Commerce Directive. The court held that a hosting provider can be ordered to remove not only identical but also information that is equivalent to the content which has been declared unlawful. Moreover, the E-Commerce Directive does not preclude a court from ordering a hosting provider to remove information worldwide. The article examines critically the broad substantial scope of potential takedown orders and in particular the possibility of worldwide court orders. As to the latter, the article argues that there is neither a contradiction to the ECJ's previous decision in Google v. CNIL nor a conflict with European jurisdiction law, namely the Brussels Ibis Regulation. A national court should, however, take into consideration the highly differing views among jurisdictions on what content is unlawful and what is protected as free speech, before issuing a global take-down order. The article thus pleads for a nuanced treatment of the subject matter by courts and legislators.

L. Colberg: **Damages for breach of an exclusive jurisdiction agreement**

In a recent decision, the Federal Court of Justice ("FCJ") decided for the first time that the violation of a choice-of-court agreement can give rise to damages claims. The question had previously been the subject of intense discussions in German academic literature. In the case before the FCJ, a US party violated a jurisdiction clause in favor of the courts of Bonn, Germany by bringing a claim in a US District

Court. Based on the valid and unambiguous choice-of-court agreement, the US court held it lacked jurisdiction. As US courts do not award costs to the winning party, the German party, however, had to bear its own lawyers' fees. When the US party brought the same claim in Germany, the German party counter-claimed for damages. The FCJ decided that parties who are sued abroad despite the existence of a choice-of-court agreement in principle have a right to damages. However, some uncertainty remains as to the exact terms under which courts will award damages. The academic debate therefore is likely to continue.

J.D. Lüttringhaus: **Jurisdiction and the Prohibition of Abuse of Rights**

Does the Lugano Convention allow for an abuse of rights exception? A recent decision by the Higher Regional Court of Karlsruhe draws upon the principle of good faith and the prohibition of abuse of rights in order to disregard the defendant's attempt to challenge jurisdiction pursuant to Art. 24 Lugano Convention. The Court found the defendant's contesting of jurisdiction in the main proceedings irreconcilable with his pre-trial application for independent proceedings for the taking of evidence in the same jurisdiction. This reasoning does, however, not take into account that jurisdiction for independent proceedings for the taking of evidence may well differ from jurisdiction for the main proceedings. Against this backdrop, the article provides a critical analysis of the abuse of rights exception under both, the Lugano Convention and the Brussels Ibis Regulation.

F. Maultzsch: **International Jurisdiction and Service of Process in Cross-Border Investment Torts under the Lugano Convention 2007/Brussels Ibis Regulation**

The Supreme Court of Justice of the Republic of Austria (OGH) had to deal with issues of international jurisdiction for cross-border investment torts. Besides general problems of jurisdiction under Art. 5 No. 3 of the Lugano Convention 2007/Art. 7 No. 2 of the Brussels Ibis Regulation, the case touched upon the relation between service of process and possible jurisdiction by way of submission according to Art. 24 of the Lugano Convention 2007/Art. 26 of the Brussels Ibis Regulation. The OGH has decided that jurisdiction by way of submission may not

be inhibited by a preceding denial of service of process. This article outlines the state of discussion under Art. 5 No. 3 of the Lugano Convention 2007/Art. 7 No. 2 of the Brussels Ibis Regulation concerning problems in investment torts (in particular regarding the location of the place in which pure economic loss occurs) and agrees with the OGH's account of the relation between service of process and jurisdiction by way of submission. This account is consistent with the concept of jurisdictional submission as being akin to an ex post choice of court agreement.

J. Rapp: **The recovery of erroneously paid insurance benefits under the Brussels Recast Regulation**

In what is probably one of the last judgments of the UK Supreme Court on the Brussels Ibis Regulation, the Court addressed three fundamental questions on Article 10 et seq., 25: Is an assignee and loss payee bound by an exclusive choice of court agreement in an insurance contract between the insurer and the policyholder? And is the insurer's claim for the recovery of erroneously paid insurance benefits against the assignee a "matter relating to insurance" within chapter II, section 3 of the Regulation? If so, is the assignee entitled to rely on section 3 even if he cannot be regarded as the economically weaker party vis-à-vis the insurer? In the given judgment, the Supreme Court ruled that the assignee is usually not bound by a choice of court agreement between the insurer and the policyholder; rather, pursuant to Article 14 of the Regulation, he can only be sued in the courts of the member state in which he is domiciled, even if the protection of the economically weaker party as basic concept enshrined in Art. 10 et seq. of the Regulation does not apply to him.

C. Madrid Martínez: **The political situation in Venezuela and the Conventions of the Inter-American Specialized Conference on Private International Law of the OAS**

The government of Nicolás Maduro withdraws Venezuela from the OAS and it has an impact on the Venezuelan system of Private International Law, particularly in the application of Inter-American conventions. In this article, we want to show the erratic way the Case Law has taken and the dire consequences that a political decision has had on the Venezuelan Private International Law.

Lord Jonathan Mance on the future relationship between the United Kingdom and Europe after Brexit

Nicole Grohmann, a doctoral candidate at the Institute for Comparative and Private International Law, Dept. III, at the University of Freiburg, has kindly provided us with the following report on a recent speech by Lord Jonathan Mance.

On Wednesday, 15 July 2020, the former Deputy President of the Supreme Court of the United Kingdom (UKSC), Lord Jonathan Mance, presented his views on the future relationship between the United Kingdom and Europe after Brexit in an online event hosted by the *Juristische Studiengesellschaft Karlsruhe*. This venerable legal society was founded in 1951; its members are drawn from Germany's Federal Constitutional Court, the Federal Supreme Court, the office of the German Federal Prosecutor, from lawyers admitted to the Federal Supreme Court as well as judges of the Court of Appeals in Karlsruhe and the Administrative Court of Appeals in Mannheim. In addition, the law faculties of the state of Baden-Württemberg (Heidelberg, Freiburg, Tübingen, Mannheim, Konstanz) are corporate members. Due to Corona-induced restrictions, the event took place in the form of a videoconference attended by more than eighty participants.

After a warm welcome by the President of the *Juristische Studiengesellschaft*, Dr. Bettina Brückner (Federal Supreme Court), Lord Mance shared his assessment of Brexit, drawing on his experience as a highly renowned British and internationally active judge and arbitrator. In the virtual presence of judges from the highest German courts as well as numerous German law professors and scholars, Lord Mance elaborated – in impeccable German – on the past and continuing difficulties of English courts dealing with judgments of the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) and the future

legal struggles caused by the end of the transition period on the withdrawal of the United Kingdom from the European Union on 31 December 2020. Lord Mance's speech was followed by an open discussion regarding the most uncertain political and legal aspects of Brexit.

In his speech, Lord Mance highlighted the legal difficulties involved in the withdrawal of his country from the European Union. Since Lord Mance himself tends to picture the British as being traditional and generally pragmatic, he named Brexit as a rare example of a rather unpragmatic choice. Especially with regard to the role of the United Kingdom as a global and former naval power, Lord Mance considered Brexit a step backwards. Besides the strong English individualism, which has evolved over the past centuries, the United Kingdom did not only act as an essential balancing factor between the global players in the world, but also within the European Union. Insofar, the upcoming Brexit is a resignation of the United Kingdom from the latter position.

Subsequently, Lord Mance focussed on the role of the European courts, the European Court of Justice and the European Court of Human Rights and their judgments in the discussions leading to Brexit. Both European courts gained strong importance and influence in the UK within the first fifteen years of the 21st century. Especially, the ECtHR is of particular importance for the British legal system since the Human Rights Act 1998 incorporated the European Convention on Human Rights into British law. Lord Mance described the Human Rights Act 1998 as a novelty to the British legal system, which lacks a formal constitution and a designated constitutional court. Apart from the Magna Charta of 1215 and the Bill of Rights of 1689, the British constitutional law is mainly shaped by informal constitutional conventions instead of a written constitution such as the German Basic Law. Following the Human Rights Act 1998 and its fixed catalogue of human rights, the British courts suddenly exercised a stricter control over the British executive, which initially gave rise to criticism. Even though the British courts are not bound by the decisions of the ECtHR following the Human Rights Act 1998, the British participation in the Council of Europe soon started a dialogue between the British courts and the ECtHR on matters of subsidiary and the ECtHR's margin of appreciation. The UK did not regard the growing caseload of the ECtHR favourably. Simultaneously, the amount of law created by the institutions of the European Union increased. Lord Mance stressed the fact that in 1973, when the United Kingdom joined the European Economic Community, the

impact of the ECJ's decision of 5 February 1963 in *Van Gend & Loos*, C-26/62, was not taken into account. Only in the 1990s, British lawyers discovered the full extent and the ramifications of the direct application of European Union law. The binding nature of the ECJ's decisions substantiating said EU law made critics shift their attention from Strasbourg to Luxembourg.

In line with this development, Lord Mance assessed the lack of a constitutional court and a written constitution as the main factor for the British hesitance to accept the activist judicial approach of the ECJ, while pointing out that Brexit would not have been necessary in order to solve these contradictions. The EU's alleged extensive competences, the ECJ's legal activism and the inconsistency of the judgments soon became the primary legal arguments of the Brexiteers for the withdrawal from the EU. Especially the ECJ's teleological approach of reasoning and the political impact of the judgments were mentioned as conflicting with the British cornerstone principles of parliamentary sovereignty and due process. Lord Mance stressed that the so-called *Miller* decisions of the Supreme Court in *R (Miller) v Secretary of State* [2017] UKSC 5 and *R (Miller) v The Prime Minister, Cherry v Advocate General for Scotland* (Miller II) [2019] UKSC 41, dealing with the parliamentary procedure of the withdrawal from the EU, are extraordinary regarding the degree of judicial activism from a British point of view. In general, Lord Mance views British courts to be much more reluctant compared to the German Federal Constitutional Court in making a controversial decision and challenging the competences of the European Union. As a rare exception, Lord Mance named the decision in *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, in which the UKSC defended the British constitutional instruments from being abrogated by European law. Indeed, Lord Mance also expressed scepticism towards the jurisprudential approach of the ECJ, because inconsistences and the need of political compromise could endanger the foreseeability and practicability of its decisions. Especially with regard to the recent decision of the German Constitutional Court of 5 May 2020 on the European Central Bank and the Court's approach to *ultra vires*, Lord Mance would have welcomed developing a closer cooperation between the national courts and the ECJ regarding a stricter control of the European institutions. Yet this important decision came too late to change Brexiteers' minds and to have a practical impact on the UK.

Finally, Lord Mance turned to the legal challenges resulting from the upcoming

end of the transition period regarding Brexit. The European Union (Withdrawal) Acts 2018 and 2020 lay down the most important rules regarding the application of EU instruments after the exit day on 31 December 2020. In general, most instruments, such as the Rome Regulations, will be transposed into English domestic law. Yet, Lord Mance detected several discrepancies and uncertainties regarding the scope of application of the interim rules, which he described as excellent bait for lawyers. Especially two aspects mentioned by Lord Mance will be of great importance, even for the remaining Member States: Firstly, the British courts will have the competence to interpret European law, which continues to exist as English domestic law, without the obligation to ask the ECJ for a preliminary ruling according to Art. 267 TFEU. In this regard, Lord Mance pointed out the prospective opportunity to compare the parallel development and interpretation of EU law by the ECJ and the UKSC. Secondly, Lord Mance named the loss of reciprocity guaranteed between the Member States as a significant obstacle to overcome. Today, the United Kingdom has to face the allegation of 'cherry picking' when it comes to the implementation of existing EU instruments and the ratification of new instruments in order to replace EU law, which will no longer be applied due to Brexit. Especially with regard to the judicial cooperation in civil and commercial matters and the recast of the Brussels I Regulation, the United Kingdom is at the verge of forfeiting the benefit of the harmonized recognition and enforcement of the decisions by its courts in other Member States. In this regard, Lord Mance pointed out the drawbacks of the current suggestion for the United Kingdom to join the Lugano Convention, mainly because it offers no protection against so-called torpedo claims, which had been effectively disarmed by the recast of the Brussels I Regulation – a benefit particularly cherished by the UK. Instead, Lord Mance highlighted the option to sign the Hague Convention of 30 June 2005 on Choice of Court Agreements which would allow the simplified enforcement of British decisions in the European Union in the case of a choice of court agreement. Alternatively, Lord Mance proposed the ratification of the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments. So far, only Uruguay and Ukraine have signed this new convention. Nevertheless, Lord Mance considers it as a valuable option for the United Kingdom as well, not only due to the alphabetical proximity to the other signatories.

Following his speech, the event concluded with a lively discussion about the problematic legal areas and consequences of Brexit, which shall be summarised

briefly. Firstly, the President of the German Supreme Court Bettina Limperg joined Lord Mance in his assessment regarding the problem of jurisprudential inconsistency of the ECJ's decisions. However, like Lord Mance she concluded that the Brexit could not be justified with this argument. Lord Mance pointed out that in his view the ECJ was used as a pawn in the discussions surrounding the referendum, since the Brexiteers were unable to find any real proof of an overarching competence of the European Union. Secondly, elaborating on the issue of enforceability, Lord Mance added that he considers the need for an alternative to the recast of the Brussels I Regulation for an internationally prominent British court, such as the London Commercial Court, not utterly urgent. From his practical experience, London is chosen as a forum mainly for its legal expertise, as in most cases enforceable assets are either located in London directly or in a third state not governed by EU law. Hence, Brexit does not affect the issue of enforceability either way. Finally, questions from a constitutional perspective were raised regarding the future role of the UKSC and its approach concerning cases touching on former EU law. Lord Mance was certain that the UKSC's role would stay the same regarding its own methodological approach of legal reasoning. Due to the long-standing legal relationship, Lord Mance anticipated that the legal exchange between the European courts, UK courts and other national courts would still be essential and take place in the future.

In sum, the event showed that even though Brexit will legally separate the United Kingdom from the European Union, both will still be closely linked for economic and historical reasons. As Lord Mance emphasized, the UK will continue to work with the remaining EU countries in the Council of Europe, the Hague Conference on PIL and other institutions. Further, the discrepancies in the Withdrawal Acts will occupy lawyers, judges and scholars from all European countries, irrespective of their membership in the European Union. Lastly, the event proved what Lord Mance was hoping to expect: The long-lasting cooperation and friendship between practitioners and academics in the UK and in other Member States, such as Germany, is strong and will not cease after Brexit.